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April 12, 2002

Mrs. Blanca S. Bayó
Director, Division of the Commission
Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Re: Docket No. 990649A-TP (UNE Docket)

Dear Mrs. Bayó:

Enclosed is an original and fifteen copies of BellSouth's Post-Hearing Brief which we ask that you file in the above-captioned docket.

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

Sincerely,

Andrew D. Shore (KH)

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

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CERTIFICATE OF SERVICE
Docket No. 990649A-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express this 12th day of April 2002 to the following:

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(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into pricing of unbundled network elements	Docket No.: 990649A-TP
	Filed: April 12, 2002

BELLSOUTH'S POST-HEARING BRIEF

INTRODUCTION

The Commission less than one year ago established final cost-based unbundled network element ("UNE") rates for BellSouth pursuant to a methodology the Commission concluded complied with the FCC's TELRIC rules. The Commission-approved methodology employed "in-plant" loading factors to calculate the costs to engineer and install BellSouth's outside plant. The Commission, however, required BellSouth to re-file its cost study explicitly modeling the cost of engineering and installing its outside plant (a so-called "bottoms-up" approach) in order to determine the magnitude of any discrepancies in loop costs between using that bottoms-up approach versus using in-plant loading factors. It is no surprise that the two different costing methods produced different cost estimates. Indeed, the bottoms-up study using appropriate BellSouth specific Florida inputs resulted in higher loop costs in most instances. BellSouth is not, however, asking the Commission to increase UNE rates on that basis. In-plant factors, which are based on BellSouth's actual accounting records, produce valid and accurate cost estimates and are no less reliable than using bottoms-up inputs. Moreover, factors other than cost that the ALECs argue demonstrate a need for lower UNE rates, such as the amount of profit ALECs can make, are irrelevant and have no place in determining rates that are required to be cost-based. Consequently,

there is no legitimate reason for the Commission to discard its approved methodology or to alter the permanent rates it just adopted.

If the Commission determines, nevertheless, that it prefers a bottoms-up methodology to set UNE rates, it should use BellSouth's inputs into its loop model, and not those proposed by AT&T and WorldCom. BellSouth's inputs, as the Commission determined previously is appropriate, reflect BellSouth's current and prospective engineering principles and deployment practices. Most of the changes advocated by AT&T and WorldCom, by contrast, are based solely on the opinion testimony of a professional witness that has never engineered or placed outside plant anywhere in BellSouth's region, no less in the State of Florida. They do not provide an adequate basis upon which to calculate what BellSouth's costs will be to provide UNEs in Florida.

The only UNE rates the Commission should revisit are the charges for Daily Usage Files ("DUFs"). BellSouth's newly proposed ADUF and ODUF rates are based on a revised cost study that considered the recent increase in demand for these files by ALECs, and the proposed rates for these elements are lower than the rates currently in place. The revised study reflects a slight decrease in demand for the EODUF, with a corresponding minor cost increase. The Commission has already approved the DUF rate structure, and there is no merit to the ALECs' contention that the DUF rates allow BellSouth to double recover certain costs.

Other than the methodology to establish UNE rates, the other big issue presently before the Commission arises from the Commission's requirement that BellSouth submit a cost study for hybrid copper/fiber xDSL-capable loops. BellSouth complied -- it filed a study for a technically feasible hybrid loop that an ALEC could use to provide

DSL services to its customers served via a BellSouth remote terminal and that necessarily includes use of a DSLAM located in the remote terminal. The Commission should not, however, require BellSouth to provide the hybrid loop (or any other "broadband loop" the ALECs are seeking in this docket) as a UNE. As an initial matter, the Commission does not have jurisdiction to order BellSouth to unbundle facilities the ALECs admit will be used to carry interstate, and not local, traffic. Moreover, even if the jurisdictional barrier did not exist, no ALEC has made the impairment showing that is required for the Commission to depart from both its own precedent and the FCC's ruling that packet switching (including the DSLAM) is not a UNE.

BACKGROUND

The Commission opened this docket in 1999, at the request of the alternative local exchange carriers ("ALECs"), to set permanent deaveraged UNE prices for the three major incumbent local exchange carriers ("ILECs") providing service in Florida. The Commission subsequently bifurcated the proceedings, and the establishment of UNE rates for BellSouth proceeded on a separate track than the other two ILECs. BellSouth filed extensive cost studies, and the Commission conducted evidentiary hearings in July and in September 2000. On May 25, 2001, the Commission issued its Final Order on Rates for Unbundled Network Elements Provided by BellSouth, Order No. PSC-01-1181-FOF-TP ("Final UNE Order"). In its Final UNE Order, the Commission determined that it was appropriate to set UNE rates based on the FCC's TELRIC methodology, and it established UNE prices for BellSouth.[1]

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[1] On June 11, 2001, BellSouth filed a motion for reconsideration with respect to certain decisions set forth in the Final UNE Order, and AT&T, MCI, Covad, and Z-Tel filed a joint motion for reconsideration regarding other issues decided in the Final UNE Order. On October 18, 2001, the Commission issued its Order on Motions for Reconsideration, Order No. PSC-01-2051-FOF-TP ("Reconsideration Order"),

The Commission used BellSouth's loop model, the BSTLM, to design and to determine the material and other capital-related costs of loops and loop-related UNEs. It also adopted the in-plant loading factors BellSouth used to convert material price to an installed investment in the BellSouth Cost Calculator. In-plant loadings are account-specific factors that add engineering and installation labor and miscellaneous equipment to the inflation-adjusted material price. These costs are sometimes referred to as "EF&I," or engineered, furnished and installed costs. The Commission recognized that the BSTLM was capable of calculating EF&I costs. Therefore, "in order to determine the magnitude of discrepancies between using a loading factor approach as opposed to a 'bottoms-up' approach for placements of plant directly related to loops and loop type items, [it] required BellSouth to refile the BSTLM within 120 days . . . explicitly modeling all cable and associated supporting structure engineering and installation placements. Final UNE Order, at 239.

The Commission also directed BellSouth to file within 120 days of the issuance of its Final UNE Order a cost study for a hybrid copper/fiber xDSL-capable loop, and modified versions of its xDSL nonrecurring cost studies that exclude the design layout record, a test point, and order coordination. In addition, the Commission ordered BellSouth to identify and explain at the time it refiled its models all necessary revisions that should be made to its cost studies for network interface devices ("NIDs").

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granting in part, and denying in part, BellSouth's motion, and denying the ALECs' motion for reconsideration. On its own motion, the Commission conformed the Staff's analysis and cost model runs to its decision in this matter. The final UNE rates adopted for BellSouth are set forth in Appendix A to the Reconsideration Order.

BellSouth made its 120-day filings in accordance with the Commission's Final UNE Order. The "120-day issues" issues are presently before the Commission for determination.

DISCUSSION

Issue 1(a): Are the loop cost studies submitted in BellSouth's 120-day filing complaint with Order No. PSC-01-1181-FOF-TP?

*** Yes. BellSouth's loop cost study complies in all respects with the Commission's Final UNE Order.[2] ***

BellSouth's 120-day filing included a "bottoms-up" study in which BellSouth explicitly modeled its forward-looking outside plant EF&I costs, as directed by the Commission. The study used all inputs, including those for the cost of capital and depreciation, which the Commission ordered in its Final UNE Order, and it calculated costs in accordance with the deaveraging methodology adopted by the Commission. Tr. at 233-35.

The Commission determined in its Final UNE Order that it is "appropriate for purposes of determining BellSouth's UNE loop costs that they reflect ***BellSouth's*** current and prospective engineering principles and deployment practices." Final UNE Order, at 132 (emphasis added). Accordingly, BellSouth used its outside plant contracts for the State of Florida and its Outside Plant Construction Management ("OSPCM") System, as well as the estimates of BellSouth subject matter experts where it lacked actual data, as sources for its bottoms-up inputs into the BSTLM. Tr. at 238-

[2] As set forth in Issue 1(b) below, BellSouth does not believe that the Commission should use a bottoms-up study to re-set UNE prices. This section addresses the appropriate inputs into the bottoms-up study ***if*** the Commission decides to adopt that approach to calculating BellSouth's costs of providing UNEs.

247. The expert testimony of BellSouth witnesses Caldwell and Milner address in detail BellSouth's outside plant inputs.

AT&T and MCI propose myriad adjustments to BellSouth's inputs that, if adopted, would significantly understate BellSouth's forward-looking costs. To wit, their proposed inputs produce a state-wide average rate for a basic 2-wire voice grade loop (Element A.1.1) of $8.58,[3] which is almost 50% less than the permanent state-average rate the Commission adopted less than a year ago, and is less than one-half of the cost Bellsouth calculated using its inputs in its bottoms-up study.

AT&T and MCI changed over 400 inputs in the model run that produced their proposed rates. None of the proposed adjustments has merit. In almost every instance, the sole source for AT&T and MCI's proposed input is the opinion of former NYNEX employee John Donovan. Mr. Donovan's inputs do not even purport to "reflect BellSouth's current and prospective engineering principles and deployment practices," as this Commission already determined is appropriate. Consequently, the Commission should reject them.

The major input categories challenged by AT&T and MCI are discussed below:

Structure Sharing. These inputs reflect the amount of time BellSouth can expect to share the cost of placing structures with other utilities and, accordingly, determine the amount of structure cost assigned to Bellsouth. Mr. Donovan

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[3] *See* Ex. BFP-19 (AT&T/MCI proposed rates) and Reconsideration Order, at 28 (App. A) (Commission-approved rates). The state-wide average for an element is calculated from the parties' proposed deaveraged rates by weighting the proposed rate for each zone by the percentage of the total access lines in the zone, and then adding the costs for each zone. Thus, AT&T and MCI's proposed state-wide average for Element A.1.1 is calculated as follows: (Proposed Zone 1 rate of $6.02 x 29% = $1.75) + (Proposed Zone 2 rate of $9.19 x 68% = $6.25) + (Proposed Zone 3 rate of $19.41 x 3% = $0.58) = $8.58.

recommends a 50% sharing in buried and underground environments in rural density zones and a 33% sharing in buried and underground environments in suburban and urban density zones. Tr. at 792. In other words, Mr. Donovan slashes BellSouth's buried and underground structure costs by two-thirds in suburban and urban areas, and by fifty percent in rural areas. Significantly, Donovan did not submit or cite any data to support his structure sharing recommendations. Indeed, he admitted that they are not based on any study or other source. Ex. 25 (Kephart Depo.), at 33-34.

BellSouth's sharing percentage inputs are, by contrast, based on its actual experience in Florida. First, for aerial plant sharing, BellSouth owns approximately 40% of the poles in its territory in Florida. Therefore, BellSouth used 40% as the amount of pole costs assigned in its cost studies.

Second, due to work coordination, safety, and available space considerations, sharing of underground construction occurs very infrequently and thus BellSouth seldom, if ever, shares in underground excavation. BellSouth rarely, if ever, jointly places conduit with another party. BellSouth does lease conduit space to other parties. Leasing of duct space is not the same as sharing the construction cost and ownership of conduit, however. Duct leasing is included in BellSouth's studies in the Conduit Plant-Specific factor. Expenses associated with BellSouth leasing duct space in other parties' ducts are netted with revenues received from other parties leasing BellSouth owned ducts and included in the conduit (4C) plant-specific expenses. BellSouth used the percentage of duct space leased to other parties in Florida (.07%) as a surrogate of potential opportunities for underground structure sharing.

Finally, for buried sharing, BellSouth assumed that 4% of the time, conditions would allow BellSouth to share buried excavation with another party. Today, such sharing with other utilities is rare due to timing problems. Even in a scorched node scenario, cable television and power lines would already be in place, so the opportunities for sharing would be no greater than BellSouth has experienced in the past. Tr. at 95.

The Commission adopted as forward-looking in its Universal Service proceeding structure sharing percentages based on BellSouth's actual experience in Florida. *See* Order No. 99-0068-FOF-TP, at 126; Tr. at 95-96; 241. The Commission rejected the ALECs' unsupported proposals as wholly unrealistic in that proceeding, and it should do the same here.

Percent Activities. These inputs reflect the percentage of time the various activities associated with buried structure (e.g., plowing, trenching) occur in each terrain type and in each density zone. BellSouth's subject matter experts previously reviewed the default percentages used in the BenchMark Cost Proxy Model ("BCPM") and found them to be a reasonable reflection of BellSouth's experience in various terrain and density combinations. The Commission approved the use of these inputs in the Universal Service Fund ("USF") Proceeding, Docket No. 980696-TP. BellSouth used those same percentages in this filing. Modifications were required, however, since the BCPM included nine density zones and separated feeder from distribution. The BSTLM, on the other hand, includes a breakdown into three density groups (which are groupings of the density zones) – urban, suburban and rural – and combines feeder and distribution into one table. Thus, BellSouth combined the feeder percent activities

previously approved by the Commission such that areas with fewer than 200 lines per square mile are classified as rural, areas with between 201 and 5000 lines per square mile are treated as suburban, and areas with more than 5000 lines per square mile are considered urban. Tr. at 244-45.

Messrs. Pitkin and Donovan changed some, but not all, of the activity percentage inputs in their model run. *See* Ex. 34 (BFP-7). Significantly, neither witness addressed these inputs in their testimony to even attempt to explain the basis for their changes. The Commission should use the percent activities inputs BellSouth used and which the Commission approved previously.

Exempt Material. Exempt material consists of minor "nuts and bolts" type items that are not tracked individually in a telephone company's accounts. Tr. at 308. BellSouth calculated the cost of exempt material as a percentage loading on non-exempt material. Tr. at 245. Mr. Donovan claims that exempt material is already included in BellSouth's labor rates, and, on that basis, AT&T and MCI changed this input to 0% in the model run that produced their proposed rates. Mr. Donovan is wrong. The categories of costs included in BellSouth's labor rates do not include exempt material. Tr. at 272-73.

Mr. Donovan's unsupported (and unsupportable) fallback position is that the Commission should adopt an exempt material load on labor costs of no more than 20% of direct labor costs. Tr. at 811. First, it would be inappropriate to account for exempt material costs by applying a factor to labor rates rather than to non-exempt material costs. Exempt material varies by field reporting code. Thus, the amount of exempt material associated with aerial placements is not the same as buried or underground

placements. Furthermore, the amount of exempt material associated with cable provisioning varies vastly between copper and fiber placements. Labor rates, on the other hand, do not vary. A splicer is paid the same per hour whether he is splicing aerial, buried, or underground cable. Mr. Donovan's proposed method distorts these facts, whereas BellSouth's use of the ratio of exempt to non-exempt material produces representative results. Tr. at 270 -271.

Second, Mr. Donovan's 20% figure is purely arbitrary and without any support in the record. Indeed, BellSouth's actual data for 1997-2000 shows that exempt material expressed as a percentage of labor costs, as Mr. Donovan proposes, is significantly greater than 20%.

Engineering Factors. BellSouth's forward-looking engineering costs are calculated using engineering factors based on the relationship between engineering costs and total non-engineering investment for each plant account. The source for this information is BellSouth's actual accounting records for Florida for 1998, the same year data used to develop other factors in the study. *See* Ex. 11 (BellSouth's Responses to Staff Interrog. Nos. 87(a) and (c), 88). Mr. Donovan argues that it is inappropriate to use one year's data to develop the ratio. Tr. at 822. The identical data for the years 1997-2000 demonstrates, however, that engineering costs are a significant cost component each year, and that the 1998 costs are consistent with those incurred in other years. Tr. at 297.

