ORIGINAL
RECEIVED-FPSC
01 SEP 26 PM 4:30
COMMISSION
CLERK

September 26, 2001

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

via Hand Delivery

Re: Docket No. 010098-TP – Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.

Dear Ms. Bayó,

Please find enclosed for filing in the captioned docket an original and seven (7) copies of Florida Digital Network, Inc.'s Post-Hearing Brief. Please also find enclosed a diskette containing an electronic copy of the document.

If you have any questions regarding this filing, please call me at 407-835-0460.

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

APP
CAF
CMP
COM 5
CTR
ECR
LEG 1
OPC
PAI
RGO
SEC 1
SER
OTH

Copies by e-mail & U.S. Mail to:

James Meza, III; Patrick Turner (BellSouth)
Felicia Banks (FPSC)
Mike Sloan (Swidler)

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
12167 SEP 26 ō
FPSC-COMMISSION CLERK

390 N. Orange Avenue · Suite 2000 & 200 · Orlando, Florida 32801
407.835.0300 · Fax 407. 835.0309 · www.floridadigital.net

BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996	))))))	Docket No. 010098-TP Dated: September 26, 2001

POST-HEARING BRIEF OF FLORIDA DIGITAL NETWORK, INC.

Matthew Feil
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460

and

Eric J. Branfman
Michael C. Sloan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, D.C. 20007-5116
(202) 424-7500

Attorneys for Florida Digital Network, Inc.

Dated: September 26, 2001

DOCUMENT NUMBER-DATE
12167 SEP 26 ō
FPSC-COMMISSION CLERK

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 5

I. FDN IS IMPAIRED WITHOUT UNBUNDLED ACCESS TO THE BROADBAND CAPABILITIES OF BELLSOUTH'S LAST-MILE NETWORK 5

A. BellSouth's Network In Florida 6
B. The Legal Standard for Creating New UNEs 10
C. Available Alternatives 12
D. The Business Case "Against" RT Collocation 14
E. Other Considerations Weighing Against RT Collocation 18
F. Policy Considerations Favoring Unbundling 21
G. The Commission Should Follow the Lead of Other Regulatory Authorities and Classify Broadband Loops as a UNE 23
H. Prior Florida Commission Orders Do Not Bar the Relief That FDN Seeks 26

II. BELLSOUTH FAILS TO COMPLY WITH ITS RESALE OBLIGATIONS 27

A. BellSouth Sells DSL at Retail 30
B. BellSouth Cannot Avoid Its Resale Obligations By Bundling DSL and Internet Services 33
C. BellSouth's Reliance on the Second Advanced Services Order is Misplaced 35
D. Other State Commissions Have Recognized that ILECs Must Resell Their DSL Transport Services 37
E. BellSouth Must Offer DSL For Resale On The Same Terms And Conditions That It Provides DSL To Itself 37

III. THE COMMISSION MUST PUT AN END TO BELLSOUTH'S UNLAWFUL PRACTICE OF REFUSING TO PROVIDE ITS RETAIL DSL SERVICE TO CONSUMERS PURCHASING VOICE SERVICE FROM FDN 38

A. Line Sharing Orders Don't Provide Justification For Bell's Policies. 44

BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996	))))))	Docket No. 010098-TP Dated: September 26, 2001

POST-HEARING BRIEF OF FLORIDA DIGITAL NETWORK, INC.

Through undersigned counsel, Florida Digital Network, Inc. ("FDN") submits this brief in support of its Petition to arbitrate certain terms of a new interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth").

INTRODUCTION

Issue A: What is the Commission's jurisdiction in this matter?

FDN Position: *The Commission's jurisdiction is as set forth in Section 252 of the Federal Telecommunications Act of 1996 and Chapter 364, Florida Statutes.*

Issue 1: For purposes of the new interconnection agreement, should BellSouth be required to provide xDSL service over UNE loops when FDN is providing voice service over that loop?

FDN Position: *Yes. The Commission should require BellSouth to offer a UNE broadband product as set forth in FDN's testimony and pleadings. BellSouth must also be required to resell BellSouth's high-speed data services to FDN and must be required to provide BellSouth-branded xDSL services to any end users receiving FDN voice service.*

The evidence presented at the hearing was stark and unequivocal: for practical purposes, there is no DSL competition in Florida. BellSouth controls more than 99 percent of the market, and is gaining fast.[1] Moreover, the prospect for competition in the future is bleak. Because

[1] ALECs provide DSL to fewer than 1000 customers in BellSouth's Florida footprint. Tr. at 380. As of April 2000, BellSouth provided DSL service to 133,015 customers. Exh. 1, p. 2 (BellSouth Answer to FDN Interrogatory No. 2). Of those 133,000 customers, 43,000, or almost one-third, "were added in the first quarter 2001." *Id.*

BellSouth refuses to provide access to network elements necessary for ALECs to provide customers with DSL service, fewer than 10 percent of Floridians in BellSouth territory can choose among competing DSL providers. Thus, it is not a matter of ALECs being out-marketed or out-hustled by BellSouth. Rather BellSouth simply makes it impossible for ALECs to serve prospective customers. BellSouth also refuses to comply with its statutory resale obligations, making ALEC entry through that vehicle impossible, as well.

Finally, and perhaps most insidiously, BellSouth is using its monopoly power in the DSL market as leverage to strengthen its already firm grip on the voice market. Specifically, BellSouth refuses to sell its FastAccess DSL products to consumers who purchase voice service from FDN (or other Florida ALECs). Thus, FDN is effectively prevented from competing for customers who purchase DSL from BellSouth, because switching to FDN means losing DSL. Similarly, any current FDN customer that wants DSL will have to drop FDN service and purchase both voice and DSL from BellSouth.

FDN is a three-year-old company that began serving its first customer in Florida a little more than two years ago. FDN now serves more than 20,000 Florida customers with more approximately 60,000 access lines in service, eighty percent of them in BellSouth territory. Tr. at 90 (Gallagher). FDN's business strategy is to place as much of its customers' traffic on its own network as possible, but to engage in resale where this is not practical. FDN collocates equipment in each central office ("CO") from which it serves customers. FDN currently has more than 100 collocations in BellSouth COs throughout Florida. FDN's collocated facilities are linked together by FDN's own network, which extends several hundred miles through the state. Tr. at 3.

Although FDN's network is extensive, FDN must still purchase last-mile loop facilities from BellSouth. With very few exceptions, each of the 60,000 lines that FDN serves represents a UNE loop purchased from an ILEC such as BellSouth. Tr. at 89. Though comparative

statistics are unavailable, FDN believes that it is the largest purchaser of UNE loops in the state. Tr. at 90.

FDN is entitled to a fair opportunity to compete directly with BellSouth and offer consumers FDN-branded DSL-based Internet access and data services products. For the reasons explained herein, FDN does not have an opportunity to do so. BellSouth's anticompetitive practices, including tying its DSL and voice products together, have had and will continue to have a devastating impact on competition. Unless the Commission acts quickly and decisively, the prospects for telecommunications competition in Florida are bleak, and not just in the DSL market. Even with the current down-turn in the economy, the demand for advanced services is growing quickly. This demand will to increase exponentially, as more and more services, including voice, are provided over packet-switched networks. But unless the Commission takes the steps outlined in Mr. Gallagher's testimony, only BellSouth will be in a position to satisfy that demand and competition in the data, voice and combined voice-and-data markets will whither.

FDN therefore asks the Commission to order BellSouth to do three things: (1) unbundle the packet switching functionality of the DSLAM that BellSouth has deployed – and continues to deploy -- in remote terminal facilities throughout its network and offer a broadband UNE consisting of the entire transmission facility from the customer's premises to the central office; (2) comply with its legal obligations and permit the resale of the DSL transmission services that BellSouth provides to Florida consumers at retail; and (3) end the anticompetitive practice of insisting that consumers who buy BellSouth DSL also purchase BellSouth voice.

The remainder of this brief reviews the evidence presented at the August 15, 2001 arbitration hearing and the legal bases for FDN's request. Part I explains FDN's request that BellSouth unbundle the packet switching functionality of BellSouth DSLAM equipment and offer a broadband UNE. Because of the unique nature of BellSouth's network in Florida, and

because of fundamental economic and logistical considerations, FDN is impaired from serving the customers it seeks to serve without unbundled access to DSLAM and other equipment in BellSouth's network. This section of the brief also demonstrates that FDN's request is not precluded by any previous orders of the FCC or this Commission.

Part II explains the basis for FDN's request that BellSouth resell its various DSL transmission offerings. BellSouth's legal obligation to offer DSL for resale by FDN (and other ALECs) is straight-forward and not subject to serious debate: because BellSouth markets and sells DSL at retail, it must permit requesting ALECs to resell the service at the avoided cost discount provided by Section 252(d). The FCC made this obligation plain in its recent order approving Verizon's Connecticut Section 271 application.[2] Moreover, BellSouth's attempt to hide the ball by claiming that it offers consumers an "enhanced information service," which somehow permits it to avoided reselling the underlying transmission component, is legally unsupportable and illogical. As the FCC ruled in the *Connecticut 271 Order*, BellSouth must permit FDN to resell DSL on the high frequency portion of FDN loops, in the same manner that BellSouth provides the service to itself.

Finally, Part III explains BellSouth's anticompetitive practice of conditioning a retail customer's purchase of its FastAccess Internet access and data products upon that customer's purchase of BellSouth voice service. Tying the two products together in this manner constitutes a *per se* violation of both federal and Florida antitrust laws and is having a devastating effect on competition for voice service in Florida. Regardless of how it resolves the other issues in this arbitration, the Commission must exercise its general power (and duty) to promote competition in the state's utility markets and put an end to this unreasonable practice.

---

[2] Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, FCC

ARGUMENT

I. FDN IS IMPAIRED WITHOUT UNBUNDLED ACCESS TO THE BROADBAND CAPABILITIES OF BELLSOUTH'S LAST-MILE NETWORK

For FDN to compete in the DSL market, it must have unbundled access to the packet switching functionality of digital subscriber line access multiplexer ("DSLAM") equipment that BellSouth has placed in thousands of remote terminals around the state. This will require the Commission to do something that it indisputably has the power to do: create a "new" unbundled network element ("UNE") in addition to those currently enumerated on the FCC's list of nationally available UNEs.

When the FCC established the current UNE list in the 1999 *UNE Remand Order*,[3] the FCC formalized as UNEs only the network elements needed for DSL service in an ILEC network in which the predominant last mile connections are home run copper loops. BellSouth's network in Florida is very different from the FCC's conceived model, with more far more feeder and digital loop carrier ("DLC") facilities in the network. As Mr. Gallagher testified, this deployment of DLC in BellSouth's network is unusually high. Tr. at 92. To illustrate Mr. Gallagher's point, just weeks before the FCC issued the *UNE Remand Order*, the FCC observed that "[t]he use of DLCs varies by telephone company and typically ranges from almost zero to as much as 30 percent of the local loops within a given LEC's local network."[4] Given that DLC accounts for as much as *90 percent* of BellSouth's network, Tr. at 324, it is apparent that the

---

No. 01-208, CC Docket No. 01-100 (July 20, 2001) ("*Verizon-Connecticut 271 Order*") ¶¶ 27-33.