Mr. Donovan computed his composite engineering factor based on his unsupported assumption that BellSouth should have one engineer per six technicians, or a ratio of engineering to labor of 16.7%. Tr. at 5; Ex. 67. AT&T and MCI did not offer

any data to support Mr. Donovan's arbitrary selection of 1:6 as a "TELRIC Ratio." BellSouth's actual accounting records show that over the most recent four-year period BellSouth did not have such a ratio for even a single plant account. *See* Ex. 67. Consequently, there is no legitimate basis upon which to conclude that BellSouth would be able to achieve such a ratio on average for all accounts on a going forward basis. The Commission should, therefore, reject Mr. Donovan's factor, which unjustifiably and dramatically slashes BellSouth's engineering costs,[4] and it should adopt the factors developed using BellSouth's actual ratios of engineering costs to total investment.

Outside Plant Labor Costs. The source for BellSouth's inputs for its structure placement costs was BellSouth's actual outside contractor contracts for Florida. BellSouth's contracts include a single, blended price per foot for buried excavation, with a few exceptions for high cost work such as boring. Mr. Donovan dismisses this type of pricing as inconsistent with his experience in New York, and replaces BellSouth's verifiable costs with figures that are merely a fraction of BellSouth's actual costs and that vary depending on the type of excavation. For example, Mr. Donovan recommends using an input for plowing costs of $0.80 per foot. He admitted, however, that this input is not based on any study of what it costs today, or will cost going forward, to plow cable in Florida. Ex. 25 (Donovan Depo.) at 51. Consequently, there is no legitimate basis to replace BellSouth's verifiable inputs with those proffered by AT&T and MCI.

Mr. Donovan also criticizes BellSouth's use of a 25.43% factor applied to contractor costs to capture miscellaneous contractor costs as "non-TELRIC embedded base expenditures," Tr. at 776, and changed this input to 0% in AT&T and MCI's model

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[4] For the largest account, buried copper, for example, Mr. Donovan's input reduces BellSouth's engineering costs by approximately 50%. *See* Ex. 67.

run. The miscellaneous costs captured by this input include, for example, costs for flagmen and police officers to direct traffic around construction sites, renting chainsaws, bulldozers and other heavy equipment. They are legitimate costs that BellSouth will incur in a forward-looking environment. Consequently, BellSouth is entitled to recover these costs. Tr. at 91; 279.

Splicing and Set-Up Times. BellSouth's OSPCM system was the source for BellSouth's splicing times, which BellSouth converted to a time per 100 pairs spliced. Travel and set-up times are included in BellSouth's input time. Mr. Donovan is correct that BellSouth's approach overstates, to some degree, the cost of splicing larger cable sizes. Tr. at 802. It is also necessarily the case, however, that BellSouth's approach understates the cost of splicing smaller cables. Since the BSTLM places predominantly smaller size cables in designing BellSouth's Florida network, this is not an issue for practical purposes. Tr. at 328-29. In addition to Mr. Donovan's argument that travel, set-up, and closure times should be separate from splicing times, it is hardly surprising that the travel, set-up and closure times he recommends are far too little. The salient point, however, is that there is no evidence to support them. Donovan conceded that he has not done any study of the locations of BellSouth's garages in Florida and that his inputs are not based on any analysis or empirical observations. Ex. 25 (Donovan Depo.), at 40, 54. As Mr. Donovan stated, "That's just my opinion." *Id.* at 54. The Commission should not rely on unverifiable opinions to determine appropriate inputs into the BSTLM.

Manhole Costs. BellSouth used its actual contractor costs in 2000 to determine its manhole cost inputs. Since BellSouth pays its contractors to place manholes on a

per cubic foot basis, its inputs into the BSTLM for manhole costs were based on the total cubic feet of the manhole placed by the model. Tr. at 246. Mr. Donovan criticizes the sample size BellSouth used, and recommends the Commission use the lowest per cubic foot cost for all manholes. He also claims that BellSouth should use the smallest manhole sizes for Types 1, 2 and 3 manholes. Mr. Donovan's recommendations are, to be certain, inconsistent with BellSouth's actual engineering and deployment practices. They should be rejected on that basis alone.

Facility Sharing. Mr. Donovan recommends that when feeder and distribution cables are located along the same path, 75% of the time these cables will share structure (i.e., both will be aerial, both will be buried, or both will be underground). This recommendation overstates the sharing that will occur. Several factors contribute to this lack of sharing, including the fact that access to distribution cable is generally needed more frequently than is access to feeder cable. *Id.* BellSouth's network experts expect facility sharing to continue to be infrequent in the future, reflecting the 25% value used by BellSouth. Tr. at 96; 242. Mr. Donovan claims that he would "expect facility sharing to occur frequently," Tr. at 793, and recommends changing this input to 75%. The Commission should reject Donovan's unsubstantiated "expectation" and utilize BellSouth's 25% figure.

Conduit Loading Factor. AT&T and MCI eliminated BellSouth's conduit loading factor in its entirety. Mr. Donovan claims that conduit and manhole prices used in the study "are inclusive of all additional materials that may be required. As such the 40% adder is inappropriate and should be disallowed by the Commission." Tr. at 831.

Mr. Donovan is wrong. The loading is necessary in order to capture total conduit and manhole costs. As Ms. Caldwell explained, the miscellaneous material, sales tax, supply expense, and other loadings factors, which provide for exempt material, sales tax, right of way, indirect plant labor, interest during construction, etc., are developed as a ratio of non-exempt material for all plant categories. The BSTLM then applies these factors to non-exempt material computed by the model. However, BellSouth used the contracted conduit and manhole costs as inputs into the model, and as currently constructed, the BSTLM places all contractor costs into the EF&I columns in the model. Since these conduit (and manhole) material costs do not appear in the BSTLM's material fields, the miscellaneous factor cannot be applied. Hence, if the BSTLM applied the miscellaneous loading factors to the conduit account (4C) as it applies this factor to other accounts, the factor would be multiplied by $0 material costs and the miscellaneous costs associated with conduit would not be captured. Therefore, to properly capture these incurred miscellaneous costs for conduit, BellSouth developed a miscellaneous loading factor for Field Reporting Code ("FRC") 4C as a percentage of total contractor installation costs (which includes labor and material), and applied these factors to the contractor conduit and manhole costs (which include labor and material) outside of the BSTLM to properly compute conduit miscellaneous costs.

Mr. Donovan's fallback position is that the Commission should reduce this factor to 16%. This recommendation is based on his argument that BellSouth's factor double counts certain exempt material and incorrectly calculates engineering costs, which are included in the 40% factor used by BellSouth. Tr. at 829-831. Mr. Donovan is, once again, incorrect. Items included in BellSouth's exempt material are not captured

elsewhere in its cost study. And his engineering cost calculations are inappropriate for the reasons discussed above in the section addressing engineering costs.

Moreover, BellSouth's conduit loading factor is conservative. It is based on 1998 data. Had more recent data been used, the factor would be 49%. Tr. at 283. The Commission should adopt BellSouth's 40% factor.

Other Material Loading Factor. BellSouth applied a factor to its material costs to account for the costs of indirect salaries, benefits, and other costs not captured in its labor rates, as well as right-of-way items and interest during construction. Mr. Donovan removed the costs for indirect salary, benefits and other labor costs, claiming that they "are already components of BellSouth's fully loaded labor rate." Tr. at 812. As Ms. Caldwell explained, and as is set forth in BellSouth's cost study, they are not. Tr. at 274. The Commission should, therefore, reject the alternative factors Donovan recommended.

Restoration Costs. BellSouth spread these costs over buried cable placements, underground placements, buried boring, and underground boring to develop the average cost of restoring the surface to the condition that existed prior to excavation. Tr. at 280. Mr. Donovan argues that there should not be restoration costs when either boring or plowing is performed, and he recommends changing the buried excavation inputs to apply these costs only to buried placements. Tr. at 781-82.

The Commission should reject Mr. Donovan's proposal. BellSouth's method of recovering these costs is straightforward and eliminates the need for quibbling about how often restoration costs are incurred in each excavation method.

Buried Splice Pits. Mr. Donovan claims that splice pits are not needed for normal splicing operations because such splices are generally placed in aboveground pedestals, and that because the costs for these enclosures are accounted for by the exempt material loading factor, buried splice pit costs should be excluded from the study. Tr. at 783. Mr. Donovan is incorrect. First, BellSouth's actual 2000 contractor data used to develop inputs for the study shows that costs for buried splice pits, including digging and shoring, do indeed occur. Moreover, even if the Commission were to accept Mr. Donovan's contention that all splices should occur in pedestals, he did not account for the costs associated with pedestals with his proposed inputs. Although the pedestal material would be captured through the miscellaneous material loading, the labor associated with placing the pedestals is not reflected in the model or in Donovan's proposed inputs. Tr. at 280-81.

Pipe Costs. Similar to the argument regarding restoration costs, Mr. Donovan argues not about whether the cost of steel pipe, PVC pipe, and flex-pipe should be included in the cost study, but about which contractor activities should include these costs. Donovan argues that the pipe costs should be included within the "push pipe and pull cable" category of costs rather than spreading these costs over the total boring activity costs, as BellSouth did. Tr. at 783. BellSouth's method of recovering these costs is straightforward and eliminates the need for quibbling about how often a pipe will be required in boring (i.e, the percent activities for "push pipe / pull cable"), and simply spreads the pipe cost out over all boring activities.

Pole Spacing. BellSouth's input of 120 feet between poles is based on BellSouth's network data and accurately depicts the number of poles required to place

the number of sheath feet of aerial cable the BSTLM places in BellSouth's network. Tr. at 97; 289. This spacing takes into account a number of factors, including mid-span clearances, joint use clearances, right-of-way limitations, strand tension requirements, and sag limitations. Tr. at 97. Mr. Donovan criticizes this input based on pole spacing he observed while driving around Tallahassee, and recommends a value of 184 feet. Tr. at 794-95. Mr. Donovan's unscientific observation of pole spans for a limited distance in non-BellSouth service territory does not provide adequate evidence to reject BellSouth's input.

Copper Cable Placing Costs. Mr. Donovan admits that his alternative copper cable placing inputs are not based on any independently verifiable information, and he relies yet again on his experience as his sole source. Ex. 36 (Donovan Depo.), at 40. Even his experience does not support his inputs here, however. Donovan testified that, in his experience, Regional Bell Operating Companies generally use two-man crews to place aerial cable. *Id.* at 52. Yet, he assumed only one technician in computing his proposed inputs. Tr. at 800. The Commission should reject inputs that even AT&T and MCI's paid expert admits are not realistic.

Digital Loop Carrier Costs. Mr. Pitkin claims that the Final UNE Order required BellSouth to use bottoms-up inputs to calculate digital loop carrier ("DLC") investment, and that BellSouth inappropriately used the DLC in-plant factors the Commission approved previously instead. Tr. at 583-85. Mr. Pitkin's criticism misses the mark. The Commission ordered BellSouth to use a bottoms-up approach for "cable and associated supporting structure engineering and installation placements." Final UNE Order, at 239. BellSouth complied -- DLC equipment is neither cable nor a

supporting structure. Tr. at 300. Consequently, DLC inputs should not be an issue in this phase of the proceeding. The Commission rejected the "corrected" DLC factors Messrs. Donovan and Pitkin recommended in phase I, and there is no legitimate basis upon which to adopt them now.

Issue 1(b): Should BellSouth's loop rate or rate structure, previously approved in Order No. PSC-01-2051-FOF-TP, be modified? If so, to what extent, if any, should the rates or rate structure be modified?

*** No. UNE rates must be cost-based. Factors other than BellSouth's costs, such as whether ALECs can make a profit using UNEs, are irrelevant. A bottoms-up study does not more accurately reflect BellSouth's costs. ***

A. <u>The ALECs Did Not Even Attempt to Show that the Standard the Commission Set for Determining Whether It Would Revisit its Rates or Rate Structure in This Proceeding Has Been Satisfied, Because it Clearly Has Not.</u>

The Commission stated in its Final UNE Order that it would address ***whether*** it would be appropriate to revisit loop rates ***after*** it "determine[d] the magnitude of discrepancies between using a loading factor approach as opposed to a 'bottoms-up' approach for placements of plant directly related to loop[.]" Final UNE Order, at 239. The ALECs' arguments that the Commission should lower loop rates ignore the Commission's directive that any decision to "revisit" rates would be based on a finding of some unacceptable degree of discrepancies between costs produced using a bottoms-up study versus those calculated using loading factors. Significantly, no ALEC witness even attempted to justify the ALECs' selfish pleas for lower UNE rates based on any discrepancies between using a bottoms-up study versus using loading factors to calculate EF&I cost. There are no significant discrepancies between the existing UNE

rates in Florida and costs calculated using appropriate inputs into a bottoms-up study. The fact is that the loop rates BellSouth calculated using appropriate inputs into its bottoms-up study are generally higher than the rates it calculated using loading factors, and they are higher than the Commission-approved rates. *See* Ex. DDC-1. In-plant loadings produce accurate, reasonable cost estimates that are just as accurate and valid as cost estimates produced using a bottoms-up approach. Tr. at 249. Consequently, there is no legitimate reason for the Commission to revisit the loop rates established in the Final UNE Order.

B. The ALECs' Other Arguments Do Not Justify the Commission Abandoning the Rates and/or Rate Structure it Adopted in its Recent Final UNE Order.

1. An ALEC's potential profit margin is irrelevant to setting cost-based rates. First, there is no question that UNE rates must be cost-based. 47 U.S.C. § 252(d)(1). ALEC witnesses Ford, Darnell, and Gallagher contend, nevertheless, that ALECs cannot make enough profit using UNEs at the current rate levels, and that the Commission should, therefore, lower rates. The FCC has repeatedly rejected this same argument and held that how much profit ALECs can make using UNEs to serve customers has no place in the equation for determining cost-based UNE rates under the Act. For example, in its Kansas/Oklahoma 271 Order, the FCC rejected AT&T and WorldCom's contention that loop rates did not comply with the Act because they were too high to allow ALECs to use UNE-P to offer local residential service on a state-wide basis. The FCC stated: **"Such an argument is irrelevant. The Act requires that we review whether the rates are cost-based, not whether a competitor can make a**

profit by entering the market." Memorandum Opinion and Order, CC Docket No. 00-217, at ¶ 92 (emphasis added).[5]

2. <u>ALECs can make a profit at the current UNE rates in any event.</u> Even if profitability were a legitimate factor to consider in setting UNE rates, which it is not, the fact is that the ALECs can make a profit serving residential customers in Florida at the current UNE-P rates.[6] The following table compares an ALEC's cost of providing residential service using UNE-P with the revenues it can expect to receive from providing such service.[7]

Costs	**Zone 1**	**Zone 2**	**Zone 3**	**Statewide Average**
UNE-P	$12.94	$17.06	$31.87	$16.39
Usage[8]	$ 3.41	$ 3.41	$ 3.41	$ 3.41
Features per port	$ 2.26	$ 2.26	$ 2.26	$ 2.26
ODUF[9]	$ .98	$ .98	$ .98	$ .98
Platform-Recurring Cost	**$19.59**	**$23.71**	**$38.52**	**$23.04**
Estimated Revenues				
BST's-Complete Choice – FL	$30.00	$30.00	$30.00	$30.00

[5] Counsel for FDN suggested during his cross-examination of BellSouth witness Ruscilli that the D.C. Circuit Court of Appeals decision in *Sprint Communications Company v. FCC*, 274 F.3d 549 (D.C. Cir. Dec. 28, 2001), somehow alters this conclusion. It does not. The D.C. Circuit did not overturn the FCC's decision.

[6] The ALEC testimony claiming an inability to serve customers profitably focuses on using UNE-P to serve residential customers. *See, e.g.*, Tr. at 394. While it is true that ALECs have, for the most part, ignored residential customers in Florida, they have targeted and won significant numbers of business customers in Florida. They do not make any arguments regarding their ability to serve business customers.

[7] It is appropriate to use BellSouth's retail price for its Complete Choice® Plan as the reference for anticipated local revenue, because an ALEC can provide all of the features included in that Plan using the UNE-P.

[8] BellSouth calculated the average usage cost for FL using the FCC's usage characteristics.