[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd. 3696 (1999) ("*UNE Remand Order*").

[4] *Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279, 14 FCC Rcd 14712 (October 8, 1999) at ¶ 197 n.357.

FCC did not have BellSouth's Florida network in mind when it opined on the obstacles ALECs face provisioning service in a DLC network. Moreover, many of the FCC's assumptions about the future course of competition in the advanced services market simply did not turn out as the FCC expected.[5] Given the disconnect between the FCC's assumptions and findings in the *UNE Remand Order*, and the current-day reality in Florida, it would be inappropriate for the Commission to rely on the *UNE Remand Order* in evaluating FDN's request.

A. BellSouth's Network In Florida

When FDN purchases a UNE voice loop from BellSouth in the vast majority of cases it is *not* purchasing an uninterrupted copper loop extending from the central office to the customers' premises. Rather, much of BellSouth's network – perhaps as much as 90 percent (Tr. at 324 (Williams)) – is comprised of digital loop carrier ("DLC") architecture. As Florida grew rapidly beginning in the 1960s, BellSouth accommodated this growth by placing greater reliance on the feeder portion of the network – usually fiber transport facilities, but also occasionally high capacity copper lines. This network design permitted BellSouth to deploy less copper distribution facilities in the telephone plant, resulting in cost savings and improved performance. Tr. at 90-91 (Gallagher); 323-24 (Williams). Individual copper distribution loops still serve individual end-users, but rather than terminating at BellSouth COs, these DLC loops terminate at remote terminal ("RT") facilities in the field. BellSouth's network is comprised of more than 12,000 RTs, but fewer than 200 central offices.[6]

Once individual customer signals "arrive" at an RT, the signals are multiplexed and routed over the shared feeder facility to a BellSouth CO, where the signals are demultiplexed and

---

[5] *See UNE Remand Order* ¶ 307. The FCC's expectations about the future prospects of companies such as Covad, Rhythms and Northpoint (each of which has either been dissolved, is in the process of dissolution, or is attempting to reorganize under Chapter 11) proved incorrect.

[6] *See* BellSouth Answer to FDN Interrogatories Nos. 3 (identifying 196 central offices) and 4 (12,037 Remote Terminals).

either handed-off to an ALEC such as FDN, or routed on to the public network, whichever the case may be. Tr. at 325-26. Thus, when FDN purchases a stand-alone UNE loop, it is also purchasing the functionality of multiplexing equipment that BellSouth has deployed at the RT that serves the end-user customer. This is in keeping with FCC regulations that define the "local loop network element" as the "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises ... includ[ing] all features, functions, and capabilities of such transmission facility."[7] As BellSouth witness Williams admitted at the hearing, "if the FCC [had] said that a local loop is just a copper transport facility, then CLECs would not be able to order voice service." Tr. at 327.

Providing DSL Services in a DLC-Based Network. As the Commission is aware from this proceeding, the BellSouth UNE cost case, and other arbitrations, DSL is a technology that facilitates the high-speed transmission of packetized data over ordinary copper telephone lines. DSL signals are transmitted on the high frequency portion (typically above 3000-4000 Hertz) of the loop, permitting the voice signal to "travel" without interruption on the lower frequencies. Tr. at 317-18. Not all copper loops are DSL-capable, however. Generally, loops must be shorter than 18,000 feet and free of signal interfering devices, such as load coils, bridge tap.[8]

---

[7] 47 C.F.R. § 51.319(a)(1). The definition also includes the "attached electronics," used by the ILEC to multiplex and transmit customer signals. The definition excludes "those electronics used for advanced services, such as the Digital Subscriber Line Access Multiplexers." *Id.* As explained above, however, the exclusion of advanced services equipment from the definition of the local loop was based on the FCC's assessment of the extent to which CLECs were impaired from providing such services in 1999, as well as the FCC's assessment of where competition was headed. The FCC's assessment in 1999 is in no way binding on the Commission today. As Commissioner Jaber recognized, the Commission has ample authority to create additional UNEs, depending on the particular needs of Florida carriers. *See UNE Remand Order* ¶ 154.

[8] *See* Tr. at 119, 320 (loop lengths); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147, Fourth

DSL works by placing special modems at either end of the copper line to send and receive the DSL signal. At the end-user's premises, the signal is routed to the computer. On the telephone company's end, the signal is routed to the DSL access multiplexer ("DSLAM"). Like any other multiplexing device, the DSLAM aggregates multiple DSL signals reflecting the traffic of multiple end-users, and routs those signals over a shared transmission medium, such as a DS1, DS3 or higher speed line. Tr. at 318-19. DSL signals can be transmitted only on copper loops. DSLAMs must be placed at the point at which copper loops terminate. Tr. at 329. For customers served by "home run" copper loops (defined as a copper loop that runs uninterrupted from a serving central office to the customer's premises), DSLAMs placed in COs will suffice. Tr. at 336-37.

As Mr. Gallagher explained, the equipment FDN has collocated in BellSouth central offices have built-in DSLAM functionality. Tr. at 91. Thus, FDN is fully capable of providing DSL from its CO collocated facilities. The problem confronting FDN and other Florida ALECs, however, is that 90 percent of Floridians in BellSouth territory are not served by home-run copper loops. Tr. at 324. These end-users can only receive DSL service if BellSouth places DSLAMs in the RTs where the serving copper loops actually terminate. BellSouth has been placing DSLAMs in its RTs for the past several years in order to offer DSL service. DSLAMs will be in place in nearly one-quarter of the state's RTs before the end of the year. Tr. at 329.

BellSouth's position in this arbitration is that FDN wants to provide DSL service, it should place DSLAMs in RTs just as BellSouth has done. Tr. at 289, 313. BellSouth further cites the FCC's *UNE Remand Order* as justification for its unwillingness to provide unbundled access to DSLAMs' packet-switching functionality, and further asserts, with nothing more than

---

Report and Order in CC Docket No. 96-98, FCC 99-355 (rel'd Dec. 9, 1999) (*"Line Sharing Order"*) ¶¶ 83-87 (conditioning).

the *UNE Remand Order* as support, that ALECs are not impaired without UNE access to the DSLAM's functionality.

As demonstrated at the hearing, and as explained below, ALECs are clearly impaired without access to DSLAMs located at BellSouth RTs. The best evidence of this impairment is the absence of a *single* competitive DSLAM co-located in any BellSouth RT anywhere in the state. Tr. at 353. As the FCC has observed, "the presence of multiple requesting carriers providing service with their own packet switches is probative of whether they are impaired without access to unbundled packet switching." *UNE Remand Order* ¶ 306. By implication, the absence of competitors indicates that the Commission should draw the opposite inference. Indeed, FDN knows of only one CLEC (Sprint) that has successfully collocated a DSLAM in an ILEC RT anywhere in the country.[9] The process took more than a year and cost hundreds of thousands of dollars. Indeed, after reviewing Sprint's evidence, the Illinois Commerce Commission judged SBC's arguments that CLECs could collocate DSLAMs at SBC's remote terminals "[a]s simply not feasible." *Id.* at 33.

Where BellSouth has deployed DLC facilities, FDN requires access to unbundled DSL-capable transmission facilities between the customer's Network Interface Device ("NID") and the BellSouth distribution frame in its central offices, including all attached electronics that perform DSL multiplexing and splitting functionalities located in BellSouth's network, including in RTs deployed in the field. Collectively, this combination of discrete network elements would

[9] Proposed Order on Rehearing, *In the Matter of Illinois Bell Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Services*, Illinois Commerce Commission, Docket No. 00-0393, (August 10, 2001) ("*Illinois Rehearing Order*") at 21-22.

constitute a "broadband-capable loop," and would permit FDN to provide advanced services on the same terms and conditions that it provides voice services today.[10]

B. The Legal Standard for Creating New UNEs

The Commission has ample authority to create new UNEs depending on the state's needs. When it established the basic list of UNEs that must be unbundled by all ILECs, the FCC emphasized that "section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list."[11] Similarly, the *Line Sharing Order,* which sought to promote unbundled CLEC access to DSL, further encouraged state commissions "to impose additional, pro-competitive requirements consistent with the national framework established in this order."[12] Thus, there is nothing legally remarkable about FDN's request.

FCC Rule 51.317 prescribes the legal standard to be used by state commissions when creating new UNEs.[13] When no proprietary rights are implicated, the Commission need only find that CLECs would be "impaired" without access to the element.[14] When evaluating whether to

---

[10] The broadband loops FDN seeks would include the packet switching and splitter functionalities that are performed by BellSouth's equipment located at an RT. The traditional UNE loop does not include the DSLAM. *See* 47 C.F.R. § 51.319(a)(1). FDN would accept a ruling limiting new unbundling requirements to facilities deployed at BellSouth RTs, because, as explained below, ALECs are uniquely impaired from collocating facilities there. Thus, FDN does *not* seek an order that BellSouth unbundle packet switching generally across its network.

[11] *UNE Remand Order* ¶ 154

[12] Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Third Report and Order, 14 FCC Rcd. 20912, at ¶ 159 (1999) ("*Line Sharing Order*").

[13] 47 C.F.R. § 51.317.

[14] When prospective UNEs implicate specified proprietary rights of the ILECs, a state must find that access to that element is "necessary." The discrete elements such as line sharing, packet switching, and fiber functionality that comprise the unbundled access that is sought here

unbundle a network element under the "impair" standard, the Act requires unbundling if lack of access to the network element impairs a carrier's ability to provide the services it seeks to offer. "A requesting carrier's ability to provide service is 'impaired' if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." 47 C.F.R. § 51.317(b). The FCC rules establish that the "totality of circumstances" must be considered to determine whether an alternative to the ILEC's network is available in such a manner that a requesting carrier can *realistically* be expected to actually provide services using the alternative. *UNE Remand Order* at ¶ 62. When determining whether to require additional unbundling, FCC Rule 51.317(b) requires that the Commission consider the cost, timeliness, quality, ubiquity, and impact on network operations that may be associated with any alternatives to unbundling. In addition, other factors such as the rapid promotion of competition; facilities-based competition, investment, and innovation, and certainty may also be considered by the Commission. *See* 47 C.F.R. § 51.317(c). When these factors are considered in light of the evidence presented at the hearing, it becomes apparent that the Commission should order the additional unbundling that FDN requests.[15]

---

have been previously deemed non-proprietary by the FCC. *See UNE Remand Order* at ¶ 180 & 305; *Line Sharing Order* at ¶ 28.

[15] To the extent that BellSouth invokes the four-part test for unbundling packet switching contained in FCC Rule 51.319(c)(3), the Commission has already found, at BellSouth's urging, that the "impair" governs requests to unbundle packet switching. Final Order on Arbitration, *Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc.*, Docket No. 991854-TP, Order No. PSC-00-1519-FOF-TP (Aug. 22, 2000) at 33. Thus, once the Commission finds that an ALEC would be impaired without access to unbundled packet switching, it can and should order such unbundling without literal application of the *UNE Remand* test.

C. Available Alternatives

BellSouth alleges that at least two alternatives are available to CLECs – the use of all-copper loops and CLEC collocation of DSLAMs at the remote terminal.[16] Neither of these options offer viable options for FDN or other CLECs. Indeed, Mr. Williams admitted that the first "alternative" is not really an option for CLECs seeking to provide ubiquitous, competitive DSL service in the BellSouth Florida footprint. First, and most important, 90 percent of Floridians in BellSouth territory are served by DLC facilities, not by home-run copper loops. Tr. at 324. Thus, FDN cannot serve all its prospective customers by collocating in a BellSouth central office. To provide a dedicated copper line to this 90 percent of Floridians currently served by DLC, there must either be a spare home-run loop available in the network, or a spare copper feeder pair that can be used to "by-pass" the RT currently being used to serve the customer. Tr. at 305; Exh. 1 at 19 (BellSouth Answer No. 23). As Mr. Williams admitted, however, the amount of spare copper feeder that could be dedicated to "by-pass" the RTs in the

---

Moreover, whether this test is meant to constitute a separate test, or simply a means of implementing the statutory "impairment test" is of no moment, because FDN is entitled to the packet switching functionality of the DSLAM under either standard. Rule 51.319(c)(3) requires ILECs to unbundle packet switching when (1) the ILEC has installed DLC systems; (2) there are no spare copper loops that are capable of supporting the xDSL services the CLEC seeks to offer; (3) requesting CLECs are "not permitted" to collocate DSLAMs at ILEC remote terminals on the same terms and conditions that apply to the ILEC's own DSLAM; and (4) the ILEC has deployed packet switching for its own use.

As explained below, BellSouth concedes that its network satisfies items (1), (2) and (4). BellSouth maintains that (3) is not satisfied, however, because it nominally "permits" ALECs to collocate DSLAMs at RTs (even if doing so is not financially or logistically possible). BellSouth's interpretation of the word "permit," thus, cannot be squared with the statute. BellSouth would undoubtedly "permit" FDN to build its own duplicative network, but FDN is obviously impaired from doing so. Thus, to the extent that the Commission relies on FCC Rule 51.319(c)(3) at all, the regulation's use of the word "permit" should be read expansively to mean "able to." *See* The American Heritage College Dictionary (3rd Ed. 1997).

[16] Tr. at 290. BellSouth has not suggested presented no evidence suggesting that there are ubiquitous third-party alternatives to BellSouth's last-mile loop facilities. *See* Tr. at 363.

field (so as to provide a direct "home run" copper line) is extremely small. And even where such facilities might be available, the chances are great that loop lengths will exceed DSL tolerances. Tr. at 335.

Finally, even in those limited cases where spare loops are available, and loop lengths do not exceed DSL tolerances, ALECs will still be unable to provide service at parity with the service that BellSouth provides its own customers. This is because DSL transmission quality (and speed) declines with the length of the copper loop. Tr. at 321. When spare copper loops are available (by-passing an intervening RT), and FDN is able to serve a customer with a DSLAM collocated at a CO, the copper loop serving BellSouth's customer will be considerably shorter than that serving FDN's. In those cases, the customer will receive better service from BellSouth than from FDN. The FCC has concluded that "the quality of alternative network elements available to the competitive LEC is relevant to a determination of whether a requesting carrier's ability to provide service is impaired" and that "a material degradation in service quality associated with using an alternative element will materially diminish a competitor's ability to effectively provide service."[17] Thus, these facilities do not constitute reasonable alternatives to FDN's request.

That leaves collocating DSLAMs in BellSouth RTs as the only "available" alternative. The overwhelming evidence presented at the hearing demonstrated, however, that collocation on such a massive scale is both financially and logistically impossible. Indeed, BellSouth cannot even cite evidence of a *single* competitor – including companies with much greater financial and technical resources than FDN – that has accomplished what BellSouth maintains is so readily achievable.

---

[17] *UNE Remand Order* ¶ 96.

Even the less onerous terms for ALECs seeking remote terminal collocation announced in this proceeding – which slash RT collocation application fees, and entirely eliminate site preparation fees that are standard for the CO collocation process – do little to facilitate the RT collocation process. Tr. at 97-98. Even with these new terms, ALEC RT collocation is hopelessly cost-prohibitive.[18] These marginally reduced rates have little bearing on the economic and logistical considerations that prevent CLECs from collocating in BellSouth RTs. As explained below, FDN could never justify the expense, and even if it could, FDN could not collocate in RTs quickly enough to actually compete head-to-head with BellSouth.

D. The Business Case "Against" RT Collocation

The FCC has noted that "the costs associated with self-provisioning or purchasing alternative elements from third-party suppliers are relevant to [a] determination of whether the element is a practical and economical alternative to the incumbent LEC's unbundled network element." *UNE Remand Order* ¶ 72. As explained below, even without considering the many years it would take to collocate DSLAMs in thousands of BellSouth RTs, self-provisioning this component of BellSouth's last mile network could never be justified.

BellSouth's proposed solution for ALECs seeking to provide DSL essentially requires ALECs to assemble, on a piece-part basis, the full functionality of the loop facilities that BellSouth has already deployed in its network. When the new UNE rates finally become

[18] Moreover, FDN has questions about the RT collocation terms that Mr. Williams described. Prior to Mr. Williams' deposition, BellSouth never advised FDN the special rates and processes for RT collocation. The rates cited in BellSouth's Interrogatory Answer No. 58 (Exh. 5) have not been approved by this Commission. There is no proof that the numerous BellSouth account managers or contract negotiators assigned to work with FDN ever mentioned them. Similarly, the BellSouth RT Collocation guide, available on BellSouth's web site, does not indicate that discounted rates, and special terms and conditions, govern RT collocation (as opposed to those governing collocation in BellSouth central offices or other facilities). Finally, BellSouth's Collocation Director testified at deposition in the 271 proceeding (Commission Docket No. 960786-TL), that there is no special treatment for RT collocation as described by Mr. Williams, who acknowledged in this case he was not a collocation expert. FDN intends to serve

available to FDN, FDN will pay $11.74 (monthly recurring, plus $45 non-recurring) for a Zone I UNE loop.[19] For the 90 percent of Floridians in BellSouth territory served by DLC, this $12 rate includes the copper "sub-loop" running from the RT to the customer NID, the voice multiplexing functionality located in the RT and CO, and the "local transport" service (*i.e.*, the feeder) running from the RT to the CO.

To provide DSL service, on the other hand, BellSouth would have FDN purchase each of the above-enumerated elements separately, and self-provision the DSL multiplexing functionality. Thus, FDN would have to pay $6.90 monthly (plus $54.26 non-recurring) for the copper sub-loop and $44 monthly (plus $643 non-recurring) for a T1-capacity facility to transport traffic to and from the RT and central office.[20] Thus, the piecemeal approach BellSouth advocates would require FDN to pay $40 more to serve its first DSL customer than it pays for the very same facilities used to provide voice service.

The above-identified costs, however, represent only a fraction of the costs FDN would incur if it pursued the RT collocation "strategy" that BellSouth advocates. Pursuant to Commissioner Palecki's request, Tr. at 340-41, FDN prepared an estimate of the costs it would incur serving customers via an 8-port DSLAM collocated at BellSouth RTs. *See* Exh. No. 13.

---

on the same date as this Post-Hearing Brief a motion to supplement the record with this evidence from the 271 case. .

[19] Final Order on Rates For Unbundled Network Elements Provided by BellSouth, *Investigation Into Pricing of Unbundled Network Elements*, Florida Public Service Commission Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP (May 25, 2001) ("*BellSouth UNE Pricing Order*") at 524.

[20] BellSouth Answer to FDN Interrogatory No. 56 (Exh. 5 at 8). The $44 monthly charge assumes FDN purchases the 4-wire DS1 facility in zone 1. The non-recurring charge is comprised of the DS1 installation charge ($121), plus the per-site set-up charge ($522). As Mr. Gallagher testified, a CLEC deploying remotely collocated DSLAMs could get by with a DS1 transport if it served only a few customers. But once data traffic reached appreciable levels, however, the CLEC would almost require a DS3 facility. DS3 facilities, of course, are considerably more expensive ($402 monthly, $3,386 non-recurring). Exh. 5 at 5.

Of the two bids FDN received, the lower priced unit was a Phillips device estimated at $6,900.[21] The vendor estimated that FDN would incur one-time installation and engineering costs of approximately $2,000, and FDN identified an additional $1100 of one-time costs associated with self-provisioning the DSLAM. *See* Exh. No. 13. Thus, FDN would incur total capital costs of approximately $10,058 to install an 8-Port DSLAM in a single BellSouth RT, and additional monthly recurring costs of approximately $284.[22]

With this cost structure, FDN could never hope to build a successful business by collocating at BellSouth RTs. Assuming that FDN could charge its customers $45 for DSL Internet access (probably an unrealistic assumption),[23] and assuming a 75 percent utilization of the DSLAM,[24] FDN would earn only $270 per month from a remotely collocated DSLAM. Thus, FDN would not even be able to cover the monthly recurring charges assessed by BellSouth, let alone the capital and other costs of providing the service (such as the Internet services themselves -- *i.e.*, the "water" flowing through the "pipe"), and overhead. Indeed, FDN

---

[21] Note that FDN's estimate corresponds favorably to the bid-quote BellSouth received on a similar device. *See* Late Filed Exh. No. 12.

[22] The $284 is derived as follows: $51 for sub-loop feeder and distribution (identified above); $233 for rent and power. Note that FDN's Exhibit neglected to identify the cost associated with the sub-loop copper distribution facility. FDN's exhibit also included costs for inter-office transport facilities not included here. This $90 recurring cost has been excluded in anticipation of BellSouth criticism that it would be inappropriate to include the cost of connecting individual central offices in FDN's data network. For the incremental cost of serving FDN's first DSL customer, the cost would be incurred, and thus could reasonably be included here.

[23] One of the reasons customers choose FDN over BellSouth is because FDN offers lower prices, usually 10 percent lower. At $45 per month, however, FDN would be pricing its DSL Internet data service at the same level charged by BellSouth *See* Exh. 13.

[24] The industry average for telecommunications equipment is 75-80 percent, depending on the facility. *See* Exh. No. 13 at 1.

estimates that it would cost almost twice as much to serve customers via an RT-collocated DSLAM, on a fully-loaded basis, than FDN could reasonably expect to earn.

Although BellSouth can be expected to quibble at the margins with FDN's cost-estimates, BellSouth cannot realistically argue that collocating DSLAMs at BellSouth RTs can be economically justified. Moreover, FDN is not in the same position that BellSouth was a couple of years ago, when it "tested" the DSL market by deploying 8-port DSLAMs. *See* Tr. at 336. Having established that consumers are, in fact, interested in DSL, BellSouth no longer deploys 8-port facilities, *id.*, and it would be impractical for FDN to follow such a deployment plan, as FDN explained in late-filed Exhibit 13.