[9] Estimates of ODUF messages used in calculation of ODUF costs and Access revenues per line per month based on AT&T Witness Lieberman's Affidavit Exhibit D-6 filed March 8, 2002, in BellSouth's FCC GA/LA 271 proceeding. ODUF rates used in calculation of ODUF costs are the rates BellSouth is proposing in this proceeding. *See* Issue 2 below.

Subscriber-Line Charge	$ 5.00	$ 5.00	$ 5.00	$ 5.00
Access[8]	$ 0.90	$ 0.90	$ 0.90	$ 0.90
Total	**$35.90**	**$35.90**	**$35.90**	**$35.90**
Margin-Complete Choice Residence	**$16.31**	**$ 12.19**	**-$2.62**	**$12.86**
% (Margin divided by Total Revenue)	**45%**	**34%**	**-7%**	**36%**
% of BellSouth access lines	**29%**	**68%**	**3%**	

This table illustrates that in Zones 1 and 2, which encompass 97% of the access lines in Bellsouth's Florida service territory, there is a significant positive margin. Indeed, using the statewide average UNE-P cost, which is what ALEC witnesses Darnell and Ford discussed in their testimony, produces a profit margin of $12.86, or 36%. The ALECs' claim that current UNE prices do not allow them to make a profit serving residential customers are, in reality, pleas for the Commission to ensure that they can make an even greater profit. While not surprising, their greed should not factor into the Commission's consideration.

3. <u>Dr. Ford's "sanity test" does not apply.</u> Dr. Ford's self-described "sanity test," which he claims will aid the Commission in "determining whether the [existing] rates meet the required TELRIC standard," likewise does not justify this Commission retreating from its current rates. What Dr. Ford dubbed a "sanity test" and/or "TELRIC test" is a secondary analysis the FCC has employed in 271 proceedings. The FCC has ***never*** concluded that any UNE rate failed to comply with TELRIC based on its secondary comparison test. Tr. at 411.

In describing its procedure, the FCC stated: "The Commission has stated that when a state commission does not apply TELRIC or does so improperly (e.g., it made a

major methodological mistake or incorrect input or several smaller mistakes or incorrect inputs that collectively could render rates outside the reasonable range that TELRIC would permit), ***then*** we will look to rates in other section 271-approved states to see if rates nonetheless fall within the range that a reasonable TELRIC-bases ratemaking would produce. A comparison is permitted when the two states have a common BOC . . . and the Commission has ***already*** found the rates in the comparison state to be reasonable." Memorandum Opinion and Order, CC Docket No. 01-194 (Nov. 16, 2001) ("Arkansas/Missouri 271 Order"), at ¶ 56 (emphasis added).

Thus, the FCC's secondary test only applies ***if*** a State commission improperly applies the TELRIC methodology, ***and if*** the FCC concludes that the rates in a comparison state are reasonable. Neither condition is present here. First, there is no question that the FCC has not yet approved a BellSouth section 271 application.

Second, this Commission determined in its Final UNE Order that the permanent rates Dr. Ford subjects to his "sanity test" are TELRIC compliant. Z-Tel's counsel suggested at the hearing that application of Dr. Ford's "sanity test" is, nevertheless, appropriate because ALECs contend that the rates are not TELRIC compliant. This argument begs the question. This Commission considered and rejected in is 500 page Final UNE Order and in its Reconsideration Order the ALECs' arguments that the Commission-established rates violate the FCC's pricing rules. It makes no sense for the Commission to recognize the existence of arguments it has already rejected as a means to validate employing Dr. Ford's "sanity test."

Furthermore, Dr. Ford acknowledged that in applying the secondary test he calls the "sanity test," the FCC has said that the fact that the difference in UNE rates between

states is greater than the cost differential between states reflected in the FCC's universal service model does not mean that the rates are not within a reasonable TELRIC range. Tr. at 412, *see also* Kansas/Oklahoma 271 Order at ¶¶ 83-85. This Commission has determined that its current rates are TELRIC compliant. There is, therefore, no reason to revisit those rates, especially based on application of a secondary test that does not apply in the instant case.

4. Witness Gillan's "analysis" is flawed, but it is irrelevant in any case. The "analysis" upon which AT&T/MCI witness Gillan bases his claim that the Commission should lower loop rates is based on an incorrect assumption. Gillan claims to compare BellSouth's "proposed UNE rates" with the rates advocated by AT&T and MCI. The "rates" Gillan claims are BellSouth's "proposed UNE rates," and which he uses in his comparison, are the costs calculated in BellSouth's bottoms-up study. The Bellsouth direct testimony Mr. Gillan purports to rebut makes clear that BellSouth believes that the bottoms-up study should not be used to establish new UNE rates. BellSouth never proposed that the Commission adopt the higher costs calculated using the bottoms-up study as new UNE rates. Thus, Gillan's claim that the costs calculated in BellSouth's bottoms-up study constitute "BellSouth's UNE rate proposal" is incorrect, as is his "analysis" using that assumption.

Gillan's "analysis" is irrelevant to setting UNE rates in any event. The Commission is charged with the responsibility to set UNE rates based on BellSouth's forward-looking costs. Mr. Gillan does not address *any* cost issue.

5. Witness Darnell's arguments are admittedly misplaced. MCI witness Darnell contends that BellSouth's UNE rates should be lowered because the

Commission used multiple scenarios in the BSTLM to establish the rates. The Commission rejected this argument in its Final UNE Order and in its Reconsideration Order. Indeed, every state Commission that has considered this issue has rejected MCI's position and concluded that it is appropriate to use multiple scenarios to accurately calculate BellSouth's costs of providing UNEs. Tr. at 556. Notwithstanding the fact that he spent one-third of his prefiled testimony making this argument, Mr. Darnell himself conceded that the use of multiple BSTLM scenarios to calculate BellSouth's costs is *not* an issue in this proceeding. He testified specifically that further consideration of that issue "would have to occur in a different proceeding." Tr. at 532; Ex. 30 (Darnell Depo.), at 45.

Mr. Darnell also claims that BellSouth's UNE rates should be lowered because Florida is BellSouth's lowest cost state on an embedded basis. He acknowledged, however, that does not mean Florida will be the least cost BellSouth state on a forward-looking basis. Tr. at 562-63. He further admitted that no regulatory body has used embedded cost as a basis to set, or lower, rates established in accordance with the FCC's pricing rules. *Id.*

Issue 2(a): Are the ADUF and ODUF cost studies submitted in BellSouth's 120-day compliance filing appropriate?

Issue 2(b): Should BellSouth's ADUF and ODUF rates or rate structure, previously approved in Order No. PSC-01-2051-FOF-TP, be modified? If so, to what extent, if any, should the rates or rate structure be modified?

*** The Commission should adopt the cost-based rates for Daily Usage Files ("DUFs) set forth in BellSouth's revised DUF study. These costs are incremental to

providing ALECs with call measurement detail needed to bill their end-users, and they are not reflected in BellSouth's shared and common cost factors. ***

DUFs are unique programs BellSouth developed, at the request of ALECs, in order to provide the ALECs with the call information they need in a format they can use to bill their end-users.[10] Tr. at 250-51. The Commission recognized in setting rates for the DUFs in its Final UNE Order that the costs associated with this on-going process and the computer resources required to implement and support the programs are incremental. Tr. at 251. The cost results for the DUFs are demand-dependent, and BellSouth experienced a significant increase in the in the number of message records requested for ADUF and ODUF and a slight decrease in the demand for EODUF since the time of the original DUF study filed in this docket. BellSouth, therefore, revised its study to reflect these changes in demand, and filed its revised study in this phase of the proceeding. Tr. at 251-52. The Commission should adopt DUF rates equal to the cost calculated with the demand projected in BellSouth's revised DUF study.

AT&T/MCI witness Darnell claims that establishment of DUF rates will allow BellSouth to double recover the costs of providing call measurement detail because these costs are reflected in BellSouth's shared and common cost factors. Tr. at 541-42. As the Mississippi Public Service Commission concluded after considering this same allegation on an identical record, "Mr. Darnell is incorrect." Tr. at 557-558 (quoting

[10] There are three types of DUFs: (1) Access Daily Usage Files ("ADUF") provides information of the end user's daily originating and terminating access carrier messages; (2) Optional Daily Usage Files ("ODUF") provide call detail for billable messages transported through BellSouth's network and processed in BellSouth's Customer Records Information System; and (3) Enhanced Optional Daily Usage Files ("EODUF") provides usage data for local calls that originate from resold, flat-rated lines.

Mississippi PSC Final Order in Docket No. 00-UA-999 (Oct. 12, 2001), at 44).[11] BellSouth identified and removed costs that are directly assigned in the cost studies from the development of the shared and common cost factors. BellSouth's cost filing in this proceeding outlines the adjustments BellSouth made to remove the directly identified costs. Tr. at 265-66. The Commission should, therefore, reject Mr. Darnell's argument, and it should adopt BellSouth's proposed DUF rates.

Issue 3(a): Is the UCL-ND loop cost study submitted in BellSouth's 120-day filing complaint with Order No. PSC-01-1181-FOF-TP?

*** Yes. The UCL-ND fulfills the Commission's directive that BellSouth determine xDSL loop nonrecurring costs that exclude the Design Layout Record, test point, and order coordination. The UCL-ND also satisfies the Commission's requirement that BellSouth provision a nondesigned xDSL-capable loop and guarantee not to convert it to another technology. ***

In phase I of this docket, certain ALECs stated that they desired a non-designed xDSL-capable loop from BellSouth, as well as a guarantee that the loop will not be rolled to another facility. Final UNE Order, at 66. The Commission ruled in favor of the ALECs on these issues. In its Final UNE Order, the Commission directed BellSouth "to file modified versions of its xDSL nonrecurring cost studies, which exclude the following: 1) the DLR, 2) a test point, and 3) order coordination." *Id.* The Commission also determined that it was appropriate "to require BellSouth to provision an SL-1 loop and guarantee not to roll it to another facility, or in other words, guarantee not to convert it to alternative technology." *Id.*

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[11] The Louisiana Public Service Commission also rejected Mr. Darnell's double counting of DUF costs theory. Ex. 30 (Darnell Depo.), at 22.

BellSouth's new Unbundled Copper Loop – Non-Designed ("UCL-ND"), which became available after the hearing in phase I, satisfies both of these requirements. As the name indicates, this xDSL-capable all cooper loop is not designed, and thus, is not provisioned with a test point or a DLR. Tr. at 253. The recurring cost of a UCL-ND is not only less than designed xDSL-capable loops, but is also less than the cost of an SL1 (2-wire analog voice grade) loop. Tr. at 254. That is because the UCL-ND is generally less than 18,000 feet in length because its resistance is restricted to 1300 ohms in order to ensure it can be used to provide DSL service. Tr. at 254-55. The nonrecurring cost of a UCL-ND is also less than that of an SL1 because it is all copper and, therefore, a plug-in does not have to be provisioned in the digital loop carrier system. Tr. at 255.

No ALEC contends that the UCL-ND fails to fulfill the requirements for non-designed xDSL-capable loops set forth by the Commission in is Final UNE Order. Indeed, AT&T and MCI admitted in response to a data request from Staff that, other than the issue (present for all loops) of the appropriate cost study approach and inputs, which is discussed below in Issue 3(b), the UCL-ND complies with the Commission's Final UNE Order. See Ex. 2 (AT&T and MCI's Response to Staff Interrogatory No. 6).

Issue 3(b): What modifications, if any, are appropriate, and what should the rates be?

*** For the reasons set forth above in response to Issue 1(b), the Commission should not use the bottoms-up cost study filed in this docket to set rates for the UCL-ND. The Commission should establish rates for the UCL-ND pursuant to the cost study for this element filed in Docket No. 960786-TL, which used in-plant loading factors to calculate outside plant EF&I costs. ***

As set forth above, it is neither appropriate nor necessary for the Commission to set UNE rates in accordance with a different cost methodology than it adopted in its Final UNE Order. Thus, the Commission should not use the bottoms-up study it required BellSouth to file for comparison purposes to establish a rate for the UCL-ND. BellSouth filed in its 271 proceeding, Docket No. 960786-TP, a cost study for the UCL-ND that used in-plant loading factors and inputs prior to the Commission's Final UNE Order. Also, in response to Staff's Request for Production No. 19 and Staff Interrogatory No. 72, BellSouth submitted the UCL-ND cost study using the inflation factors per the Final UNE Order, resulting in recurring rates of $15.14 for Zone 1, $18.49 for Zone 2, and $20.80 for Zone 3. Furthermore, the nonrecurring rates for the UCL-ND are set forth in BellSouth's Final Cost Summary – Revision 3 filed on January 28, 2002, in this instant proceeding (Installation 1st - $45.74, Additional - $20.90, and Disconnect 1st - $24.88, Additional - $6.45.) The Commission should base rates for the UCL-ND on the costs set forth above.

Issue 4(a): What revisions, if any, should be made to NIDs in both the BSTLM and the stand-alone NID cost study?

Issue 4(b): To what extent, if any, should the rates or rate structure be modified?

*** No adjustments are necessary for the NID costs considered in the BSTLM. The stand-alone NID cost study, however, should be revised to include exempt material, and the Commission should adopt the revised rates for stand-alone NIDs set forth in BellSouth's revised NID study. ***

The Commission noted in its Final UNE Order that BellSouth added an exempt material component to its NID cost in the BSTLM, and stated that "because these inputs presumably would also be multiplied by the in-plant loadings which are meant to recover the costs of exempt material, BellSouth may be double counting exempt materials added to the NID investment, which is included in the various loop rates." Final UNE Order, at 190. The Commission also observed that the cost study for stand-alone NIDs did not include any costs for exempt material and "therefore, it does not appear that BellSouth has captured any exempt material costs in its standalone NID rate." *Id.* at 190-91. The Commission, accordingly, ordered BellSouth "to identify and explain all necessary revisions that should be made to NIDs (both in the BSTLM and in its standalone NID study). . . . " *Id.* at 191.

The network interface device, or NID, is the device at the customer's premise where the drop wire from BellSouth's loop terminates. *Id.* at 188. The NID is generally provisioned with the loop at the time the premise is constructed. Tr. at 257. For most cable placements in BellSouth's cost study, the cost of exempt material is reflected via a factor applied in the BellSouth Cost Calculator. For the drop and NID, however, BellSouth directly identifies in the BSTLM the cost of exempt materials, and does not apply factors to these items. Thus, BellSouth is not double counting exempt material added to the NID investment. Tr. at 257-58. Consequently, no adjustments are necessary for the NID costs considered in the BSTLM.

An ALEC may also purchase a stand-alone NID/NID access as a separate UNE, apart from the loop. The stand-alone NID material (housing, interface, and protectors) is exactly the same as for the NID placed with the loop. The Commission correctly

noted in its Final UNE Order that BellSouth failed to include exempt material cost in its stand-alone NID study. As these are real costs that the Commission has recognized that BellSouth is entitled to recover, BellSouth should have included those costs in the study. Bellsouth revised the stand-alone NID study filed in this phase of the proceeding to properly account for exempt material costs. Tr. at 258.

Issue 5(a): What is a "hybrid copper/fiber xDSL-capable loop" offering, and is it technically feasible for BellSouth to provide it?

*** BellSouth designed a technically feasible hybrid copper/fiber loop that would allow an ALEC to provide DSL services to customers served via a BellSouth remote terminal ("RT"). This loop incorporates the Digital Subscriber Line Access Multiplexer ("DSLAM") functionality at the RT. This loop is not a UNE. ***

Issue 5(b): Is BellSouth's cost study contained in the 120-day compliance filing for the "hybrid copper/fiber XDSL-capable loop offering appropriate?

*** Yes. BellSouth calculated the cost of the "hybrid copper/fiber xDSL capable loop" consistent with the Commission's Final UNE Order. ***

Issue 5(c): What should the rate structure and rate be?