Not surprisingly, the economies of self-deployment shift with market penetration. As Mr. Gallagher explained, FDN estimates that if it could serve 50 customers out of a collocation site, its deployment of DSLAM facilities could become cash-flow positive. Tr. at 340. FDN's estimates in this regard are in step with other industry observers.[25] With the average RT serving only 500 customers, Tr. at 95, however, FDN would have to win 10 percent of the market before beginning to break even from a cash-flow standpoint (even before depreciation and return on investment). All the CLECs in the state together, however, have only about one-half that that market share.

One final word on the economic considerations that prevent CLECs from collocating DSLAMs in BellSouth RTs. The fact that ALECs cannot economically pursue such a strategy is not an indictment of ALEC business models. BellSouth is essentially arguing that FDN should be required duplicate components of BellSouth's last-mile network. It should not be surprising that ALECs cannot economically do so. While policy considerations may, in some cases, favor

---

[25] *See* Gary Kim, *No Demise for DSL*, Fatpipe, Aug. 2001, at 26 (citing estimates by CLEC Birch Telecom that "it can turn a central office cash flow positive with about 50 DSL accounts").

facilities-based competition,[26] nothing in the Act, its legislative history, or in any FCC or Florida PSC orders suggest that Congress or the Florida legislature expected competitors to eventually duplicate the ILECs' in-place, last-mile network. The whole point of TELRIC pricing is that it permits carriers to take advantage of the ILECs' economies of scale.[27] That is why a DLC UNE voice loop costs only $12 for voice service, but jumps to $44 if a CLEC is forced to purchase the dedicated components of the loop separately. A dedicated DS1 line is obviously much more expensive than if carriers are permitted to share the cost of that line with all of the other users served by a particular RT. The incremental cost associated with purchasing stand-alone loop facilities will always exceed the comparable TELRIC rate of the shared facility. That the price of the shared facilities is lower is not evidence that it the price is confiscatory, but rather reflects ILEC efficiencies, which ILECs are required to share with ALECs.[28] BellSouth seeks to deprive FDN of the efficiencies to which it is entitled under the Act, and further cement its monopoly hold on the Florida market.

E. Other Considerations Weighing Against RT Collocation

In addition to cost, the FCC's impairment analysis requires considering factors such as timeliness, quality, ubiquity and impact on network operations in assessing the practicality of self-provisioning elements of the ILEC's network. The evidence presented at the hearing

---

[26] Facilities-based competition is not always essential to promoting competition, however. MCI, of course, began as a reseller of AT&T's tariffed services, and the Commission has long promoted resale as an important vehicle for promoting competition and cost based-pricing. *See e.g., In re Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261 (1976), *amended on reconsideration*, 62 FCC 2d 588 (1977).

[27] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) ¶ 679.

[28] Consider the case of a new subdivision with 1,500 addresses. It will always be far more costly for a CLEC to construct lines to serve 150 discrete customers than to pay the ILEC 10 percent of its total costs for constructing facilities that serve the entire subdivision.

demonstrated that these factors all militate against requiring FDN to collocate DSLAMs at BellSouth remote terminals.

Timeliness. As demonstrated at the hearing, even if BellSouth's ALEC collocation procedures went perfectly – *i.e.,* an ALEC successfully completed the collocation application to BellSouth's liking, and space was available in the target RT – BellSouth's own current operating procedures provide that the RT collocation process might not begin for six months until after the ALEC submitted its application. Tr. at 50-51, 97-98, 358-59. But as Mr. Gallagher testified, this is unlikely to happen. FDN's experience collocating in BellSouth COs is that BellSouth typically rejects initial collocation applications, that some special construction is usually required to prepare the site, and that the entire process, from beginning to end, can take upwards of a year.

There is every reason to believe that the RT collocation process will be even worse. Mr. Williams explained that the average RT deployed in BellSouth's network is a little bigger than a file cabinet. BellSouth has not undertaken any study of the availability of space in its RTs, nor did Mr. Williams know what space augmentation efforts BellSouth has had to undertake for its own RT placement efforts. Tr. at 357. Despite what Mr. Williams described as BellSouth's policy to make RT collocation as "ALEC-friendly," as possible, there is every reason to believe that special construction will be frequently required when a CLEC seeks to collocate a DSLAM in a BellSouth RT.

And the special construction process is likely to be far more burdensome for RT collocation than central office collocation. RTs are fixed sized facilities deployed in neighborhoods and office parks. Construction permits will almost always be necessary to undertake such work, and zoning modifications and waivers may also be frequently required, no matter which company does the work. Tr. at 357. Though as part of the RT collocation collocations policies announced for this proceeding, BellSouth maintains that it will undertake all such efforts on behalf of requesting ALECs free of charge, the process will still take time.

Thus, FDN expects that Sprint's experience in Kansas City, in which the process took more than a year, would likely be typical in Florida. Given the FCC's finding that collocation intervals exceeding six months presumptively constitutes an impairment, there can be no doubt that the time involved with collocating DSLAMs in BellSouth RTs would impair competitors from providing competitive service. *See UNE Remand Order* ¶ 91.

Ubiquity. Before the end of this year, BellSouth will have DSLAMs in place in nearly one-quarter of its 12,000 RTs, giving it the capacity to provide DSL to nearly one-half the customers in its footprint, while ALECs have collocated none. With capital costs approaching $50,000 per DSLAM per RT collocation,[29] it would take FDN years to collocate even one-half the number of DSLAMs that BellSouth has in place *today*. Even if FDN had expended $80 million of capital – an impossibility for a concern of its size – buying and collocating DSLAMs (as opposed to investing in its other network operations, marketing and back office functions), it still would have raised enough capital to collocate DSLAMs in only 1600 RTs. Thus, as a practical matter, if FDN is forced to collocate DSLAMs in BellSouth RTs in order to provide DSL, it will never be able to compete on a level playing field with BellSouth. It will always be behind BellSouth in terms of network deployment, exactly the opposite result intended by the Telecommunications Act, which envisioned that competitors would be able to utilize the incumbent's in-place network immediately.

Quality and Impact on Network Operations. These factors are to be considered from the ALEC's vantage point: "the *quality* of alternative network elements available to the competitive LEC is relevant to a determination of whether a requesting carrier's ability to provide service is impaired." *UNE Remand Order* ¶ 96. Similarly, the impairment analysis requires "consider[ing] how self-provisioning a network element or obtaining it from a third-party supplier may affect

---

[29] This figure assumes that ALECs would collocate an expandable, 48-port DSLAM, the only type of installation that could ever make business sense. *See* Tr. at 160.

the technical manner in which the competitor can operate its network." *Id.* ¶ 99. Both considerations militate in favor of unbundling the packet switching functionality of the DSLAM, and permitting FDN to purchase, at UNE rates, the broadband capabilities of BellSouth's network. As explained in previous sections, self-provisioning is simply not a viable option, and there are no third-party alternatives. Thus lack of access to the UNEs identified by FDN would indeed effect the "quality" of DSL service provided by FDN, as well as FDN's "network operations," because FDN would simply not be in a position to offer the service.[30]

F. Policy Considerations Favoring Unbundling

The impairment analysis also requires considering the effect unbundling would have on certain policy objectives, including promoting competition, facilities-based competition, investment, and innovation.[31] Again, these considerations all weigh in favor of unbundling the DSLAM. As the FCC found in imposing a similar unbundling obligation on SBC's DLC network, a broadband offering available to ALECs would promote the rapid introduction of competition.[32] FDN hopes to obtain this service as soon as possible and would offer competitive DSL soon thereafter. Floridians would finally be able to choose among competing DSL providers. Moreover, the availability of a broadband UNE loop would have a far more immediate and profound effect on DSL competition in Florida than in SBC's region due to the higher percentage of BellSouth DLCs deployed in the Florida. Finally, as Mr. Gallagher

---

[30] BellSouth has not alleged in this proceeding that providing the relief FDN would requests would degrade the quality or have an impact on its own network operations.

[31] *See* 47 C.F.R. § 51.317(c).

[32] Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket No. 98-141, ASD File No. 99-49, Second Memorandum Opinion and Order, FCC 00-336 (rel. September 8, 2000) ("*Project Pronto Order*"), ¶¶ 23, 30.

explained, he expects that it will become more and more difficult to raise capital if FDN cannot demonstrate to investors that it has a high-speed data products strategy.

BellSouth makes two policy arguments against FDN's request. First, BellSouth asserts that the presence of cable television companies providing high speed Internet access in competition with its own should allay concerns about BellSouth's monopoly hold on the DSL market. Second, BellSouth can be expected to argue that if the Commission grants the relief FDN requests, ALECs "would only be able to provide that service to folks who already get voice and data from BellSouth."[33]

Neither of these arguments provide any justification for denying FDN's request. First, as the Illinois Commission found, the presence of cable, satellite, wireless or other broadband competitors in the market "simply begs the question of [Ameritech's] obligation to provide requesting carriers access to its network under relevant state and federal statutes ...."[34] These other providers do not have statutorily mandated unbundling obligations. Moreover, there is very real question about the ability of cable modem providers to serve small and medium sized businesses. DSL provides a dedicated line to end-users, while cable subscribers share an Ethernet connection with their immediate neighbors, and the speed of that connection declines as more users sign onto the local network. Thus, it is not surprising that cable market penetration in the business market is relatively small. *See* Precursor Group Study (appended to Williams Rebuttal Testimony). The FCC also has already addressed this point directly:

> We also disagree with the incumbent LECs' argument that cable television service offers a viable alternative to the incumbent's unbundled loop. ... [D]eclining to unbundle loops in areas where cable telephony is available would be inconsistent with the Act's goal of encouraging entry by multiple providers. Given that neither mobile nor fixed wireless

---

[33] Tr. at 154 (question posed by BellSouth counsel).

[34] *Illinois DSL Rehearing Order* at 33.

> can yet replace wireline service, if we were to take the incumbents' approach, consumers might be left to ... choose between only the cable company and the incumbent LEC.

UNE Remand Order ¶ 189. Although the FCC's prognostication about the future of DSL competition in the *UNE Remand Order* has been overtaken by events, its assessment about the minimal weight that should be given to cable alternatives in the impairment analysis remains sound.

Finally, BellSouth's argument that the unbundling relief FDN seeks amounts to a "zero-sum gain," is essentially an attack on the Act itself, and is simply irrelevant in this context. Moreover, it is patently false. The same argument could have been made when AT&T was forced to allow MCI to resell AT&T service in the 1970s. The presence of a competitor in the market, however, put downward pressure on prices, spurred innovation, and led to the modern telecommunications economy that we enjoy.

G. The Commission Should Follow the Lead of Other Regulatory Authorities and Classify Broadband Loops as a UNE

FDN's request in this proceeding is by no means novel. SBC is required to provide a functionally identical product throughout its 13-state region. The product that SBC must offer to CLECs is called the "Broadband Offering," which the FCC has described as a "combination of network elements provided as a wholesale arrangement."

The history of SBC's obligation to offer the broadband UNE offering bears directly on FDN's request in this proceeding. As a condition of the SBC-Ameritech merger, the FCC had required SBC to place all assets in a separate affiliate that would be required to deal at arms length with SBC on the same terms and conditions as it deals with CLECs. *Project Pronto Order* ¶ 3. Shortly after consummating the merger, however, SBC returned to the FCC seeking a waiver of one of the separate affiliate terms. In order to spur deployment of DSL and other services in its territory, SBC planned to reconstruct its network by increasing the amount of DLC in its network, thus permitting it to shorten the lengths of the copper loops serving individual

end-users and improve over-all reliability. *Id.* ¶ 4. In other words, SBC wanted to deploy the network that BellSouth already has in place in Florida.[35]

The FCC recognized the benefits that consumers would receive from the network modifications SBC proposed, but also recognized the potential death-blow to competition that would also follow, for many of the reasons identified above. *Project Pronto Order* ¶ 24. Thus, the FCC conditioned the waiver on SBC's Broadband Offering, which must be offered alone and in combination with a voice offering, at rates, terms, and conditions that are just, reasonable, and nondiscriminatory and priced in accordance with the TELRIC methodology applicable to unbundled network elements. *Id.* ¶ 30. SBC's Broadband Service is available in SBC's thirteen-state region today, is functionally equivalent to the broadband loop requested by FDN in this arbitration.[36] Therefore, FDN is seeking from BellSouth what SBC already offers to CLECs in its thirteen-state region.

The FCC did not formally classify the offering as a UNE, primarily because the issue of whether ILECs should be required to provide unbundled access to RTs was, and still is, pending in a generic proceeding, the results of which will be generally applicable to all ILECs.[37] Two recent state decisions have taken the next step, however, and ordered SBC to provide CLECs

---

[35] With the notable exception that the Project Pronto architecture actually uses far fewer RTs than BellSouth's Florida network. In Illinois, for example, the Project Pronto deployment will involve construction of 2100 RTs. Nonetheless, the Illinois Commission found that CLECs could not possibly collocate at so many RTs, and were therefore impaired without access to the DSLAM functionality of SBC's next-generation DLC equipment. *Illinois Rehearing Order* at 33.

[36] Mr. Williams acknowledged that Project Pronto's use of different DLC technology than that used by BellSouth does not impact on the technical obstacles confronting CLECs who seek to collocate facilities in BellSouth RTs. Tr. at 376.

[37] *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147, CC Docket 96-98, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket 96-98*, FCC 00-297, at ¶¶ 81-83, 103-12, 119-28 (rel. Aug. 10, 2000).

with unbundled access to their Project Pronto DLC architecture. In Texas, for example, an Arbitration Panel ruled that SWBT must provide access to the "unbundled loop element from the demarcation point at the customer's premises to the termination (port) on the OCD in the central office, including the associated electronics at the RT and the CO. . . ."[38] Similarly, SWBT will have to make packet switching available as a UNE for any customer served by the Project Pronto DLC architecture. The Panel's finding with respect to SWBT's arguments that competitors were not impaired because they could collocate their own DSLAMs are particularly relevant:

> SWBT does not allow CLECs to collocate DSLAMs at the remote terminal on the same terms and conditions that it provides to itself.... [A] CLEC wishing to collocate a standalone DSLAM into the RT will often run into space constraints, not to mention local regulations that may make it impossible to construct adjacent structures. The evidence indicates that SWBT designed many of its RTs to fit only SWBT equipment and did not consider CLEC collocation needs in its planning designs. In response to criticism, SWBT has "voluntarily" offered to either increase the size of future RTs, or construct an adjacent structure for a requesting CLEC. However, the Arbitrators do not agree that these "voluntary" commitments put CLECs in the position to receive "the same terms and conditions that apply to SWBT's own DSLAM," a standard which this Commission adopted in the first xDSL Arbitration. Indeed, evidence in the record supports the proposition that only in unique circumstances will it be remotely economical for CLECs to pay for an ESC and install their own DSLAM.

Id. at 78. Similarly, the Illinois Commerce Commission recently created the broadband loop with packet switching functionality as a new UNE, specifically rejecting DSLAM collocation as an option ("DSLAM collocation fails again because of ... lack of collation space at RTs, timeliness and poor economics").[39]

---

[38] Arbitration Award, *Petition of IP Communications Corp. to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues*, Docket No. 22168, *Petition of Covad Communications Co. and Rhythms Links, Inc. Against Southwestern Bell Tel. Co. For Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Docket No. 22469, Public Utility Commission of Texas (July 13, 2001) ("*Texas Arbitration Award*") at 75.

[39] Proposed Order on Rehearing, *In the Matter of Illinois Bell Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Services*, Illinois Commerce Commission, Docket No. 00-0393, (August 10, 2001) ("*Illinois Rehearing Order*").

H. Prior Florida Commission Orders Do Not Bar the Relief That FDN Seeks

Finally, BellSouth's claims that the Commission's prior orders in the *Intermedia* and *ICG* arbitrations preclude the relief FDN seeks here constitutes a gross misreading of those orders. Contrary to BellSouth's characterization, neither case establishes a general prohibition against unbundling packet switching. Rather, both cases involved general requests to unbundle packet switching throughout BellSouth's network, and failed to present *any* evidence demonstrating impairment.

For example, in the *Intermedia Order,* the Commission denied Intermedia's broad request to unbundle packet switching generally throughout BellSouth's network, finding that Intermedia "presented no information ... to demonstrate that Intermedia would be 'impaired' without access to BellSouth's packet switching capabilities as UNEs." *Id.* at 35. With respect to Intermedia's request to unbundle certain frame relay elements in particular (as distinguished from the broadband functionality at issue in this proceeding), the Commission found that "Intermedia's assertion, that establishing UNI, NNI, and DLCI as 'distinct UNEs because they reflect a vital element of modern, digital networks that is becoming increasingly important,' is insufficient to demonstrate that Intermedia is impaired in its ability to provide the services it seeks to offer." *Id.* at 39.[40] ICG's broad and unsupported requests were denied on similar grounds. *See ICG Arbitration Order* at 7.

In sharp contrast, FDN has requested unbundled access to a particular network element, and presented overwhelming evidence of its impairment. Thus, the cases BellSouth cites bear little, if any, resemblance to FDN's Petition.

[40] Further, the case does *not* stand for the proposition that an ILEC is "relieved from unbundling packet switching if the ILEC permits a requesting carrier to collocate its DSLAM in the incumbent's remote terminal, on the same terms and conditions that apply to its own DSLAM.'" *Id.* at 34. BellSouth apparently made this argument in the context of an issue that is not otherwise identified in the order. The order makes clear that the Commission did not rely on the "argument" in reaching its decision.

II. BELLSOUTH FAILS TO COMPLY WITH ITS RESALE OBLIGATIONS

Although resale is not FDN's preferred means of serving customers, and, under FCC Orders, is not a substitute for UNE access,[41] the Act does require BellSouth to offer it. Thus, FDN must have the opportunity to purchase BellSouth's DSL transmission service at wholesale rates, pursuant to Section 251(c)(4) of the Act. FDN would then bundle this transmission service with FDN's Internet access and content services. In the parlance that was adopted at the hearing, FDN seeks to resell the "pipe" used to provide the service, but will provide its own water to flow through that pipe.[42] As Mr. Gallagher explained, under FDN's proposal, BellSouth would not be required to have end-user relationships, such as billing or customer service, with FDN's customers.[43]

After the FCC's ruling in the *Verizon-Connecticut 271Order*, there is little doubt that FDN is entitled to resell BellSouth DSL. In rejecting many of the same arguments BellSouth raises here, the Commission ruled that, "we cannot accept Verizon's contention that it is not required to offer resale of DSL unless Verizon provides voice service on the line involved." *Verizon-Connecticut 271Order* ¶ 30. The bases for the FCC's conclusion are explained below.

---

[41] See *UNE Remand Order* at ¶ 67.

[42] *See* Tr. at 9-16 (opening statement); 138-41, 152, 211-12.

[43] The precise mechanism by which BellSouth would "hand-off" the signal to FDN would be subject to negotiation. At no point in the hearing or in its pre-filed testimony has BellSouth suggested that FDN's proposal is technically unfeasible. BellSouth should be required to resell its DSL transport service on the same terms and conditions that it provides the service to itself. BellSouth's current bundled ADSL/Internet Service rate is $49.95, which includes DSL transport and unlimited access Internet service. When unlimited Internet service is ordered separately from BellSouth, the cost is $20.95. Therefore, in the absence of any Commission-approved cost study allocating costs between the DSL and Internet service, the DSL transport service has an imputed retail rate of $29.00 ($49.95 minus $20.95). The existing resale discount rates established by the Commission would be applied to the $29.00 rate.

This Commission has also recognized and repeatedly enforced BellSouth's obligation under "both Section 251(c)(4) of the Act and FCC orders to offer a resale discount on all telecommunications services that BellSouth offers on a retail basis to subscribers who are not telecommunications carriers."[44] The Commission has further acknowledged that this obligation extends to "all DSL service offerings that are made available to retail customers." *Id.* at 26. Whether a given BellSouth product is available for resale under Section 251(c)(4) depends on whether the product "is available to end-user customers on a retail basis." *Id.* at 27 (citation omitted). If it is, then it must be provided to CLECs at the avoided-cost discount rate.

The evidence presented to the Commission at the hearing demonstrated clearly that BellSouth markets and sells several distinct DSL products to Florida end-users. Indeed, BellSouth's witness admitted that BellSouth directly "markets [DSL] to its end users." Tr. at 241. Nonetheless, BellSouth refuses to comply with its statutory resale obligations. BellSouth offers two alternative justifications for its refusal to resell its various DSL offerings. First, BellSouth claims that it has no "retail, tariffed" DSL products available for resale under Section 251(c)(4). Rather, BellSouth claims that it offers only a "wholesale" DSL product available for purchase exclusively by ISPs, who, in turn, package it with their Internet service "content" and resell it to end-users.[45]

---

[44] Final Order on Arbitration, *Petition by MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996*, Docket No. 000649-TP, Order No. PSC-01-0824-FOF-TP (March 30, 2001) ("*MCI Arbitration Order*") at 25.

[45] There is, however, a notable exception: ALEC-affiliated ISPs who seek to resell the service on the high frequency portion of ALEC UNE loops are prevented from doing so. Thus, BellSouth unreasonably discriminates in the provision of this service, because it refuses to serve FDN's ISP affiliate in the same manner that it provides it to itself or AOL because BellSouth's wholesale "tariffed" DSL offering is only available for telephone lines on which BellSouth is the local exchange carrier. Therefore, this service is not an option for FDN, which seeks to combine high-speed data services on the same line as its facilities-based local exchange service. As

BellSouth claims that this product is exempt from Section 251(c)(4) resale obligations because BellSouth's customers are not retail customers, but are rather ISPs who purchase BellSouth's DSL transport service, bundle it with their own Internet and data "content" and resell it to end-users. Thus, BellSouth relies explicitly on the FCC's *Second Advanced Services Order*, which exempted such narrowly tailored offerings from the Act's resale obligations. To qualify for the *Second Advanced Services Order* "exception," however, ILEC offerings must, in fact, be exclusively wholesale offerings. As demonstrated at the hearing, however, BellSouth's offering are not so narrowly tailored, and thus are not exempt.