*** The Commission should not order BellSouth to provide the hybrid loop as a UNE. If it does, however, the Commission should adopt rates equal to the results of BellSouth's cost study. ***

A. <u>BellSouth's hybrid loop cost study complies with the Commission's Order.</u>

The Commission ordered BellSouth "to submit a cost study for hybrid copper/fiber xDSL-capable loops . . . for further consideration by this Commission." *See* Final UNE Order at 65. Without waiving its right to challenge any requirement to provide such loops as UNEs, BellSouth complied with this Order by filing its Hybrid Copper/Fiber

xDSL-Capable loop ("hybrid loop") study. Tr. at 80. Unlike BellSouth's other loop offerings, the hybrid loop incorporates DSLAM functionality that is performed at the RT. Tr. at 81. The hybrid loop, therefore, would allow an ALEC to provide Digital Subscriber Line ("DSL") capability to its customers served via a BellSouth RT. The hybrid loop consists of: (1) a dedicated, non-designed two-wire copper physical transmission facility that connects the ALEC's Network Interface Device at the end users' premises to a DSLAM at the RT; (2) a DSLAM located at the RT[12]; and (3) a dedicated DS1 facility that runs from the DSLAM at the RT through multiplexers in the RT and then to the BellSouth central office. *See* Tr. at 77-78; 141.

The hybrid loop terminates on the main distribution frame in the central office. An ALEC can pick up its packets that have been delivered over the hybrid loop at the frame and deliver them to the packet switching network that it uses. This arrangement is technically feasible.

1. FDN's proposal for "a line-at-a-time" access to BellSouth's DSLAMs at RTs is not technically feasible unless ATM packet switching is included, and no party has presented any evidence of impairment with regard to ATM packet switching.

FDN has asked the Commission to reject BellSouth's offering and to order BellSouth to allow ALECs to access DSLAMs located at RTs on "a line-at-a-time basis." Tr. at 643. Both BellSouth's and FDN's witnesses, however, agree that it is *not technically feasible* to provide such access without including ATM packet switching in the offering. *See* Tr. at 85; 147; 153-54; 715-16. This is because the traffic that is going from the DSLAM at the RT to the central office is packetized, and under FDN's proposal, that traffic would include FDN's packets, BellSouth's packets, and the packets of any

[12] The DSLAM in BellSouth's study can accommodate up to 16 end user lines. Tr. at 78.

other ALECs that were "sharing" the DSLAM. Tr. at 715-16. FDN's witness acknowledged that if those intermingled packets were simply dropped off at the main distribution frame in the central office, they would be useless. Tr. at 716. In order to make FDN's proposal work, the traffic containing those intermingled packets would have to go through BellSouth's ATM packet switch that would separate the packets and send BellSouth's packets to the destination designated by BellSouth, FDN's packets to the destination designated by FDN, and other ALECs' packets to the destinations designated by those ALECs. Tr. at 84-85, 716.

The Commission, however, cannot order BellSouth to include ATM packet switching in a UNE offering unless if finds that lack of access to such switching materially impairs an ALEC's ability to provide the services it seeks to offer. *See* BellSouth's Post-Hearing Brief in Docket No. 010098-TP ("BellSouth's FDN Arbitration Brief") at 18.[13] No party has presented *any* evidence that suggests that ALECs are impaired in their ability to provide broadband services absent access to BellSouth's ATM packet switches. In fact, in the FDN-BellSouth arbitration proceeding, FDN argued that "ALECs are *uniquely impaired* from collocating facilities [at RTs]" and expressly stated that "FDN does *not* seek an order that BellSouth unbundled packet switching generally across its network." *See* FDN's Arbitration Brief at 10 n.10 (emphasis added). Consistent with these arguments, FDN limited the "impairment" evidence it presented in that proceeding to DSLAMs at remote terminals. Similarly, in this proceeding, FDN argued that "for a DLC loop to be xDSL-capable, packet switching must be performed by a DSL line card or DSLAM *at the remote terminal.*" Tr. at 622 (emphasis added). No

[13] Attachment A to this Brief is a copy of BellSouth's FDN Arbitration Brief.

"impairment" evidence that was presented in either the FDN arbitration proceeding or in this proceeding addresses packet switching at the central office generally or ATM packet switching specifically.[14]

Thus, it is undisputed that it is *not* technically feasible for BellSouth to provide ALECs with access to DSLAMs at RTs on "a line-at-a-time basis" without including ATM packet switching in the offering. And, given the absence of *any* evidence of impairment with regard to ATM packet switches, the Commission cannot lawfully include ATM packet switching in any UNE it may order BellSouth to provide. Consequently, the Commission must reject FDN's request for a UNE that would provide access to DSLAMs at RTs on "a line-at-a-time basis."

2. BellSouth's Hybrid Loop Cost Study Complies with TELRIC Methodology.

No party presented any evidence suggesting that BellSouth's cost calculations regarding to the hybrid offering are inaccurate. Instead, FDN claims that "no matter what number of customers FDN had, and no matter how efficiently FDN could provide service, it would lose money under BellSouth's proposed rates [for the hybrid loop]." Tr. at 630. As noted above in BellSouth's discussion of Issue 1(b), however, the FCC has made it clear that the standard for setting UNE prices is whether UNEs are cost-based, and not whether UNE-based entry is profitable at those cost-based rates. *See also* Tr. at

[14] The reason that no ALEC has presented any evidence of impairment with regard to ATM packet switches is simple – ALECs suffer no such impairment. Many ALECs throughout the country provide DSL offerings, and they often either self-provision ATM packet switching functionality or they obtain it from vendors other than the ILEC. *Cf.* Tr. at 658-59 (FDN's witness acknowledged that when it provides DSL through a DSLAM it has collocated at a BellSouth central office, that DSLAM "will send the data in this case to your collocation space, and from there you can send it to your packet switch and do with it as you do every other packet technology."). It is not surprising, therefore, that the FCC has declined to designate ATM packet switching (or any other aspect of packet switching functionality) as a UNE. *See* BellSouth's FDN Arbitration Brief at 12-17. Moreover, BellSouth is unaware of any state Commission that has ordered the unbundling of ATM packet switching.

38, 414. Even if that were not the case, the evidence presented at the hearing clearly refutes FDN's claims that it would lose money under BellSouth's proposed rates.

FDN is serving 80,000 Florida access lines today, Tr. at 649-50, and every one of those 80,000 access lines serves a business customer. Tr. at 649-50; 694.[15] FDN's witness, Mr. Gallagher, acknowledged that BellSouth's retail price for its FastAccess DSL service for business customers is about 50% higher than an ALEC's per-customer cost (using BellSouth's proposed cost-based rates) of the hybrid loop with a fully-utilized DSLAM in Zone 1. Tr. at 694-695. He further acknowledged that even if an ALEC were to serve only 12 customers out of the DSLAM encompassed in the hybrid loop, BellSouth's retail price for is FastAccess DSL service for business customers still is about 20% higher than an ALEC's per-customer cost of the hybrid loop in Zone 1.[16] Tr. at 696.

FDN, however, does not intend to provide only data services to its customers. Instead, FDN intends to provide both voice and data services to its customers. Tr. at 697. Mr. Gallagher acknowledged that an ALEC could provide voice and data services to the same end-user by purchasing both a hybrid loop (over which it could provide data services) and a UNE-P (over which it could provide voice services). Mr. Gallagher further acknowledged that the sum of BellSouth's retail rate for FastAccess DSL service for business customers and the lowest retail rate for BellSouth's Complete Choice for

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[15] Although FDN has claimed that its lack of unbundled access to BellSouth's DSLAMs is causing it to lose customers, FDN is serving 25% more access lines than it was serving in August of 2001. Tr. at 649-50.

[16] While it is true that it would not be profitable for an ALEC to serve only 1 or 2 customers using the hybrid loop, it is also true that *no* carrier – including BellSouth – could profitably serve only one or two customers by way of a DSLAM located at a remote terminal. No authority requires BellSouth to price its UNEs such that an ALEC is guaranteed to make a profit on the first few DSL customers it serves from a given remote terminal.

Business offering (about $127.04) is much higher than the sum of the price for a hybrid loop and a UNE-P in Zone 1 (about $73.68).[17] Tr. at 697-705.

Mr. Gallagher addressed approximate UNE-P rates during the cross-examination referenced above. *See* Tr. at 701. In addition, he understated slightly in his prefiled testimony some of the hybrid loop costs, *see* Tr. at 611-12, and he did not address Zone 2 rates for the hybrid loop at all. *See* Tr. at 630-31. In order to present a complete and accurate picture, BellSouth has prepared Attachments B, C, and D to this brief in order to compare the retail prices for BellSouth services to the hybrid loop rates in BellSouth's study and to the UNE-P rates the Commission ordered in Phase I of this proceeding. The footnotes in these attachments provide a reference in the record that supports each price and rate figure set forth in the attachments.

Attachment B shows that the retail price for BellSouth FastAccess DSL service for business customers exceeds the hybrid loop rate by nearly 50% in Zone 1, by nearly 35% in Zone 2, and by 35% on a statewide average basis.[18] Attachment C shows that the sum of the retail rate for BellSouth FastAccess DSL service for business customers plus the retail rate for BellSouth's Complete Choice for Business offering exceeds the sum of the hybrid loop rate plus the UNE-P rate by more than 75% in Zone 1, by 54% in Zone 2, and by more than 55% on a statewide average basis. Attachment D shows that the sum of the retail rate for BellSouth FastAccess DSL service for residential customers

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[17] It is appropriate to compare BellSouth's retail price for its Complete Choice offering to the UNE-P prices because an ALEC can provide all of the features included in Complete Choice using the UNE-P.

[18] Only three percent of BellSouth's Florida access lines are in Zone 3, which generally encompasses the most rural areas of the state. *See* FPSC Order No. PSC-01-1181-FOF-TP, Docket No. 990649-TP, Appendix B. Accordingly, the vast majority of business customers are likely to be in Zones 1 and 2.

plus the retail rate for BellSouth's residential Complete Choice offering exceeds the sum of the hybrid loop rate plus the UNE-P rate in Zone 1, and it is less than 8% below the sum of the statewide average rate for the hybrid loop plus the UNE-P. [19]

Finally, in considering the foregoing analysis, it is important to keep the following facts in mind:

1. Nothing prohibits an ALEC from charging more for its service than BellSouth charges for comparable services. FDN's witness, for instance, testified that when FDN began using BellSouth's federally-tariffed DSL offering to provide Internet services to its end users, it added innovations that BellSouth did not provide to its own end users. It is not surprising, therefore, that while BellSouth charges its business customers no more than $80 for its FastAccess DSL service, FDN has "several packages ranging from $59 to roughly $99 a month." Tr. at 652-53; and

2. The analysis does not take into account all of the revenue an ALEC would collect from its customers. For example, in addition to local voice service and data services, FDN also offers its customers interLATA toll services and international toll services. Tr. at 651-52. FDN's revenue stream for this bundle of services will be whatever the market will bear. Tr. at 736. In addition to this revenue stream, FDN also collects access charges for any long-distance business generated by its customers, *id.*, as well as federally-approved charges like the common line charge. Id..

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[19] Even if a price squeeze analysis were appropriate in this docket (and it is not), the issue at the heart of a price squeeze analysis is whether the overall pricing structure prevents efficient firms from competing in the market. This is similar to the inquiry a court makes in the related area of predatory pricing—where a dominant firm tries to drive rivals from the market through below-cost pricing. Several predatory pricing cases discuss the requirement that a court take into account the full range of services sold in order to determine whether a particular instance of below-cost pricing could be anticompetitive. *See, e.g., Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1256-57 (5th Cir.), *cert. denied*, 488 U.S. 890 (1988)(in determining whether price structure was predatory, court should consider both below-cost sales of original equipment spark plugs to vehicle manufacturers and subsequent above-cost "replacement parts" sales to vehicle owners); *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir.) *cert. denied*, 469 U.S. 833(1984)(in determining whether defendant engaged in predatory pricing, it was necessary to consider the full product line). As the leading antitrust treatise explained with respect to predatory pricing, "rivals generally can hardly be ruined so long as prices for the product line as a whole are compensatory." P. Areeda & H. Hovenkamp, Antitrust Law § 715.1a at 525 (Supp. 1996). The same rationale applies here. As demonstrated below, when the full range of services that FDN and BellSouth provide to their end users is considered, it becomes clear that FDN has failed to prove that it is unable to make a profit using BellSouth's hybrid loop.

FDN, therefore, has failed to prove its assertion that "no matter what number of customers FDN had, and no matter how efficiently FDN could provide service, it would lose money under BellSouth's proposed rates [for the hybrid loop]." Tr. at 630. Indeed, the evidence clearly refutes FDN's assertion.

B. Neither the hybrid loop nor any "broadband loop" the ALECs seek in this docket is a UNE.

The Commission should not order BellSouth to provide the hybrid loop (or any other "broadband loop" the ALECs are seeking in this docket) as a UNE for at least two reasons. First, the Commission lacks jurisdiction to impose such a requirement. Second, even if the Commission had jurisdiction, the ALECs have failed to make the requisite showing that they are impaired in their ability to provide broadband services absent access to the DSLAMs that BellSouth has located in RTs in Florida.

1. The Commission lacks subject matter jurisdiction to order BellSouth to provide the hybrid loop or any other type of "broadband loop" as a UNE.

FDN acknowledges that it would use the hybrid loop or any other type of "broadband loop" that it seeks in this docket "primarily to provide Internet access services." Tr. at 717. The evidence suggests that other ALECs would use such loops in a similar fashion. *See* Tr. at 109 (no carrier is using packet technology to carry significant amounts of any voice service, much less local exchange voice service). As FDN acknowledged, however, the FCC has found that ISP-bound traffic is interstate, and not local, in nature. *Id.*[20] The federal Telecommunications Act of 1996 requires ILECs to provide access to the *local exchange* network. Because ALECs admittedly

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[20] *See* Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* FCC Order No. 01-131 at ¶52 (April 27, 2001)(" ISP traffic is properly classified as interstate . . . .").

would not use the hybrid loop or any other "broadband loop" for local exchange traffic, this Commission has no jurisdiction to order BellSouth to provide any such loop as a UNE. As this Commission acknowledged in the Order it entered in the BellSouth-Intermedia arbitration proceeding, the FCC has declined to allow ALECs to use UNEs for the purpose of carrying traffic that is not substantially local in nature.[21]

Beyond that, the FCC recently published its tentative conclusion that "wireline broadband Internet access services - whether provided over a third party's facilities or self-provisioned facilities - are *information services* subject to regulation under Title I of the Act . . . ."[22] The FCC also tentatively concluded that "the transmission component of retail wireline broadband Internet access service provided over an entity's own facilities is 'telecommunications' and *not* a 'telecommunications service.'"[23] In light of these tentative conclusions, the FCC has requested comments on the following issues:

> Because "network element" is defined as a "facility or equipment used in the provision of a telecommunications service," *how could an incumbent LEC provider of wireline broadband Internet access service over its own facilities be required to provide access to those facilities as "network elements"* if those facilities are used by the incumbent LEC exclusively to provide information services? For example, what would be the implications for the Commission's line sharing and line splitting rules? If an incumbent LEC provider of wireline broadband Internet access service over its own facilities uses certain facilities to provide both information services and telecommunications services, to what

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[21] *See* Final Order on Arbitration, *In re: Petition of BellSouth Telecommunications, Inc for Section 252(d) Arbitration of Interconnection Agreement with Intermedia Communications, Inc.* at 30, Docket No. 991854-TP (August 22, 2000)("the current state of the law provides that an incumbent LEC is not obligated to convert special access circuits to EELS unless the ALEC is providing all of the customer's local exchange services or a 'significant amount of local exchange service.'").

[22] Notice of Proposed Rulemaking, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC Order No. 02-42 at ¶16 (February 15, 2002)(emphasis added).

[23] *Id.* at ¶17 (emphasis added).

extent would the LEC be required to provide access to such shared-use facilities as "network elements?"[24]

Thus, even if the traffic the ALECs intend to carry over any "broadband loop" they are seeking in this docket was local in nature (and it is not), the Commission's jurisdiction to order BellSouth to provide such a loop as a UNE would be questionable. Given that such traffic clearly is interstate in nature, however, the Commission has no jurisdiction to order BellSouth to provide any such "broadband loop" as a UNE.

2. The ALECs have failed to make the requisite showing that they are impaired in their ability to provide broadband services without access to the DSLAMs that BellSouth has located in RTs in Florida.

Even if the Commission had jurisdiction to establish a "broadband loop" as a UNE, the Commission could not include the DSLAM in such a UNE unless an ALEC satisfies the impairment standard set forth in the FCC's rules. *See generally* 47 C.F.R. §51.317; BellSouth's FDN Arbitration Brief at 18-19. The only ALEC that even attempted to present such "impairment" evidence in this docket was FDN, and it did so primarily by incorporating portions of the evidence it presented in its arbitration proceeding with BellSouth. Tr. at 616. For all of the reasons set forth in BellSouth's FDN Arbitration Brief, which BellSouth incorporates herein by reference, the evidence FDN submitted falls far short of satisfying the impairment standard. The discussion below supplements BellSouth's FDN Arbitration Brief with evidence presented during the hearing in this docket and with recent developments at the FCC.

a. BellSouth is not the dominant player in the nascent broadband market.

DSL is not the only method of providing broadband services -- other technologies by which broadband services can be provided to end users include wireless, cable

[24] *Id.* at ¶61 (emphasis added).

modem, and satellite technologies. Tr. at 690.[25] FDN's witness Mr. Gallagher acknowledged, for example, that FDN's ADSL offerings compete with cable modem offerings. Tr. at 691. This is obvious from the following statement that appears among the "Quotes from ADSL users" that are set forth on FDN's webpage: "I was sold on my cable modem, until FDN.com installed ADSL. This is faster and more reliable." (*See* Hearing Exhibit No. 63.)

DSL is not even the most prevalent method of providing broadband services. Since the hearing in the FDN arbitration proceeding, the FCC has noted that "[i]n the broadband arena, the competition between cable and telephone companies is particularly pronounced, *with cable modem platforms enjoying an early lead in deployment.*"[26] In fact, the FCC has noted that as of the end of June 2001, "almost 5.2 million high-speed lines [were] in service using cable modem technology" as compared to only "2.7 million ADSL lines in service . . . ."[27]

Moreover, the roughly 227,000 DSL lines that BellSouth had in service in Florida at the end of the fourth quarter of 2001 pales in comparison to the nearly 6.5 million total BellSouth access lines in Florida. Tr. at 59-60; 139. Similarly, the roughly 700,000 DSL lines that BellSouth has in service throughout its region pales in comparison to the nearly 25 million total BellSouth access lines throughout the region. *See* Tr. at 523-24.

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[25] *See also In the Matter of Inquiry concerning High-Speed access to the Internet over Cable and Other Facilities*, FCC Order No. 0-355 at ¶43 (September 28, 2000) ("High-speed services are provided using a variety of public and private networks that rely on different network architectures and transmission paths including wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies.").

[26] Third Report, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC Order No. 02-33 at ¶37 (February 6, 2002)(emphasis added).

[27] *Id. at* ¶¶44, 49.

BellSouth, therefore, is a long way from cornering the broadband market either in Florida or in its nine-state region.

b. Forcing BellSouth to unbundle its DSLAMs would inappropriately stifle the incentive for future investment in DSL and other broadband technologies.

The deployment of DSLAMs at remote terminals to provision broadband services over DSL is a new endeavor for BellSouth. While BellSouth and its predecessors have been deploying loops and circuit switches in Florida for a hundred years, BellSouth has been deploying DSLAMs at RTs only over the last two years. *See* Tr. at 520-33; 662-63. Mr. Gallagher acknowledged that each time BellSouth deploys a DSLAM at an RT, BellSouth must expend the resources to: purchase the DSLAM; augment space at the RT as necessary; resolve any power, zoning, and right-of-way issues; install the DSLAM in the RT; and provision the facilities necessary to connect the DSLAM to the end user and to the central office. Tr. at 664-68. BellSouth, therefore, does not simply decide to place a DSLAM at an RT one week and have service up and running the next week. Tr. at 668.

During the past two years in which BellSouth has been taking the time and incurring the expense to place DSLAMs in remote terminals, ALECs also could have been purchasing the same types of DSLAMs BellSouth has been purchasing, collocating their DSLAMs in the same RTs as BellSouth has been installing its DSLAMs, and providing the same broadband services that BellSouth has been providing. Instead of taking the risks BellSouth has taken, however, the ALECs have elected to sit on the sidelines and watch. Now that they have seen the results of the risks BellSouth has

taken, the ALECs are asking this Commission to allow them to reap where they have not sown.

Clearly, an ILEC's incentive to invest in new and innovative equipment will be stifled if its competitors, who can just as easily invest in the equipment, can take advantage of the equipment's use without incurring any of the risk. *See* BellSouth's FDN Arbitration Brief at 25-27. The FCC relied in part on this stifling effect when it declined to unbundle the DSLAM in its *UNE Remand Order*, *see id.,* and it alluded to this stifling effect again in December 2001 when it sought comments on

> whether we should modify or limit incumbents' unbundling obligations going forward so as to encourage incumbents and others to invest in new construction. . . . Commenting parties should also address whether we should exempt from unbundling obligations only certain types of new facilities, *such as those intended to provide advanced telecommunications capabilities*. In particular, should fiber loops be categorically de-listed, while copper loops remain UNEs?[28]

Additionally, the Staff recently recommended that the Florida Commission file comments with the FCC in the Matter of Review of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities.[29] The Staff's recommended comments state, in part:

> [T]here is a great deal of uncertainty for the ILEC when performing its cost/benefit analysis on technology and deployment . . . . Simply put, why invest in something only to be forced to concede significant portions of the return on that investment with others who do not share equally in the risk?

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[28] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC Order No. 01-361 at ¶24 (December 20, 2001)(emphasis added).

[29] *See* March 28, 2002 Memorandum to Executive Director from Division of External Affairs and Office of the General Counsel.

> This tension for the ILEC is a dilemma for regulators and policy makers as well, and the [FCC's] NPRM has quite correctly contemplated and sought comment on an alternative regulatory regime to address the provision of wireline broadband Internet access services by ILECs and the implications for unbundling. This aspect of the NPRM alone constitutes a fertile ground for debate and *the FCC should avoid a rush to judgment and instead permit a thorough dialogue.* At this time *the FPSC takes no position on any alternative regulatory regime but for consideration offers a suggested concept for further dialogue . . . .*[30]

See Staff's Proposed Comments at 12 (emphasis added). Finally, when FDN's witness Mr. Gallagher was asked if FDN would share access to any DSLAM it may decide to collocate in a BellSouth remote terminal, he was unwilling to commit to sharing such access at TELRIC rates, and he could not identify any market rate at which FDN would be willing to provide such access. Tr. at 676.

The uncertainty regarding a requirement to offer unbundled access to DSLAMs at RTs is affecting BellSouth's deployment decisions today. With the exception of a very few locations that are being used for testing purposes, BellSouth does not currently use "combo cards" in its network. Tr. at 444. BellSouth would like to begin using combo cards in conjunction with other technology to increase the number of Floridians who have access to its DSL services in the future. Tr. at 512-13. However, just as FDN was unable to state that if it collocated a DSLAM at a BellSouth RT, it would provide other ALECs with access to that DSLAM at TELRIC rates, Tr. at 676, BellSouth is waiting to decide whether to deploy such technology until it knows whether it will be required to provide unbundled access to such technology to its competitors at TELRIC prices. Tr. at

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[30] This suggested concept does not involved unbundling any aspect of the packet switching network. Instead, it involves: consideration of "impos[ing] resale obligations" on such broadband services in order to "alleviate ILEC concerns over the requirement to unbundle new iterations of technology and the dampening impact that might have on deployment;" and "permit[ting] and encourag[ing] joint ventures between the ILEC and competitors that would allow a sharing of costs as well as profits in provisioning of wireline broadband Internet services." *See* Staff's Recommended Comments at 12-13.

510-513. Once it knows the answer to that question, BellSouth can analyze the applicable business risks and determine whether and where it makes business sense to deploy such technology. Id.

c. Both the FCC and this Commission already have declined to unbundle DSLAMs.

Given that the ILECs had no head start on the ALECs in provisioning DSL service, and given the stifling effect that unbundling requirements would have on broadband investment, the FCC has declined to unbundle DSLAMs as FDN is requesting in this proceeding. See BellSouth's FDN Arbitration Brief at 12-17.[31] After the FCC rendered this decision, the Florida Commission itself declined to unbundle packet switching functionality (which includes the DSLAM) not once, but twice. *See* Tr. at 38-39; BellSouth's Arbitration Brief at 17-18. In light of these two Commission decisions declining to unbundle the DSLAM, BellSouth has continued to install DSLAMs in remote terminals in order to provide DSL services to more and more Floridians. Tr. at 520-222. It would be inappropriate for the Commission to now change the rules of the game after BellSouth made these investments based on a business case that did not include providing access to these DSLAMs at TELRIC prices. *See* Tr. at 510-513.

d. The costs of collocating a DSLAM at an RT do not impair an ALEC's ability to provide DSL service.

ALECs clearly are not impaired in their ability to purchase DSLAMs. Mr. Gallagher, for example, testified on cross-examination that that FDN has had no

[31] In making that decision, the FCC carefully and consciously considering the manner in which proposed unbundled elements would affect an ALEC's ability to provide advanced services such as xDSL, recognizing how the existence of IDLC would impact the provisioning of advanced services such as xDSL, and noting that "the remote terminal has, to a substantial degree, assumed the role and significance traditionally associated with the central office." *See* BellSouth's Arbitration Brief at 14-16.

problem finding vendors that will sell it a DSLAM, and he acknowledges that the price quotes FDN has received for DSLAMs are comparable to the price quotes that BellSouth has received for similar DSLAMs. Tr. at 668-69.

Nor are ALECs impaired in their ability to collocate their own DSLAMs at a BellSouth RT. BellSouth provides ALECs the same opportunity to offer DSL service where DLC is deployed as BellSouth provides itself. *See* Tr. at 37; 439. In particular, if sufficient space does not exist within an RT in which BellSouth has not installed its own DSLAM, BellSouth will make good-faith efforts to augment the space at that RT *at BellSouth's own expense*, such that the ALEC can install its own DSLAM at that RT. Tr. at 439, 499. Although FDN's witness refers to this as a "streamlined process" for collocation, and although FDN has been aware of this streamlined process since the FDN arbitration proceeding in August of 2001, FDN still has not even attempted to submit an application to collocate a DSLAM at a BellSouth remote terminal. Tr. at 671. Accordingly, FDN's testimony regarding its alleged inability to collocate DSLAMs at BellSouth's remote terminals is simply speculation and conjecture.

Moreover, this speculation and conjecture is refuted by the facts. The evidence shows that one ALEC is in the process of collocating its own DSLAM in a BellSouth RT in Alabama, another is in the process of collocating its own DSLAM in a BellSouth RT in Mississippi, and yet another ALEC has expressed interest in collocating its own DSLAMs at other BellSouth remote terminals. Tr. at 499, 518-19. These ALECs are purchasing their own DSLAMs, collocating them in BellSouth's remote terminals, and purchasing UNE subloop feeder and distribution elements from BellSouth at the TELRIC

rates established by the respective state Commissions.[32] *See Id;* Tr. at 465-66. The fact that these ALECs are doing exactly what FDN claims that it cannot do (even though it has never tried) lends new credence to the old saying that "can't never could do anything."

Issue 6: In the 120-day filing, has BellSouth accounted for the impact of inflation consistent with Order No. PSC-01-2051-FOF-TP?

*** Yes. There is no dispute that BellSouth accounted for the impact of inflation in its 120-day cost study in the same manner that it accounted for inflation in the cost study originally filed in this docket, and as approved by the Commission in Order No. PSC-01-2051-FOF-TP, the Reconsideration Order. ***

There is no question that BellSouth accounted for inflation in its bottoms-up cost study in exactly the same fashion as it did in its earlier cost study, and as the Commission deemed appropriate in its Reconsideration Order. It is the fact that BellSouth accounted for inflation consistent with the Commission's earlier ruling with which the ALECs now take issue. The ALECs did not, however, request that any additional issue regarding inflation be decided in this proceeding. Consequently, the Commission should not consider the new inflation arguments AT&T and MCI inserted into this proceeding through Mr. Pitkin's testimony. If, the Commission determines, nevertheless, that it is appropriate to consider issues not timely and properly raised by AT&T and MCI, it should reject their arguments and it should apply the inflation factors BellSouth used in its study.

[32] FDN's witness acknowledged on cross examination that BellSouth will sell FDN a UNE subloop between the remote terminal and the customer premises and a UNE subloop between the remote terminal and the BellSouth central office. *See* Tr. at 672. FDN's witness further acknowledged that BellSouth has agreed to provide these UNEs at the rates established by the Commission. *Id.*

AT&T/MCI witness Pitkin claims that BellSouth's inflation factors are inappropriate because they were developed using 1998 data as a base to project inflation over the 2000-2002 study period, and that BellSouth should have used more recent available data instead. He recommends revised inflation factors he developed using actual 2000 and 2001 data, and estimating inflation for 2002 by using a linear trend. Tr. at 602.

The Commission should not use data that is now available, but was not known at the time BellSouth developed its inflation factors. Beginning with its initial cost study filing in this docket in early 2000, BellSouth has consistently used 1998 data as its base source for developing all of the factors used in its cost study, including, but not limited to inflation factors. It would be inconsistent to require BellSouth to use more recent data that was not available when BellSouth developed its original factors to use in developing *some* factors used in the study. A cost study must employ data available when the study is performed, and the nature of the regulatory process is that the timeliness of the data can often be questioned during the review process. Such criticism is, to a large degree, unfair and outside the control of the cost study proponent. BellSouth used the inflation factors approved by this Commission in this Docket. It would be inconsistent and unfair to allow the ALECs to continually "update" the data as it suits them.

Mr. Pitkin also criticizes BellSouth's continued use of a blended inflation factor that is comprised of material price inflation and labor rate inflation. He claims that BellSouth should apply only a material inflation rate because the inflation factor is applied only to material costs in the bottoms-up study. *See* Ex. 23 (BellSouth's

Responses to Staff's 3rd Interrogatories; Staff's 3rd Requests for Production) As an initial matter, this would not be an issue at all if the Commission determined, as it should for the reasons set forth above in response to Issue 1(b), that it need not "revisit" the UNE rates it adopted last year using in-plant factors.

More importantly, Pitkin's criticism is unfounded. BellSouth's total costs are not impacted to a large degree by the use of a blended inflation factor. The engineering factor is not inflated in BellSouth's bottoms up study. Thus, although the use of a blended factor may tend to cause a small overstatement of material costs, it also understates engineering costs. Consequently, there is no need to use a material only inflation factors.

If, however, the Commission decides to use a material only inflation factor to develop material costs via a bottoms-up study, it would also need to update the engineering factors used in the study to recognize the impact of inflation on engineering costs. *See* Ex. 11 (BellSouth's Responses to Staff Interrog. Nos. 92 and 96 and Atts. 1-3 to Response to Interrog. No. 96). Failing to do so would cause BellSouth's costs to be understated.

Issue 7. Apart from Issues 1-6, is BellSouth's 120-day filing consistent with the Orders in this docket?

*** Yes. The cost studies BellSouth filed incorporate all of the adjustments ordered by the Commission. ***

Respectfully submitted this 12th day of April, 2002.