Whether BellSouth will continue to rely on the theory that it does not offer DSL at retail in its post-arbitration brief, given the conclusive evidence to the contrary presented at the hearing, remains to be seen. BellSouth's alternative claim is that the retail DSL-based Internet access service it sells to end-users is an "enhanced, nonregulated, nontelecommunications" service that is exempted from the Act's resale obligations.[46] This argument, however, is similarly unavailing. First, it is a black-letter regulatory principal that a common carrier must unbundle enhanced from basic services and offer the basic services separately.[47] Thus, it is irrelevant whether the "finished" service that BellSouth offers to end-users is an enhanced or information service: the underlying telecommunications service remains subject to all common carrier obligations, including the Act's resale obligations. Moreover, as the D.C. Circuit recently

---

discussed below, BellSouth offers no justification for refusing to provide DSL service on the high frequency portion of an unbundled loop that an ALEC uses to provide voice service.

[46] Tr. at 210.

[47] *See, e.g., Independent Data Communications Manufacturers Association, Inc. and American Telephone and Telegraph Co. Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition,* Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, ¶ 45 (1995) ("AT&T cannot avoid its *Computer II* and *Computer III* obligations under the auspices of the contamination doctrine, which applies only to nonfacilities-based service providers").

explained, the regulatory classification of DSL is irrelevant for determining whether ILEC DSL offerings must be resold under section 251(c)(4). So long as services are offered to end-users at retail, which BellSouth's DSL services clearly are, then they must be made available to ALECs under the Act's resale discount provisions. Each of these principles is explained at greater length below.

A. BellSouth Sells DSL at Retail

No matter how BellSouth claims it is "technically" offering its DSL services, it cannot credibly claim that it does not offer retail DSL services to Florida consumers. At the outset, however, it must be recognized that the testimony of BellSouth's witness on this issue was confusing and contradictory, and left the record in a state of disarray. The record contains at least three different versions of how BellSouth Telecommunications, Inc., "the regulated telephone company," Tr. at 220, provides its DSL-based Internet access service – known as "FastAccess" – to its residential and business customers. At his deposition, Mr. Ruscilli stated that Florida end-users who buy FastAccess are actually customers of BellSouth.net, a separate ISP affiliate of BellSouth's holding company separate ISP affiliate. Mr. Ruscilli stated that BellSouth.net purchases the DSL transport service out of the federal DSL tariff on the same terms and conditions as other ISPs. *See* Tr. at 221-24. At the hearing, however, Mr. Ruscilli retracted his deposition testimony, explaining that BellSouth.net, in fact, has no direct relationship with customers. Mr. Ruscilli explained that "BellSouth.net does not physically purchase out of that tariff," and agreed that "[i]t's BellSouth Telecom that's providing service to end users." Tr. at 223.

Mr. Ruscilli's story changed again, however, when he was asked about a April 13, 2001 letter from BellSouth's Florida General Counsel (Ms. Nancy White) to the Commission (Exh. 10). Ms. White submitted the letter to correct erroneous statements she had made to the Commission at the February 6, 2001 agenda meeting. Ms. White's letter largely tracked Mr.

Ruscilli's revised testimony, with one exception. The letter states that, "BellSouth.net, Inc. is not, and never has been, an Internet service provider." Exh. 10 at 2; Tr. at 233. Ms. White's letter largely (though not perfectly) tracks BellSouth's Answer to FDN Interrogatory No. 68. In that answer, BellSouth explains BellSouth.net's function "as a vendor that provides BST with the equipment and professional services that enable BST to provide an enhanced information service to retail customers [known] as BellSouth FastAccess ADSL." Thus, as the record stands today, neither the Commission nor FDN can be confident about which BellSouth entity actually provides the ISP service (*i.e.,* the water) consumed by end-users, because BellSouth has stated that neither BellSouth Telecommunications nor BellSouth.net provides ISP services.

At the end of the day, however, it does not matter how BellSouth seeks to obscure the "corporate structure" by which it provides DSL-based data and Internet services to Florida consumers. As the D.C. Circuit ruled in *ASCENT I*, retail sales of advanced telecommunications services by ILEC affiliates are subject to the resale obligations of the Act. The court found that an ILEC may not "sideslip § 251(c)'s requirements by simply offering telecommunications services through an ... affiliate."[48] Thus, even if Commissioner Jaber's concern was correct, that "BellSouth.net was established just for the purpose of" permitting BellSouth to evade the Act's resale and unbundling obligations, BellSouth's efforts were futile. Tr. at 237. The Act does not permit corporate form to be elevated above function. As long as any BellSouth entity markets and sells DSL at retail, then BellSouth must make the service available for ALECs to resell.

Make no mistake about it, BellSouth sells DSL at retail. In addition to Mr. Ruscilli's direct admission, the objective evidence presented at the hearing documented BellSouth's retailing of DSL. An end user reading BellSouth's marketing materials, whether in a newspaper advertisement, on the back of a supermarket receipt (*see* FDN Exh. 9), or on BellSouth's web

---

[48] *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. Jan. 2001) ("*ASCENT I*").

page, can come to but one conclusion: BellSouth itself is selling DSL services directly to retail customers. Checking BellSouth's own web page (at www.BellSouth.com), and clicking on the proper icons for residential or business services reveals that BellSouth is directly marketing DSL services to end-users.[49] On their face, none of the BellSouth marketing materials submitted in the record of this proceeding are offerings to ISPs, as BellSouth would have the Commission believe. They are all plainly offers to end users. Indeed, the advertisements explain that BellSouth's DSL services are available to residential customers, and provide specific pricing, ordering and installation information.

Mr. Ruscilli explained that the entire process of ordering BellSouth FastAccess can be done on-line, Tr. at 219-20, and that "BellSouth Telecommunications, the regulated telephone company, is the company that bills for that and can provide that to you." *Id.* at 220. This is confirmed by BellSouth's marketing literature. Mr. Ruscilli confirmed that BellSouth bundles Fast Access with other telecommunications services at discounted rates. Tr. at 228; *see* also Exhibit 9.[50] BellSouth's marketing material further refers to the DSL product marketed by BellSouth to its retail customers as "*BellSouth* FastAccess Internet Service."

BellSouth holds itself out to the public as a provider of retail DSL service, and is therefore subject to the resale discount requirements of Section 251(c)(4). The evidence of this direct relationship between BellSouth – the regulated phone company – and BellSouth Fast

---

[49] Mr. Ruscilli's discussion of BellSouth offerings on the web necessitates citing to those materials, which concededly are not record evidence, in this brief. On the page devoted to large businesses, a banner notes that "BellSouth is the leading provider of DSL in the Southeast." http://www.bellsouth.com/business/products_services/data_adsl.html (visited Sep. 20, 2001).

[50] BellSouth even provides customers with billing and installation instructions, and further informs consumers that with "the BellSouth Complete Choice Plan or Area Plus Plan, you may be eligible for special savings on select Internet, Cingular Wireless, or Paging services." *See id.*

Access customers – is overwhelming, and was quite candidly admitted by Mr. Ruscilli, who acknowledged that BellSouth packages its own DSL transport services with Internet services, and offers that combined package directly to end-users. Moreover, BellSouth handles all customer care, service and billing functions.

B. BellSouth Cannot Avoid Its Resale Obligations By Bundling DSL and Internet Services

Despite the overwhelming facts to the contrary, BellSouth attempts to justify its refusal to make DSL services available to FDN for resale on the demonstrably false claim that it does not sell DSL at retail. Mr. Ruscilli explained BellSouth's position as follows: "BellSouth does not offer a tariffed … retail DSL service, and therefore, BellSouth has no obligation to make available its wholesale DSL service at the retail discount." Tr. at 210. The product offered at retail, Mr. Ruscilli said, is an "enhanced, nonregulated, nontelecommunications" service that is purportedly exempt from the Act's resale obligations. Tr. at 210.

Conspicuously absent from BellSouth's explanation is any citation to supporting legal authority to support its claim that "bundled," "enhanced" services are exempt from the resale obligation. The explanation for this "omission" is that there is none. Indeed, exactly the opposite is true. For the last 20 years, FCC bundling rules have required facilities-based common carriers to offer telecommunications services separately from any enhanced services, even if it only offers them at retail as a bundled product.[51] The FCC has expressly held that DSL transmission is an interstate telecommunications service that does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II."[52] As the FCC explained in its March 2001 *Computer III Order*:

---

[51] *See, e.g., Frame Relay Order, supra.* (citing FCC precedent).

[52] *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, FCC No. 98-292, CC Docket No. 98-79, 13 FCC Rcd 22466, ¶ 20.

> [W]here there is an incentive for a carrier to discriminate unreasonably in its provision of basic transmission services used by competitors to provide enhanced services, section 202 acts as a bar to such discrimination. In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act. We also note that the Commission's Title II resale requirements mandate that wireline common carriers provide telecommunication services to competitors.[53]

Thus, the FCC's bundling rules forbid *exactly* what BellSouth is trying to get away with here. A carrier may not evade Title II obligations (including the resale obligations of Section 251(c)(4) by attempting to obscure the common carrier services it provides by "bundling" them with information services.

The expansive scope of BellSouth's resale and unbundling obligations were confirmed recently in the D.C. Circuit's recent *WorldCom* decision.[54] Among the issues in *WorldCom* was whether DSL would be subject to the Act's resale and unbundling obligations. Qwest argued that because DSL is neither "exchange access" nor a "telephone exchange service," that its DSL offerings were exempt from the various Section 251(c) obligations. The court rejected the argument, finding that so long as a carrier "qualifies as a LEC by providing either 'telephone exchange service' or 'exchange access,' then it must resell and unbundle all of its telecommunications offerings, including DSL *Id.* at 694. The Court further rejected Qwest's policy arguments that the FCC's interpretation could lead to absurd results, including overly expansive resale obligations. *Id.* at 694-95. As the Court explained, "the duty of an incumbent

---

[53] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket 96-61; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets,* Report and Order, CC Docket 98-183, FCC 01-98 (rel. March 30, 2001), at ¶ 46.

[54] *WorldCom, Inc. v. FCC,* 246 F.3d 690 (2001).

LEC under § 251(c)(4) to offer at wholesale those telecommunications services that it sells at retail *seems unlimited.*" *Id.* at 695 (punctuation altered) (emphasis added).