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ATTACHMENT "A"

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
	)	Filed: September 26, 2001

POST-HEARING BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") submits this post-hearing brief in support of its position on the issue submitted to the Commission for arbitration in accordance with Section 252 of the Telecommunications Act of 1996. 47 U.S.C. § 252. Considering the evidence and applicable law, the Commission should adopt BellSouth's position on the sole remaining issue in this proceeding.

I. INTRODUCTION AND STATUTORY OVERVIEW

This arbitration proceeding was initiated by Florida Digital Network, Inc. ("FDN").[1] BellSouth has been negotiating the terms of a new interconnection agreement with FDN since August 2000. Through good-faith negotiations that continued through the date of the hearing, BellSouth and FDN were able to reach agreement on all of the issues except one, and that issue is identified in FDN's Petition as Issue No. 1.

[1] FDN filed its Petition for Arbitration on January 24, 2001, raising certain disputed issues concerning the parties' proposed interconnection agreement. BellSouth filed its Response to the Petition on February 19, 2001, and the Commission heard this matter on August 15, 2001. During the hearing, the Commission heard the testimony of FDN witness Michael P. Gallagher, and it heard the testimony of BellSouth witnesses John A. Ruscilli and Thomas G. Williams. A transcript of this hearing, which consists of 394 pages and 13 exhibits, was prepared.

The 1996 Act provides that parties negotiating an interconnection agreement have the duty to negotiate in good faith.[2] After negotiations have continued for a specified period, the 1996 Act allows either party to petition a state commission for arbitration of unresolved issues.[3] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[4] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the parties with respect to those issues; and (3) any other issues discussed and resolved by the parties."[5] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the state commission receives the petition.[6] The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.[7]

Through the arbitration process, the Commission must now resolve the remaining disputed issues in a manner that ensures the requirements of Sections 251 and 252 of the 1996 Act are met. The obligations contained in those sections of the 1996 Act are the obligations that form the basis for negotiation, and if negotiations are unsuccessful, they then form the basis for arbitration. Once the Commission provides

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2 47 U.S.C. § 251(c)(1).

3 47 U.S.C. § 252(b)(2).

4 *See generally,* 47 U.S.C. §§ 252(b)(2)(A) and 252 (b)(4).

5 47 U.S.C. § 252(b)(2).

6 47 U.S.C. § 252(b)(3).

guidance on the unresolved issues, the parties will incorporate those resolutions into a final agreement that will then be submitted to the Commission for its final approval.[8]

II. SUMMARY OF BELLSOUTH'S POSITION

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

*** BellSouth is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop. Nor is BellSouth required to: provide access to a DSLAM BellSouth has placed in a remote terminal; or offer its federally-tariffed DSL service to FDN at the wholesale discount. ***

III. SUMMARY OF ARGUMENT

The sole remaining issue in this docket addresses how FDN is going to provide relatively new DSL services -- which, for the most part, have become available in the past few years -- to its Florida customers who are served through a digital loop carrier at remote terminals. Is FDN going to do what BellSouth has had to do over the past few years – deploy smaller Digital Subscriber Line Access Multiplexers ("DSLAMs") in strategically-selected remote terminals and replace these DSLAMs with larger ones as demand for the service dictates? Or, is FDN going to be granted unbundled access to the DSLAMs that BellSouth has deployed in the past few years in order to provide DSL-type service to its own customers?

It is easy to understand why FDN has asked the Commission to choose the second of these options. As the FCC explained:

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[7] 47 U.S.C. § 252(b)(4).

[8] 47 U.S.C. § 252(a).

> investments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets. Customer demand for advanced services is also more difficult to predict accurately than is the demand for well established services, such as traditional plain old telephone service (POTS).

See UNE Remand Order at ¶314. Rather than taking the risk of collocating DSLAMs in BellSouth's remote terminals so that it could provide its own DSL services, FDN has elected to sit on the sidelines and watch BellSouth buy the same DSLAMs FDN could have bought, deploy those DSLAMs at the same remote terminals that FDN could have deployed its own DSLAMs, and offer the same types of DSL services that FDN could have offered. Now that it has seen the results of the risks BellSouth has taken, FDN has asked this Commission to allow FDN to reap where it has not sown. As such, FDN's request is inherently unfair and should be denied.

The applicable legal standard that governs the outcome of FDN's request is not whether unbundled access to BellSouth's DSLAMs makes it cheaper and easier for FDN to do business. Instead, the applicable legal standard is whether FDN can prove that its ability to provide DSL service is impaired if it is not granted such access. FDN has not proved this kind of impairment in this proceeding. As explained below, the FCC has already ruled that ALECs are not impaired in their ability to provide DSL service and, therefore, ALECs are not entitled to unbundled access to the DSLAM (or to other elements of the packet switching functionality). Similarly, this Commission has reached the same conclusion in prior dockets. Finally, the proof in this docket shows that: 1) BellSouth provides UNE loops and subloops that allow FDN to carry DSL signals from its equipment that is collocated in BellSouth's central offices to end users; 2) the only additional element that FDN needs to provide DSL service to end users served from a

remote terminal is a DSLAM collocated at that remote terminal; 3) BellSouth will allow FDN to collocate a DSLAM at a remote terminal as required by the FCC's *UNE Remand Order*; and 4) DSLAM equipment is readily available to FDN for purchase at competitive prices. FDN, therefore, simply is not impaired in its ability to provide DSL service to end users who are served from remote terminals, and FDN is not entitled to unbundled access to BellSouth's DSLAMs.

Nor is BellSouth required to provide DSL service over a UNE loop that FDN is using to provide voice service to an end user. Both the FCC and this Commission have issued rulings to that effect, and FDN has presented no evidence that suggests that these prior rulings should be overturned. To the contrary, earlier this week the FCC reconfirmed in its Verizon Pennsylvania 271 Order that an ILEC is not required to permit resale of its DSL service in conjunction with voice service provided using the UNE loop or UNE-P.

BellSouth is not required to offer its FastAccess Internet Service to FDN for resale, nor is BellSouth required to offer its federally-tariffed DSL service to FDN for resale at the wholesale discount. As explained below, BellSouth's FastAccess Internet Service is an enhanced or information service and not a telecommunications service that is subject to the resale obligations of the Act. Moreover, BellSouth's tariffed DSL service is available only on a wholesale basis and not on a retail basis, and the D.C. Circuit Court of Appeals recently upheld the FCC's decision that DSL services that are available only on a wholesale basis are not subject to resale at the wholesale discount pursuant to section 251(c)(4) of the Act.

When FDN resells BellSouth's voice service to an end user, FDN can provide DSL service to the same end user over the same loop. If only one or two FDN end users that are served from a given remote terminal want DSL service, therefore, FDN is not required to choose between losing those voice customers to another provider that can provide both voice and data over a single line or deploying a DSLAM at that remote terminal. Instead, FDN can use resale (as opposed to a UNE arrangement) to serve those customers. If other FDN end users served by that same remote terminal later desire DSL service, FDN can collocate a small DSLAM at that remote terminal, convert those lines from resale to a UNE arrangement, and use the collocated DSLAM to provide DSL service over that UNE arrangement. Similarly, if an FDN business end user desires four voice lines and one data line, FDN can use four UNE arrangements to provide the voice service and one resold line to provide the DSL. Again, if additional business customers that are served from that remote terminal begin ordering DSL service, FDN can collocate a small DSLAM at that remote terminal, convert the one line from resale to a UNE arrangement, and use the collocated DSLAM to provide DSL service over that UNE arrangement.

FDN's problem with this approach has nothing to do with the availability of DSL service to FDN's end users. Instead, FDN' problem with this approach is simply one of money. As FDN's witness put it during the hearing:

> the wholesale rate . . ., it's like 35 bucks. Their retail rate is 45 bucks. *So there's not much arbitrage in there* . . . .

(Tr. at 134). As noted above, however, the applicable legal standard is not whether unbundling the DSLAM will provide a boost to FDN's arbitrage efforts. Instead, the

standard is whether FDN is impaired in its ability to provide DSL services, and the proof presented at the hearing clearly shows that it is not. The Commission, therefore, should rule in BellSouth's favor on the sole remaining issue in this proceeding.

IV. FACTS

The issue in this proceeding arises when FDN wants to use a UNE arrangement to provide both voice services and DSL services over a single loop to an end user who is served through a digital loop carrier ("DLC"). DSL services cannot be transmitted through a DLC unless they are first multiplexed for digital transmission to the central office. (*See* Gallagher Direct at 6). When DLC is involved, therefore, the only way that BellSouth, FDN, or any other carrier can provide DSL services to an end user is to locate or collocate a Digital Subscriber Line Access Multiplexer ("DSLAM") at the remote terminal that is serving that end user. (*See* Gallagher Direct at 5; Tr. 126-27).

DLCs perform an analog to digital conversion that allows BellSouth to aggregate telecommunications from multiple end users and transport those telecommunications back to the central office over a single facility. (*See, e.g.,* Gallagher Direct at 6.) BellSouth, therefore, has deployed DLCs in remote terminals in order to make its voice network more efficient. (*See* Tr. at 322). Additionally, FDN's witness acknowledged that BellSouth had deployed DLCs extensively in Florida long before the federal Telecommunications Act of 1996 ("the 1996 Act") went into effect. (*See* Tr. at 130).

A. BellSouth has deployed DSL services in Florida gradually over time.

FDN's witness acknowledged that when BellSouth is providing DSL service to an end user who is being served through a DLC, BellSouth has had to place a DSLAM at the remote terminal that is serving that end user. (*See* Tr. at 130. *See also* Williams

Rebuttal at 5). Unlike certain other network elements like loops and circuit switches, DSL technology and the DSLAMs that are necessary to make DSL technology work in a DLC environment are recent developments in the telecommunications industry. In fact, as recently as 1999, the FCC cited "the nascent nature of the advanced services marketplace" as supporting its decision not to order unbundling of the packet switching functionality (which it defined as including the DSLAM).[9] Thus, as FDN's witness acknowledged on cross-examination, most of the DSLAMs that currently are in BellSouth's remote terminals have been installed "in the past couple of years." (*See* Tr. at 147). FDN's witness also acknowledged that each time BellSouth has placed a DSLAM in a remote terminal, BellSouth has had to purchase the DSLAM, install the DSLAM in the remote terminal, and address any space or zoning issues that might have arisen with regard to that remote terminal. (*See* Tr. at 130-31. *See also* Williams Rebuttal at 5).

BellSouth witness Mr. Williams explained that when BellSouth began providing DSL service in Florida, it did not immediately begin installing DSLAMs in remote terminals in the hopes that the customers served by those terminals would purchase DSL services from BellSouth. Instead, BellSouth started providing DSL service using central office based solutions, and BellSouth installed DSLAMs in remote terminals as demand for the service warranted:

> Now, when BellSouth stared deploying their own data network, they didn't go out and start putting DSLAMs in all remote terminals because we didn't

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[9] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *Third Report and Fourth Further Notice of Proposed Rulemaking,* 15 FCC Rcd 3690 at ¶ 306 (1999) ("UNE Remand Order").

have any customers. So when you have no customers, you don't go out and spend that kind of money. What we did is, we started deploying central office based solutions, and we still have central office based solutions.[10] And then as you start building a base of customers, you start to look at where those customers are located. And what we found is that they cluster in neighborhoods.

Certain neighborhoods had a higher propensity to buy data services than others. And where you find those neighborhoods, then you start looking at what that remote site looks like, and you make a determination whether it makes sense to put a DSLAM in that remote terminal. And when we started deploying DSLAMs in remote terminals, we didn't use 48-port DSLAMs. We started using 8-port DSLAMs first. And we put the 8-port miniRAM in, that's what we called it, to take care of the neighborhood. And as we put that in, we took those lines from the central office who had been serving those and put them on the miniRAM, and then started looking for new customers in that neighborhood so that we could fill up that miniRAM. And once it started getting to being full, we started putting larger capacities in.

And that's how you build up a data network, not go out and try to deploy in all remote terminals at one time with large equipment and DS-3 feeder facilities. It's just simply not required when you have one or two customers.

(Tr. at 331-332). Mr. Williams also testified that once BellSouth began rolling out DSL services, the services often began selling themselves:

> We started with the 8-port systems, and then as those filled up -- and by the way, one thing we found out, once you put a remote solution in a remote terminal, the neighbors talk, and they start buying it. You don't have to advertise. They start saying, I got DSL and its great. And the next thing you know you're signing the whole neighborhood up and that miniRAM is full, and you've got to put a larger solution in.

(*See* Tr. at 340).

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[10] As Mr. Williams explained during the hearing, BellSouth is unable to use central office based solutions to provide DSL services to customers who are served through DLC or to customers who are served by loops that exceed 18,000 feet in length. (*See* Tr. at 388). When initially rolling out DSL services through central office based solutions, therefore, BellSouth is unable to serve any such customers who may request the DSL service. (*Id.*).

Even today, BellSouth has not placed a DSLAM in each of its remote terminals in Florida. (*See* Tr. at 147). Nor does it have any plans to do so. (*See* Tr. at 353). Currently, BellSouth plans to have placed DSLAMs at approximately one-third of its remote terminals in Florida by the end of 2001. (*See* Tr. at 152).

B. BellSouth supports FDN's ability to deploy DSL service in Florida.

FDN owns and operates central office switches in Orlando, Tampa, Jacksonville, and Ft. Lauderdale, and these switches are connected to nearby ILEC tandems. (*See* Gallagher Direct at 3). FDN leases collocation cages or has virtual collocation space in over 100 ILEC wire centers. (*See* Gallagher Direct at 3). FDN has collocated DSLAMs in certain BellSouth central offices in Florida, (*see* Tr. at 117), and FDN's DSLAMs are connected by transport facilities back to a packet switch on FDN's network. (*See* Tr. at 117-18).

As BellSouth witness Mr. Williams testified, FDN or any other ALEC that wants to provide DSL service where DLC is deployed can collocate a DSLAM at a BellSouth remote terminal. (*See* Williams Rebuttal at 5). This will allow the ALEC to provide the high speed data access in the same manner as BellSouth. (*See* Williams Rebuttal at 5). In order to do so, an ALEC like FDN must purchase a DSLAM, collocate that DSLAM at the BellSouth remote terminal, and connect that DSLAM to the end user's premises and to the BellSouth central office where FDN's equipment is collocated. The evidence presented during the hearing shows that FDN can do each of these three things.

FDN's witness, for example, testified that FDN can purchase its own DSLAMs. In fact, as noted above, FDN already has purchased DSLAMs, collocated them in certain BellSouth central offices, and connected them to its own packet switching

facilities. Moreover, FDN's witness testified on cross-examination that FDN is not having any problems finding vendors willing to sell FDN DSLAMs, and he stated that FDN is getting competitive offers and competitive pricing for DSLAMs. (Tr. at 144).

BellSouth witness Mr. Williams explained that FDN can collocate a DSLAM it has purchased at a BellSouth remote terminal.[11] If sufficient space exists within a remote terminal, BellSouth will allow an ALEC to collocate its DSLAM at that remote terminal.[12] (*See* Williams Rebuttal at 9). If sufficient space does not exist at a remote terminal and BellSouth has not installed its own DSLAM at that remote terminal, BellSouth will file a collocation waiver request as permitted by the UNE Remand Order. (*Id.*). If sufficient space does not exist at a remote terminal and BellSouth has installed its own DSLAM at that remote terminal, BellSouth will make reasonable and good-faith efforts to augment the space and allow an ALEC to collocate a DSLAM at the remote terminal. (*See* Williams Rebuttal at 9-10). On cross-examination, Mr. Williams emphasized BellSouth's commitment to augmenting space at a remote terminal in these situations by stating that "[o]ur executives looked me in the eye and said, 'Williams, you're to

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[11] During the hearing, FDN's witness testified that he has been told that FDN cannot have access to information that tells it where BellSouth has deployed a DSLAM at a remote terminal in Florida. (*See* Tr. at 131). In response to questions about this statement, BellSouth's witness Mr. Williams testified that he was unaware of FDN ever asking BellSouth for a list of addresses that are served by remote terminals, but he explained that BellSouth is willing to look into providing that type of information to FDN and other ALECs. (*See* Tr. at 389). During a Line Splitting / Line Sharing Collaborative Meeting that took place after the hearing, BellSouth noted that the Georgia Public Service Commission has ordered BellSouth to provide the following information to ALECs: 1) the address of each remote terminal; 2) the CLLI code of each remote terminal; 3) the carrier serving area of the remote terminal; 4) which remote terminals subtend a particular BellSouth central office; and 5) the number and addresses of the customers served by each central office. *See* Attachment A (Meeting Notes of the August 23, 2001 Line Splitting / Line Sharing Collaborative Meeting). BellSouth is considering the CPNI implications of the fifth item, but BellSouth is making the first four items available today in all states, including Florida. (*Id.*).

[12] An ALEC, therefore, can get a jump on BellSouth by placing a DSLAM in a remote terminal in which BellSouth has not yet installed its own DSLAM. (*See* Tr. 352).

make room, and if you [happen] to find a case where you think you cannot make room, you come see me.'" (*See* Tr. at 357).

As FDN's witness acknowledged on cross-examination, once FDN has collocated a DSLAM at a BellSouth remote terminal, BellSouth will sell FDN a UNE subloop between the remote terminal and the customers' premises and a UNE subloop between the remote terminal and the BellSouth central office. (*See* Tr. at 148. *See also* Williams Rebuttal at 6-7). FDN's witness further acknowledged that BellSouth has agreed to provide these UNEs at the rates established by the Commission. (*See* Tr. at 151). Once FDN collocates a DSLAM at a BellSouth remote terminal, therefore, all of the parts needed to complete a voice and data combination to serve an end user that is served by BellSouth DLC facilities are available to the ALEC. (*See* Williams Rebuttal at 7).

V. ARGUMENT

FDN wants this Commission to order BellSouth to unbundle the DSLAMs that BellSouth has purchased and installed in its remote terminals, and it wants this Commission to require BellSouth to provide access to these DSLAMs at TELRIC rates. (*See* Tr. at 143). FDN is not entitled to the relief it seeks because: the FCC already has declined to unbundle DSLAMs; this Commission already has declined to unbundle DSLAMs; and FDN has failed to make the requisite showing that its ability to provide DSL service is impaired if it does not have unbundled access to the DSLAMs BellSouth has installed in its remote terminals. Nor is BellSouth required to provide DSL service over a loop when it is not providing voice service over that loop. Finally, BellSouth is not required to offer BellSouth's federally-tariffed DSL service for resale at the

wholesale discount because BellSouth (and not an affiliate of BellSouth) offers that service on a wholesale (and not a retail) basis. Accordingly, BellSouth is not required to offer its federally-tariffed DSL service at the wholesale discount.

A. The FCC already has declined to unbundle DSLAMs.

In its *UNE Remand Order,*[13] the FCC stated that "[t]he packet switching network element includes the necessary electronics (*e.g.* routers *and DSLAMS*)." *Id.* at ¶304 (emphasis added). The FCC then expressly stated "*we decline at this time to unbundle the packet switching functionality, except in limited circumstances.*" *Id.* at ¶306 (emphasis added). These limited circumstances are set forth in Rule 51.319(c)(5), which states that an ILEC must provide unbundled packet switching *only* where *all* of the following conditions are satisfied:

> (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (*e.g.*, end office to remote terminal, pedestal or environmentally controlled vault);
>
> (ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
>
> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined under § 51.319(b); and

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[13] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, *Third Report and Fourth Further Notice of Proposed Rulemaking,* 15 FCC Rcd 3690 (1999) *("UNE Remand Order").*

(iv) The incumbent LEC has deployed packet switching capability for its own use.[14]

See 47 C.F.R. §51.319(c)(5).

1. The FCC consciously considered advanced services when it decided not to unbundle the DSLAM.

Throughout the *UNE Remand Order* in which it decided not to unbundled the DSLAM, the FCC demonstrated an acute awareness of and concern for advanced services. The FCC supported its decision to unbundle dark fiber, for instance, by noting that "unbundling of dark fiber is essential for competition in the provision of advanced services." *Id.* at ¶196. The FCC also noted that "access to the subloop will facilitate rapid development of competition, encourage facilities-based competition, and promote the deployment of advanced services," *Id.* at ¶207, and it clarified that incumbents are required to "provide loops with all their capabilities intact, that is, to provide conditioned loops, wherever a competitor requests, even if the incumbent is not itself offering xDSL to the end-user customer on that loop." *Id.* at ¶191. It is clear, therefore, that the FCC was interested in establishing UNEs in a manner that allows ALECs to offer advanced services.

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[14] FDN's witness attempts to eviscerate Rule 319(c)(5) by suggesting that if each of these four conditions exists anywhere in the State of Florida, BellSouth is somehow required to provide unbundled access to DSLAMs everywhere in the State of Florida. (*See* Gallagher Direct at 29-30). That simply is not the case. As the FCC stated in its *UNE Remand Order*:

> When an incumbent has deployed DLC systems, requesting carriers must install DSLAMs at the remote terminal instead of at the central office in order to provide advanced services. We agree that, *if* a requesting carrier is unable to install its DSLAM at *the* remote terminal or obtain spare copper loops necessary to offer the same level of quality for advanced services, the incumbent LEC can effectively deny competitors entry into the packet switching market. We find that *in this limited situation*, requesting carriers are impaired without access to unbundled packet switching.

Id. at ¶313 (emphasis added). The express language of this Order makes it clear that the FCC intended for this exception to apply only in limited situations and on a case-by-case basis. Requiring the statewide unbundling of packet switching simply because an ALEC can find one remote terminal to which this exception applies would impermissibly ignore the FCC's intent by allowing the limited exception to swallow the general rule.

It is equally clear, however, that the FCC recognized that ALECs can provide their own DSL services without having unbundled access to the DSLAMs BellSouth has installed in remote terminals. In Paragraph 190, for instance, the FCC states that:

> Unbundling basic loops, with their full capacity preserved, allows competitors to provide xDSL services.
>
> * * *
>
> Without access to these loops, competitors would be at a significant disadvantage, and the incumbent LEC, rather than the marketplace, would dictate the pace of the deployment of advanced services.

The FCC further stated that "[a]ccess to unbundled loops will also encourage competition to provide broadband services." *Id.* at ¶200. Thus with *one exception*, the FCC determined that "the loop includes attached electronics, including multiplexing equipment used to derive the loop transmission capacity." *Id.* at ¶175.

Significantly, that one exception is that the loop does *not* include the DSLAM. *Id.* The FCC stated, "we include the attached electronics (*with the exception of DSLAMs*) within the loop definition. *By contrast*, as we discuss below, we find that the DSLAM is a component of the packet switch network element." *Id.* (emphasis added). As noted above, the FCC then declined to require incumbents to unbundle the packet switch network functionality, which includes the DSLAM.

When it declined to require that ILECs unbundle DSLAMs, the FCC was well aware of the use of DLC by incumbent LECs. The FCC noted "carriers need unbundled subloops to serve subscribers currently served by IDLC[15] loops." *Id.* at ¶217. More specifically, the FCC explained,

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[15] IDLC, or integrated digital loop carrier, is a form of DLC. *See UNE Remand Order* at ¶217 ("IDLC technology allows a carrier to 'multiplex' and 'demultiplex' (combine and separate) traffic at a remote concentration point, or remote terminal, and to deliver the combined traffic directly into the switch, without first separating the traffic from the individual lines.").

> In order to reach subscribers served by the incumbent's IDLC loops, a requesting carrier usually must have access to those loops before the point where the traffic is multiplexed. That is where the end-user's distribution subloop can be diverted to the competitive LEC's feeder, before the signal is mixed with the traffic from the incumbent LEC's other distribution subloops for transport through the incumbent's IDLC feeder. Accordingly, we find that denying access at this point may preclude a requesting carrier from competing to provide service to customers served by the incumbent's IDLC facilities. This would particularly affect consumers in rural areas, where incumbent LECs use the greatest proportion of DLC loops.

Id.

The FCC also was well aware of the role that DSLAMs collocated in remote terminals play in the provisioning of xDSL service when it released its *UNE Remand Order.* Despite FDN's assertions to the contrary, the following language from the *UNE Remand Order* clearly establishes that the FCC was well aware that an ALEC would quite often have to collocate a DSLAM at a remote terminal in order to provide xDSL service over a UNE loop:

> competitors seeking to offer services using xDSL technology need to access the copper wire portion of the loop. In cases where the incumbent multiplexes its copper loops at a remote terminal to transport the traffic to the central office over fiber DLC facilities, a requesting carrier's ability to offer xDSL service to customers served over those facilities will be precluded, *unless* the competitor can gain access to the customer's copper loop before the traffic on that loop is multiplexed. Thus, we note that *the remote terminal has, to a substantial degree, assumed the role and significance traditionally associated with the central office.* In addition, in order to use its own facilities to provide xDSL service to a customer, a carrier must locate its DSLAM within a reasonable distance of the customer's premises, usually less than 18,000 feet. In both of these situations, a requesting carrier needs access to copper wire relatively close to the subscriber in order to serve the incumbent's customer.

Id. at ¶218 (emphasis added).

2. The FCC's decision not to unbundle the DSLAM is firmly grounded in sound public policy.

After making these statements, the FCC expressly declined to unbundle the packet switching functionality (which it defined to include DSLAMs) except in the very limited circumstances described above. The FCC came to this conclusion after carefully considering the manner in which proposed unbundled elements would affect an ALEC's ability to provide advanced services such as xDSL, recognizing how the existence of IDLC would impact the provisioning of advanced services such as xDSL, and noting that "the remote terminal has, to a substantial degree, assumed the role and significance traditionally associated with the central office." *Id.* at ¶¶ 304, 306. In deciding not to require incumbents to unbundle packet switching functionality, the FCC acknowledged that the advanced services market is highly competitive, and it recognized that forcing ILECs to unbundle equipment used to provide competitive advanced services would only impede the further development of competition:

> [W]e are mindful that regulatory action should not alter the successful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. *We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.*

(*Id.* ¶316.) (emphasis added). As explained below, FDN has presented no evidence in this proceeding to suggest that this Commission should reach a conclusion that is contrary to the FCC's decision not to unbundle the DSLAM.

B. This Commission already has declined to unbundle the DSLAM.

In addition to the FCC, this Commission has declined to require BellSouth to provide unbundled packet switching in at least two arbitration proceedings. In the BellSouth-Intermedia proceedings, for example, the Commission found "that BellSouth

shall only be required to unbundled its packet switching capabilities under the limited circumstances identified in FCC Rule 51.319(c)(5)." *See* Order No. PSC-00-1519-FOF-TP in Docket No. 99-1854-TP at 34. Similarly, in the BellSouth-ICG proceedings, the Commission found that "packet-switching capabilities are not UNEs". *See* Order No. PSC-00-0128-FOF-TP in Docket No. 99-0691-TP at 7. In doing so, the Commission noted that

> We do not believe that ICG's argument that innovation and competition necessitate TELRIC-based pricing of packet-switching capabilities sufficiently demonstrates that these capabilities are intended under the Act to be provided as UNEs. ICG has only argued its value to ICG's own business plan.

Id. Finally, in Docket No. 990649-TP (the generic cost docket), the Commission found that "there are no other elements or combinations of elements that we shall require BellSouth to unbundle at this time." *See* Order No. 990649-TP at 368.

C. FDN has failed to make the requisite showing that its ability to provide DSL service is impaired if it does not have access to the DSLAM.

Although this Commission has the authority to order a new UNE or to order the unbundling of the DLSAM, the Supreme Court's *Iowa Utilities Board* decision and the FCC's *UNE Remand Order* make it absolutely clear that a pre-condition to compelled unbundling of a non-proprietary network element is a finding of impairment for the services at issue based on a careful analysis of available alternatives. This Commission, therefore, may establish the DSLAM as a new UNE only if the evidence FDN presented during the hearing satisfies the statutory impairment standard.

Under the statutory impairment standard, this Commission may order BellSouth to unbundle a non-proprietary network element (in this case, the DSLAM at the remote terminal) only if "lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." *UNE Remand Order* at ¶51.

The "materiality" component of this standard "requires that there be substantive differences between the alternative outside the incumbent LEC's network and the incumbent LEC's network element that, collectively, 'impair' a competitive LEC's ability to provide service within the meaning of section 251(d)(2)." *Id.* As explained below, FDN has failed to prove that its ability to provide DSL services is "materially diminished" if the DSLAMs that BellSouth has installed in remote terminals over the past few years are not unbundled.

1. FDN has failed to prove that the costs associated with collocating DSLAMs at BellSouth's remote terminals impair its ability to provide DSL service.

In order to provide DSL service to an end user served by DLC, FDN needs to purchase a DSLAM, install that DSLAM in a remote terminal, and connect the DSLAM to the end user and to the central office. FDN has claimed that doing so is prohibitively expensive. In many cases, this claim is based on inaccurate information, and in all cases this claim is simply wrong.

a. The costs of buying a DSLAM do not impair FDN's ability to provide DSL service.

FDN clearly is not impaired in its ability to purchase DSLAMs. FDN's witness, for example, testified on cross-examination that FDN is not having any problems finding vendors who are willing to sell FDN a DSLAM. (Tr. at 144). He also acknowledged that FDN is getting competitive offers and competitive pricing for DSLAMs. (*Id.*).

Moreover, the testimony of FDN's witness that "I'll never be ubiquitous" because it would cost too much for FDN to purchase and install a DSLAM in every remote terminal in Florida is a red herring. (*See* Tr. at 98.). Ubiquity is not the test for

impairment, especially with regard to network elements (like DSLAMs) that are not ubiquitously deployed by the ILEC. In the *UNE Remand* Order, for instance, the FCC was concerned with advantages "obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies." *See UNE Remand Order* at ¶86. It explained that "these government-sanctioned advantages remain barriers to the requesting carriers' ability to provide a range of services to a wide array of customers, and that their existence justifies placing a duty on the incumbent carriers to share their network facilities." *Id.*

In stark contrast to the type of facilities the FCC was addressing, BellSouth enjoys neither economies nor ubiquity with regard to the DSLAM equipment that FDN is asking the Commission to unbundle in this docket. Unlike circuit switches or loops, BellSouth did not have a significant number of DSLAMs sitting in remote terminals on the effective date of the 1996 Act. *See UNE Remand Order* at ¶308 (noting that "the incumbent LEC does not retain a monopoly position in the advanced services market."). As BellSouth witness Mr. Williams explained, BellSouth has not collocated a DSLAM in each of its remote terminals in Florida, (*see* Tr. at 147), and BellSouth has no plans to do so. (Tr. at 353). Moreover, as BellSouth Witness Mr. Ruscilli testified, BellSouth's high-speed Internet access service is "not ubiquitous in a particular city where we're deploying it." (Tr. at 212).

This testimony is consistent with FDN's testimony on the same point. FDN's witness acknowledged on cross-examination that most of the DSLAMs that currently are in BellSouth's remote terminals have been installed "in the past couple of years." (*See* Tr. at 147). During those past couple of years, FDN could have been purchasing

its own DSLAMs and collocating them in BellSouth's remote terminals. The fact that it elected not to do so hardly entitles FDN to complain that it must now be granted unbundled access to these DSLAMs so that FDN can "catch-up" when nothing prevented FDN from starting the race at the same time that BellSouth started the race.

b. The costs of collocating DSLAMs at BellSouth's remote terminals do not impair FDN's ability to provide DSL service.