C. BellSouth's Reliance on the Second Advanced Services Order is Misplaced

BellSouth's reliance on the FCC's *Second Advanced Services Order* as justification for BellSouth's position that it is not obligated to resell DSL under Section 251(c)(4) is similarly misplaced. *See* Tr. at 202-203. Among the questions before the FCC in *Second Advanced Services Order* was the legal classification of discounted transport offerings made available exclusively to ISPs, and whether such offerings trigger the discount requirement."[55] In ruling on this question, the FCC specifically held that "advanced services" sold directly by the ILEC "to residential and business end-users are subject to the Section 251(c)(4) resale obligations without regard to their [regulatory] classification ...."[56] The FCC created an exception, however, for purely wholesale offerings. The FCC found that ILEC sales to ISPs (usually offered with term and volume discounts) are not subject to resale under Section 251(c)(4).[57]

BellSouth's reliance on this order (and the D.C. Circuit Order affirming it),[58] is misplaced, however, because the FCC's finding that wholesale DSL offerings are exempt from the resale discount obligations, was only intended to apply to situations in which an ISP is ***un***affiliated with the ILEC. As envisioned by the FCC, "entities obtaining the bulk DSL services" would "perform certain functions with respect to the DSL service supplied to them, including provisioning all customer premises equipment and wiring, providing customer service,

---

[55] *Association of Communications Enterprises v. FCC,* 253 F.3d 29 (D.C. Cir. June 2001) ("*ASCENT II*").

[56] *Second Advanced Services Order* ¶ 8.

[57] Information on AOL's DSL offerings can be found at: http://aolplus-dsl.web.aol.com/faqs.html (visited Sep. 21, 2001).

[58] *ASCENT II.*

and marketing, billing, ordering, and repair." *Second Advanced Services Order* ¶ 7. The FCC emphasized that when an ILEC offers DSL service to end-user customers and provides "marketing, billing, and customer care for the end-user," those DSL services fall into the category of DSL services offered "directly to residential and business end-users" and are subject to the 251(c)(4) resale discount.[59]

This conclusion was reinforced by the FCC's recent *Verizon-Connecticut 271Order*. The FCC's words on the subject are quoted below in full:

> In light of the *ASCENT* decision, we cannot accept Verizon's contention that it is not required to offer resale of DSL unless Verizon provides voice service on the line involved. As an initial matter, we reject this argument based on the plain language of section 251(c)(4). Section 251(c)(4) states that incumbent LECs must "offer for resale at wholesale rates any telecommunications service that [they] provide[] at retail . . . ." Verizon and VADI, which are subject to the same resale obligations, currently provide local exchange and DSL services to retail customers over the same line. Therefore, we find that, because Verizon and VADI offer these services on a retail basis, these services are eligible for a wholesale discount under section 251(c)(4). Accordingly, we conclude that Verizon must make available to resellers, at a wholesale discount, the same package of voice and DSL services that it provides to its own retail end-user customers.
>
> We also reject Verizon's position on the resale of DSL on two additional grounds. First, Verizon argues that it currently provides DSL services through its affiliate VADI, and VADI provides such services exclusively through a line sharing arrangement with Verizon. Therefore, according to Verizon, the only DSL services that VADI must make available for resale are those provided to Verizon voice customers because, under the Commission's rules, an incumbent LEC is only required to provide line sharing, or access to the high frequency portion of the loop, when the incumbent provides the underlying voice service. Thus, Verizon takes the position that there is no DSL service for VADI to resell when a competitive LEC provides voice service over the line involved. Verizon's position is the same regardless of whether the competitive LEC is reselling voice service or providing voice service over a UNE loop or UNE-platform (UNE-P). We find that Verizon's position is based on a misapplication of this Commission's line sharing rules. Line sharing is not a retail service; it is a UNE provided under section 251(c)(3). Therefore, the restriction on the line sharing UNE is inapplicable to Verizon's obligations

---

[59] BellSouth's argument that its DSL service arrangement (selling the DSL component to itself and then selling a bundled product at retail) falls within the *Second Advanced Services Order* exemption and *ASCENT II* is illogical. *ASCENT I* held that the resale obligation could not be evaded through a separate affiliate's sale of the DSL component of a bundled product, so it makes no sense to suggest that *ASCENT II* permits such evasion if there is no separate affiliate involved in the exact same service arrangement. That *ASCENT II* concerned only wholesale sales to unaffiliated ISPs is the only logical conclusion.

> relating to retail services. Resellers purchase retail services at a wholesale discount, they do not purchase UNEs.
>
> Second, Verizon's argument rests on precisely the conduct ruled unlawful by the court – the use of an affiliate to avoid section 251(c) resale obligations. The *ASCENT* decision made clear that Verizon's resale obligations extend to VADI, whether it continues to exist as a separate entity or whether it is integrated into Verizon, and regardless of the way Verizon structures VADI's access to the high frequency portion of the loop. Accordingly, we conclude that to the extent Verizon's attempt to justify a restriction on resale of DSL turns on the existence of VADI as a separate corporate entity (or even a separate division), it is not consistent with the ASCENT decision. We also emphasize that Verizon's policy of limiting resale of DSL services to situations where Verizon is the voice provider severely hinders the ability of other carriers to compete. Specifically, Verizon's policy prevents competitive resellers from providing both DSL and voice services to their customers, while Verizon is able to offer both together to its customers. This result is clearly contrary to the pro-competitive Congressional intent underlying section 251(c)(4).

Verizon-Connecticut 271 Order ¶¶ 30-33.

D. Other State Commissions Have Recognized that ILECs Must Resell Their DSL Transport Services

In addition to the FCC, at least two state Commissions have found that Section 251(c)(4) requires ILECs to resell DSL. On May 7, 2001, the Connecticut Department of Utility Control (DPUC) issued a draft decision that will require the state's largest incumbent, Southern New England Telephone Company (SNET), to resell any telecommunications service, including DSL, that is sold by its ISP affiliate and any other affiliates. And the DPUC specifically rejected SNET's claim that its only DSL offering was a wholesale transport service purchased by third-party ISPs, including its own ISP affiliate, and was therefore exempt from the Act's resale obligations, accusing SNET of "ignor[ing] th[e *ASCENT]* decision's plain language."[60] *Id.* More recently, the Indiana Commission reached the same result on the same grounds.

E. BellSouth Must Offer DSL For Resale On The Same Terms And Conditions That It Provides DSL To Itself

---

[60] Petition of DSLnet Communications, LLC Regarding Section 251(c) Obligations of the Southern New England Telephone Company, Docket 01-01-17, Draft Decision at 9 (Conn. D.P.U.C. May 7, 2001) (internal citations omitted).

Finally, as the FCC has now made clear, BellSouth must offer DSL for resale on terms and conditions that permit FDN to provide DSL to its customers on the same UNE loop that FDN uses to provide voice service. BellSouth must provide the service in "substantially the same time and manner as it provides ... itself." *Verizon-Connecticut 271 Order* ¶ 5. Just as BellSouth customers are entitled to purchase DSL and voice on the same line, so are FDN customers. Any failure to provide FDN and its customers with the same level of service would constitute an unreasonable and discriminatory practice in violation of both federal and Florida law.

As the FCC explained in the *Verizon-Connecticut 271 Order*, the FCC's *Line Sharing* and *Line Sharing Reconsideration Orders* provide no support for ILECs for BellSouth's refusal to resell its service on the high frequency portion of FDN loops. As the FCC explained, those orders dealt exclusively with BellSouth's obligations when it provides line sharing as a UNE – *i.e.,* unbundled access to the high frequency portion of the loop in order for data LECs to provide DSL service to end-users. The *Line Sharing Orders* are, thus, inapplicable to FDN's resale request because FDN is not seeking to purchase a UNE line sharing product. FDN simply wants the ability to resell a product to its customers on the same terms and conditions that BellSouth provides to its own customers.

III. THE COMMISSION MUST PUT AN END TO BELLSOUTH'S UNLAWFUL PRACTICE OF REFUSING TO PROVIDE ITS RETAIL DSL SERVICE TO CONSUMERS PURCHASING VOICE SERVICE FROM FDN

Finally, the Commission must take steps to prevent BellSouth from using its monopoly in the DSL market as leverage to strengthen its already firm grip on the voice market. Specifically, BellSouth refuses to sell its FastAccess DSL products to consumers who purchase voice service from FDN. Tr. at 108. This practice threatens to undermine the already troubled state of telecommunications competition in Florida by effectively preventing FDN from competing in the

voice market for customers who purchase DSL from BellSouth. Customers who switched to FDN would lose their BellSouth DSL, and FDN is not in a position to offer them alternative DSL service. Similarly, any current FDN voice customer that wants DSL will have to drop FDN service and purchase both voice and DSL from BellSouth.

BellSouth should not be permitted to deny providing its Internet access service to FDN voice customers. The fact that this service would be provided over a BellSouth loop that has been leased to FDN presents no technical or regulatory problem, nor is it a basis for BellSouth's refusal. But there is no question that the Commission has jurisdiction under Section 364 of the Florida Statutes to prevent BellSouth from pursuing business practices that so directly undermine the development of competition in the state. Section 364.051(5)(b) provides that "[t]he commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring resolution of service complaints, preventing cross-subsidization of nonbasic services with revenues from basic services, and ensuring that all providers are treated fairly in the telecommunications market." Similarly, while Florida law grants carriers flexibility with respect to pricing and packaging of nonbasic services, the statutes do stipulate that "the local exchange telecommunications company [providing nonbasic services] shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers."

As the Commissioners recognized at the hearing, BellSouth's insistence on tying its DSL service to a concomitant requirement that customers also purchase BellSouth violates these principles of Florida law. As Commissioner Palecki remarked:

> Now, as a Commission, we have received mandates from both the federal and our state government to encourage competition. Does it seem like we are correctly following such a mandate if we allow a condition to exist that every time an ALEC customer decides to sign up for DSL service, the ALEC loses the voice customer? It doesn't seem fair to me.

Tr. at 261.

Commissioner Deason likewise recognized that BellSouth's practice of tying its DSL and voice services together was the predatory conduct of a monopolist seeking to drive its competition out of business:

> [T]here's nothing wrong with making a profit, don't get me wrong. But I guess the question I have is, I'm trying to understand BellSouth's motivation. Would there be more profit in losing a customer altogether or having a partial customer and providing DSL service even though you do not provide voice service? Or is it part of your master marketing plan that you felt like you were going to maximize your revenue by having this requirement because not only would you obtain a DSL customer but you are going to regain a voice customer?

Tr. at 265-66. Indeed, BellSouth's "master plan" is to win all the DSL *and* voice business for itself by preventing customers from choosing competitive alternatives. The bottom line is that BellSouth's refusal to provide FastAccess to FDN's voice customers is unreasonable, discriminatory, and anticompetitive, and thus in violation of a host of federal and state laws. Following is a brief review of the applicable legal principles.

Unreasonable denial of service. Section 201 of the Communications Act imposes a duty on common carriers to furnish service upon reasonable request.[61] Section 364.03(1) of the Florida Statutes imposes similar obligations.[62] BellSouth's practice violates both sections, as FDN's voice customers are being denied service when they request FastAccess DSL service from BellSouth. As the FCC has held, "carriers who are requested to provide service should make all efforts to do so," particularly when the carrier occupies a monopoly "bottleneck" position thus rendering service from the dominant carrier essential if the needs of customers or

---

[61] 47 U.S.C. § 201(a).

[62] Fla. Stat. § 364.03(1) requires that "every telecommunications carrier shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto suitable and proper telecommunications facilities and connections for telecommunications services and furnish telecommunications service as demanded upon terms to be approved by the commission."

competing carriers are to be served.[63] Given BellSouth's virtual stranglehold on the DSL market in Florida, and the way it restricts competitive provisioning of DSL, BellSouth's refusal to provide service is rendered all the more unreasonable.

Unreasonable discrimination. BellSouth's practice is also blatantly discriminatory. Both Section 202(a) of the federal Communications Act, as well as Sections 364.08(1) and 364.10(1) of the Florida Statutes, prohibit carriers from unreasonably discriminating among customers. The FCC has established a three-prong test for evaluating whether disparate treatment of similarly situated customers violates the Act. First, the Commission assesses whether the services at issue are "like one another." Second, the Commission determines whether disparate pricing or treatment exists. Third, if disparate pricing or treatment is present, then the Commission must determine whether such disparity is justified and, therefore, not unreasonable.[64]

So judged, BellSouth's refusal to provide FastAccess to FDN UNE voice customers is clearly discriminatory. The services at issue are exactly the same: both FDN's and BellSouth's voice customers are seeking BellSouth's retail DSL service. The two are clearly treated disparately, since only the BellSouth voice customer can obtain BellSouth's DSL service. Finally, the disparity is not justified. BellSouth offered no justification for refusing to serve FDN's customers other than claiming that the law didn't require it to.[65] Indeed, as

---

[63] *Hawaiian Telephone Company*, 78 FCC 2d 1062, ¶¶ 8-9 (1980). There is no "questionable" obligation, however, to provide the DSL service as it is a service that BellSouth provides to its own customers.

[64] *Elkhart Telephone Company*, 11 FCC Rcd 1051, ¶ 40 (1995).

[65] Tr. at 371. Mr. Williams' claim that FDN's request poses certain challenges for BellSouth's OSS is, obviously, no justification for BellSouth's discriminatory practice. As Mr. Williams admitted, all BellSouth would have to do to provide service to FDN's customers is track telephone lines by circuit identification number, in addition telephone number. Tr. at 348-49.

Commissioner Deason recognized, BellSouth should welcome the opportunity to provide DSL service to a customer, particularly one who is being serviced by a competitor that is bearing the full cost of the loop. BellSouth's only conceivable motivation in rejecting this arrangement could be that it wants to suppress competition for both local voice and advanced services.

BellSouth's exclusionary practice is analogous to one that the Public Utilities Commission of the State of California recently ruled unlawful.[66] Pacific Bell refused to permit MCI's customers to select Pacific Bell as their intraLATA toll presubscribed carrier. As in the situation here, Pacific Bell insisted that only its own customers could obtain its intraLATA toll offering. The arbitrator ordered PacBell to abandon the anti-competitive practice, finding that "it is blatantly discriminatory for Pacific to refuse to provide intraLATA toll service to MCIm's local service customers. Those customers could then perceive the need to transfer local service back to Pacific in order to get the intraLATA toll dialing plan they want."[67] The arbitrator concluded that "customers should be able to choose any certificated carrier which offers intraLATA service in its area, without an associated requirement that intraLATA service be bundled with local service."[68] Likewise, Florida consumers should be able to select any DSL provider they want without a requirement that the DSL service be bundled with local service.

Tying DSL and Voice Service Is Blatantly Anticompetitive. BellSouth's requirement that an end user seeking to purchase BellSouth's DSL service must also purchase its voice service

---

[66] *Application by Pacific Bell Telephone Company for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, LLC Pursuant to Section 252(b) of the Telecommunications Act of 1996,* CA PUC Application 01-01-010, Final Arbitrator's Report (July 16, 2001).

[67] *Id.* at 130.

[68] *Id.*

constitutes an illegal tying arrangement, and a *per se* violation of the antitrust laws.[69] Though this is not an antitrust proceeding,[70] the FCC and other regulatory authorities have historically been willing to apply antitrust-law principles to evaluating the anticompetitive conduct of entities within their jurisdictions.[71]

In the *Private Payphone* case, the FCC employed antitrust-style analysis in finding that a similar tying arrangement violated the underlying policy goals of the antitrust laws and, thus, was unreasonable under Section 201(b). AT&T established a plan that paid commissions to private payphone companies ("PPCs") for collect calls, third-party billed calls, and calling card calls. In order to be eligible for the commissions, the PPCs were required to designate AT&T as the PIC for each PPC telephone line. *Id.* ¶ 2. The FCC found that AT&T's tying of its "0+" service to its "1+" service "violate[d] the underlying policy goals of the antitrust laws and was therefore unreasonable under Section 201(b)." *Id.* ¶ 25 Given the distinction between the 0+ and the 1+ markets, the FCC found that AT&T was thus leveraging its dominance in the "0+" market to impermissibly control the "1+" market. *Id.* ¶ 28. The Commission concluded that AT&T's conduct was sufficiently anticompetitive that it constituted an unreasonable practice under the Communications Act. *Id.* ¶ 26. The tie-bundling effectively foreclosed competition for the PPC's "1+" provider. *Id.*

The parallels between AT&T's arrangement and BellSouth's are striking. AT&T, at the time, dominated both the 0+ and 1+ market, and was using its dominance in the 0+ market to

---

[69] *See, e.g., Eastman Kodak Co. v. Image Tech. Serv.*, 504 U.S. 451, 463 (1992).

[70] Section 364 of the Florida Statutes specifies that nothing in the section "shall limit the availability to any party of any remedy under state or federal antitrust laws."

[71] *See, e.g.,* AT*&T's Private Payphone Commission Plan*, File No. ENF-87-19, 3 FCC Rcd. 5834, ¶ 23 (1988) ("*AT&T Private Payphone*").

leverage further its dominance in the 1+ market.[72] Here, BellSouth is dominant in both the voice and DSL markets, and is using its bundled product offering of DSL and voice to leverage its position in both markets. BellSouth is requiring customers that want its DSL product to purchase its voice service even though these are two distinct services and even though the customer would prefer to have its voice service provided by another carrier. Since BellSouth controls 99% of the DSL market in Florida, this tying arrangement forecloses competition for many customers.

The FCC recognized the potential harm such ties pose to competition in the *Verizon-Connecticut 271 Order* (at ¶ 32):

> We also emphasize that Verizon's policy of limiting resale of DSL services to situations where Verizon is the voice provider severely hinders the ability of other carriers to compete. Specifically, Verizon's policy prevents competitive resellers from providing both DSL and voice services to their customers, while Verizon is able to offer both together to its customers. This result is clearly contrary to the pro-competitive Congressional intent underlying section 251(c)(4).

A. BellSouth Offers No Legal Justification For Its Tying Policy.

BellSouth offers two justifications for refusing to provide its DSL on FDN UNE loops. First, BellSouth claims that doing so would require a change to its OSS systems. Tr. at 315. Second, BellSouth claims that the FCC's *Line Sharing Order* and *Line Sharing Reconsideration Order*,[73] as well as this Commission's *MCI Arbitration Order*, preclude it from having to do so.

Neither argument has any merit. BellSouth's OSS claim is clearly a makeweight argument. As Mr. Williams admitted, all BellSouth would have to do to provide service to FDN's customers is track telephone lines by circuit identification number, in addition telephone number. Tr. at 348-49. It goes without saying that BellSouth has been required to undertake for

[72] *Id.* at ¶ 26.

[73] Third Report and Order on Reconsideration in CC Docket No. 98-147, *et al.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 01-26 (Jan. 19, 2001).

more burdensome modifications to its systems in order to comply with its local competition obligations.

BellSouth's reliance on the line sharing orders is no more persuasive. FDN has maintained throughout that none of these cases precludes the relief FDN seeks. *See* Tr. at 9. That view has been confirmed by the FCC's recent *Verizon-Connecticut 271 Order*. As the FCC explained, "[l]ine sharing is not a retail service; it is a UNE provided under section 251(c)(3). Therefore, the restriction on the line sharing UNE is inapplicable to Verizon's obligations relating to retail services." *Id.* ¶ 31. Thus, BellSouth cannot cite the *Line Sharing Orders* as a basis for evading its *retail* obligations. FDN UNE voice customers who wish to buy FastAccess DSL *at retail* should be permitted to do so.

The *Line Sharing Reconsideration Order*, which BellSouth cites so frequently cites so frequently, does not hold to the contrary. AT&T asked the FCC to rule that the *Line Sharing Order* imposed a requirement with respect to ILEC provision of *retail* DSL services. As the FCC observed in the *Connecticut 271* order, the *Line Sharing Order* did not address, as a substantive matter, retail issues.

Thus, in the *Reconsideration Order*, the FCC did not find that ILECs may lawfully refuse to provide DSL service on lines on which it is not the retail voice carrier. To the contrary, the FCC simply determined that AT&T's request was beyond the scope of a reconsideration order, which, for procedural reasons, was limited to consideration of the ILECs' obligation to provide access to line sharing as a UNE.

The FCC specifically noted that it did *not* rule on the merits of AT&T's argument, instead inviting any party aggrieved by an ILECs refusal to provide service to file a petition alleging that the ILEC's practice constituted an unreasonable practice in violation of the common carrier obligations to provide service to the public on a nondiscriminatory basis. *Id.* That is precisely what FDN is doing in this proceeding.

Nor can BellSouth rely on the Commission's *MCI Arbitration Order.*[74] To the extent that the *MCI Arbitration Order* relied on the *Line Sharing Reconsideration Order* as an analysis of BellSouth's *substantive* obligations, FDN respectfully submits that the Commission erroneously interpreted the significance of the FCC's order. *See id.* at 50. It is plain, however, that the FCC's order was not the only consideration supporting the *MCI Arbitration Order.* The Order also clearly relies on the assumption that end-users would have competitive options for DSL service. The Commission credited the testimony of BellSouth's witness who testified that "in the event that WorldCom wins the voice service for a customer served by a data ALEC through a line sharing agreement, BellSouth would offer the data ALEC the first opportunity to purchase the entire loop. We believe this procedure is consistent with the above mentioned language from the FCC's *Line Sharing Order.*" *Id.* The evidence presented in this arbitration, however, has demonstrated that the Commission's assumptions about the competitive alternatives available to Floridians was mistaken. Given this new information, the Commission should reach a new result.

[74] Final Order on Arbitration, *Petition by MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996*, Docket No 000649-TP, Order No. PSC-01-0824-FOF-TP (March 30, 2001).

CONCLUSION

For the foregoing reasons, FDN respectfully asks the Commission to grant its Petition.

Respectfully submitted,

Matthew Feil
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460

and

Eric J. Branfman
Michael C. Sloan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, D.C. 20007-5116
(202) 424-7500

Attorneys for Florida Digital Network, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Digital Network, Inc., for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996	Docket No.010098-TP

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the Post-Hearing Brief of Florida Digital Network, Inc. filed in the captioned docket was served on the following electronically and by ~~regular~~ overnight mail this 26th day of September 2001.

Mr. James Meza, III
C/o Ms. Nancy H. Sims, Dir., Reg. Relations
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Ms. Felicia Banks
Florida Public Service Comm'n
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Matthew Feil
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460