FDN's witness acknowledges that when his direct testimony was filed, he was unaware of the collocation policies addressed in the rebuttal testimony of BellSouth witness Mr. Williams. (*See* Tr. at 144). Accordingly, many of the assumptions FDN's witness made regarding the time and costs associated with collocating DSLAMs at BellSouth's remote terminals are simply incorrect. FDN's witness, for instance, stated during the summary of his testimony that the application fee for central office collocation was about $3,000, and he believed that the application fee for remote terminal collocation was the same. (*See Tr.* at 98). On cross-examination, however, FDN's witness acknowledged that FDN has never submitted an application for collocation at a BellSouth remote terminal and that he had no reason to dispute BellSouth's evidence that the fee for such application is $615.61 and not $3,000. (Tr. at 115, 145).

Even though FDN has never submitted an application for collocation at a BellSouth remote terminal, FDN's witness testified that collocating a DSLAM at a remote terminal is physically impossible in some cases because some remote terminals are too small to support additional collocation. (*See* Gallagher Direct at 21). FDN's witness then goes on to describe various costs FDN might incur in building external structures in such instances. (*Id.* at 21-22). BellSouth witness Tommy Williams,

however, testified that if sufficient space does not exist within a remote terminal in which BellSouth has installed its own DSLAM, BellSouth will make reasonable and good-faith efforts to augment the space and allow the ALEC to collocate a DSLAM at the remote terminal. (*See* Williams Rebuttal at 9-10).

On cross-examination, Mr. Williams emphasized BellSouth's commitment to augmenting space at a remote terminal in these situations by stating that "[o]ur executives looked me in the eye and said, 'Williams, you're to make room, and if [happen] to find a case where you think you cannot make room, you come see me.'" (*See* Tr. at 357). FDN, therefore, will not have to build an external structure at a remote terminal that already houses a BellSouth DSLAM. Mr. Williams also testified that BellSouth -- and not FDN -- will bear the burden and the associated costs of resolving any zoning issues that may arise in the course of adding space to such a remote terminal. (*See* Tr. at 362; Williams Rebuttal at 10).

FDN's witness also claims that FDN should not be required to collocate DSLAMs where BellSouth has employed next generation digital loop carriers ("NGDLC") because BellSouth uses digital line cards rather than DSLAMs where NGDLC is deployed. (Gallagher Direct at 24). Once again, FDN's witness is simply mistaken. BellSouth witness Tommy Williams testified that only about seven percent of BellSouth's access lines are served by NGDLC systems, and of this seven percent, only a very small number that were used for testing purposes are equipped with cards that are capable of performing DSLAM functions. (Williams Rebuttal at 9).

c. The costs of obtaining transport do not impair FDN's ability to provide DSL service.

FDN's witness claims that "in most cases, FDN could only use a remotely-collocated DSLAM if it were to construct its own fiber-optic transport between the remote terminal and FDN's facilities, such as those it has located at BellSouth's central office." (Gallagher Direct at 19-20). He then describes the costs he believes would be associated with such construction. (*Id.*) Once again, this testimony is based on inaccurate assumptions.

FDN's witness acknowledged on cross examination that BellSouth will sell FDN a UNE subloop between the remote terminal and the customer premises and a UNE subloop between the remote terminal and the BellSouth central office. (*See* Tr. at 148. *See also* Williams Rebuttal at 6-7). FDN's witness further acknowledged that BellSouth has agreed to provide these UNEs at the rates established by the Commission. (*See* Tr. at 151). To the extent that FDN is "possibly" attempting to take issue with the TELRIC prices that apply to these UNEs,[16] FDN is too late. As FDN's witness acknowledged, FDN participated in the recent UNE docket before the Commission, and FDN had an opportunity to seek different UNEs or different rates for existing UNEs in that docket. (*See* Tr. at 151).

Additionally, when FDN's witness discussed the possibility of using UNEs for transport during his summary, he talked about purchasing a DS-3 from BellSouth. (*See* Tr. at 101). In response to a question from the bench, however, FDN's witness acknowledged that a DS-3 has more capacity than FDN would need in many instances.

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[16] When Commissioner Deason asked if FDN was taking issue with the TELRIC prices that apply to these UNEs, FDN's witness replied, "well, possibly." (Tr. at 103).

(Tr. at 102). In fact, BellSouth witness Mr. Williams explained that if FDN were using an 8-port DSLAM to provide DSL service to its customers, it would need no more than a DS-1 in the vast majority of circumstances. (Tr. at 385-86).

2. The time involved in collocating DSLAMs at remote terminals does not impair FDN's ability to provide DSL service.

The FCC has concluded that "delays caused by the unavailability of unbundled network elements that exceed six months to one year may, taken together with other factors, materially diminish the ability of competitive LECs to provide the services that they seek to offer." *UNE Remand Order* at ¶89. In his prefiled testimony, FDN's witness stated that "collocat[ing] remote DSLAMs and construct[ing] or obtain[ing] lit fiber to the central office . . . in my estimation would require well more than one year before FDN could start to provide service, and perhaps much longer." (*See* Gallagher Direct at 24-25). As noted above, however, FDN is not required to construct or obtain lit fiber to the central office because BellSouth offers UNE subloops between the remote terminal and the central office. Moreover, the only evidence FDN's witness presented in support of this contention was the statement that "it is my understanding that in one of the few instances where an ALEC attempted to collocate a DSLAM at an ILEC remote terminal, cross-connection and construction issues remained unresolved more than one year after the initial collocation request was made." (Gallagher Direct at 25.)

During the hearing, FDN's witness acknowledged that he was relying on rumors that he could not substantiate when he made that statement. (*See* Tr. at 145-46). On cross-examination, FDN's witness further testified that the ILEC involved was not BellSouth, that the instance to which his testimony alludes did not take place in

BellSouth's territory, and that he does not know whether the ILEC involved in that instance had policies on collocation that are similar to what BellSouth witness Mr. Williams describes in his testimony. (*See* Tr. at 146-47).

In sharp contrast, Mr. Williams testified that "[w]hile the time will often be much shorter, BellSouth should de able to accommodate most [remote terminal] collocation requests well within six months." (*See* Williams Rebuttal at 20). FDN presented no evidence to refute this testimony. FDN, therefore, has failed to prove that the time involved in collocating DSLAMs in remote terminals would impair FDN's ability to provide DSL service.

3. Unbundling the DSLAM will promote neither the rapid introduction of competition in all markets nor facilities-based competition, investment, and innovation.

In determining whether to unbundle a network element, this Commission may consider "whether the unbundling obligation is likely to encourage requesting carriers to rapidly enter the local market *and serve the greatest number of customers.*" *UNE Remand Order* at ¶107 (emphasis added). The Commission also may consider "the extent to which the unbundling obligations . . . will advance the development of facilities-based competition and will encourage innovation by both incumbent and competitive LECs." *Id.* at ¶110. The evidence presented at the hearing shows that unbundling the DSLAM will do neither.

On cross-examination, FDN's witness acknowledged that if the Commission grants the relief FDN is seeking, the universe of end users who are able to receive both voice service and data service over the same line will not be expanded. (Tr. at 154-55). Instead, FDN would be able to provide voice and data on the same line only to those

end users who already can get voice and data over the same line from BellSouth. (*Id.*). End users who are served through DLC out of a remote terminal in which BellSouth has not located a DSLAM, however, would still not have access to DSL.

In contrast, if BellSouth's position is adopted, FDN and other ALECs may decide to get a jump on BellSouth by collocating DSLAMs in a remote terminal in which BellSouth has not yet deployed a DSLAM. (Tr. at 352). After all, FDN's witness acknowledged that "there's a huge market [for DSL] in some of the most rural areas" in the state of Florida. (*See* Tr. at 108). In that event, customers who cannot get voice and data over a single line from any telecommunications service provider[17] could then get voice and data over the same line from FDN or other ALECs. Tr. at 154-55.

Additionally, unbundling the DSLAM after both the FCC and this Commission have declined to do so in the past would have a chilling effect on BellSouth's incentives to invest in the technologies upon which advanced services depend. As the FCC explained:

> investments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets. Customer demand for advanced services is also more difficult to predict accurately than is the demand for well established services, such as traditional plain old telephone service (POTS).

See UNE Remand Order at ¶314. ALECs, however, will not have any incentive to invest in equipment to provide advanced services if they can ride the backs of, and shift investment risks to, the ILECs. To the contrary, ALECs will be incented to do what FDN

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[17] Neither BellSouth nor incumbents in general are the leading providers of advanced services. As BellSouth witness Mr. Ruscilli noted, "cable is clearly the dominant player. It's about two to one over DSL . . ." (*See* Tr. at 235). Additionally, Exhibit TGW-1 to BellSouth witness Tommy Williams' rebuttal testimony shows that of existing residential households that have broadband, 73% have cable modems and 26% have DSL.

has done in this case: watch BellSouth assume all of the risks associated with new investments and, when these investments yield rewards, ask for permission to reap where they have not sown.

Clearly, an ILEC's incentive to invest in new and innovative equipment will be stifled if its competitors, who can just as easily invest in the equipment, can take advantage of the equipment's use without incurring any of the risk. C. Michael Armstrong of AT&T made exactly this point in a speech, entitled *Telecom and Cable TV: Shared Prospects of the Communications Future,* which he delivered to the Washington Metropolitan Cable Club in November of 1998:

> No company would invest billions of dollars . . . if competitors which have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride in the investments and risks of others.

(*See* Ruscilli Rebuttal at 17-18). FDN's own witness acknowledged the truth of this statement by testifying that FDN is unwilling to commit that it would allow other carriers access to any DSLAMs that it might collocate in remote terminals, especially at TELRIC rates. (*Tr.* at 155-56). Affirming the prior rulings of the FCC and this Commission, therefore, will do more to promote the rapid introduction of competition in all markets and to promote facilities-based competition, investment, and innovation than would changing course and granting the relief FDN seeks in this proceeding.

4. FDN can provide DSL service to its voice customers who are served through DLC even if it does not deploy a DSLAM at BellSouth's remote terminals.

FDN states that it is concerned about losing its voice customers who want both DSL and voice service over the same line. (*See, e.g.,* Tr. at 164). While it is true that BellSouth does not provide DSL service over a UNE-loop that an ALEC is using to

provide voice service to an end user,[18] BellSouth will provide DSL service over a line that is being resold by an ALEC. (*See* Tr. at 248, 370). Thus, if FDN wants to provide both voice and data service to an end user over a single line without collocating a DSLAM at a remote terminal, FDN can do so by reselling BellSouth's service to that end user.

If, for instance, an FDN business customer wants four voice lines and one data line, FDN can use four UNE arrangements to provide the voice service and one resold line to provide the data service. This would allow FDN to retain this customer's business while waiting to see if additional business customers that are served from the same remote terminal begin ordering DSL service from FDN. If that happens, FDN can collocate a small DSLAM at that remote terminal, convert the one line from resale to a UNE arrangement, and use the collocated DSLAM to provide DSL service over that UNE arrangement. If no additional customers served from that remote terminal request DSL service, FDN can continue to provide that business customer data service over a single resold line.

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[18] In a recent Order, the FCC stated that "[w]e deny, however, AT&T's request that the Commission clarify that the incumbent LECs must continue to provide xDSL service in the event customers choose to obtain service from a competitive carrier on the same line because we find that the Line Sharing Order contained no such requirement." *See In Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order No. FCC 01-26 in CC Docket Nos. 98-147, 96-98 (Released January 19, 2001) at ¶26. As noted above, this Commission relied on this FCC order in ruling that "[I]f WorldCom purchases the UNE-P, WorldCom becomes the voice provider over that loop/port combination. Therefore, BellSouth is no longer required to provide line sharing over that loop/port combination." Order No. PSC-01-0824-FOF-TP in Docket No. 000649-TP at 51.

FDN's problem with this approach has nothing to do with the availability of DSL service to FDN's end users. Instead, FDN' problem with this approach is simply one of money. As FDN's witness put it during the hearing:

> the wholesale rate . . ., it's like 35 bucks. Their retail rate is 45 bucks. *So there's not much arbitrage in there* . . . .

(Tr. at 134). As noted above, however, the applicable legal standard is not whether unbundling the DSLAM will provide a boost to FDN's arbitrage efforts. Instead, the standard is whether FDN is impaired in its ability to provide DSL services, and the proof presented at the hearing clearly shows that it is not. The Commission, therefore, should rule in BellSouth's favor in the sole remaining issue in this proceeding.

D. BellSouth is not required to provide DSL service over a UNE loop that FDN is using to provide voice service to an end user.

Decisions by both the FCC and this Commission make it clear that BellSouth is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop. In a recent Order, for instance, the FCC stated,

> "We deny, however, AT&T's request that the Commission clarify that the incumbent LECs must continue to provide xDSL service in the event customers choose to obtain service from a competing carrier on the same line because we find that the *Line Sharing Order* contained no such requirement."

See In Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order No. FCC 01-26 in CC Docket Nos. 98-147, 96-98 (Released January 19, 2001) at ¶26. The FCC then expressly stated that its *Line Sharing Order* "does not require that [LECs] provide xDSL service when they are no longer the voice provider." *Id.*

This Commission reached the same conclusion in the BellSouth-Worldcom arbitration proceedings, stating that:

> [w]hile we acknowledge WorldCom's concern regarding the status of the DSL service over a shared loop when WorldCom wins the voice service from BellSouth, we believe the FCC addressed this situation in its Line Sharing Order. The FCC states that "We note that in the event that the customer terminates its incumbent LEC provided voice service, for whatever reason, the competitive data LEC is required to purchase the full stand-alone loop network element if it wishes to continue providing xDSL service." FCC 99-355, ¶72.

Order No. PSC-01-0824-FOF-TP in Docket No. 000649-TP at 51. This Commission concluded that "[i]f WorldCom purchases the UNE-P, WorldCom becomes the voice provider over that loop/port combination. Therefore, BellSouth is no longer required to provide line sharing over that loop/port combination." *Id.*

Other Commissions have reached similar conclusions. In an arbitration proceeding before the Public Service Commission of South Carolina, for instance, IDS Telecom, LLC alleged that it was anticompetitive for BellSouth not to provide DSL services over a loop that an ALEC is using to provide voice service. The South Carolina Commission rejected IDS's allegations, stating:

> IDS's allegation is without merit. The FCC recently stated that "we deny AT&T's request for clarification that under the Line Sharing Order, incumbent LECs are not permitted to deny their xDSL [data] services to customers who obtain voice service from a competing carrier where the competing carrier agrees to the use of its loop for that purpose." After denying AT&T's request, the FCC reiterated that "[a]lthough the Line Sharing Order obligated incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where the incumbent LEC provides voice service, it does <u>not</u> require that they provide xDSL service when they are no longer the voice provider." Clearly, the FCC has not required an incumbent LEC to provide xDSL service to a particular end user when the incumbent LEC is no longer providing voice service to that end user. IDS' contention that this practice

> is anticompetitive is therefore not persuasive when BellSouth is acting in accordance with the express language of the FCC's most recent Order on the subject.

See Order on Arbitration, *In re Petition of IDS Telecom, LLC for Arbitration of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252(b)*, Order No. 2001-286 in Docket No. 2001-19-C at 28-29 (April 3, 2001)(emphasis added).

Finally, last week's FCC decision in its Verizon Pennsylvania 271 Order supports BellSouth's position on this issue. In that Order, the FCC stated:

> we cannot agree with commenting parties arguing that Verizon must permit resale of DSL service in conjunction with voice service provided using the UNE loop or UNE-P in order to demonstrate compliance with [Checklist Item No. 14].

Clearly, BellSouth is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop.

E. BellSouth is not required to offer its federally-tariffed DSL service for resale at the wholesale discount.

BellSouth's FastAccess Internet Service is a combination of a federally-tariffed wholesale DSL service (which was analogized to a pipe during the hearings) and e-mail, Internet, and other enhanced services (which were analogized to the water that flows through the DSL pipe during the hearings). (*See* Tr. at 138-39). FDN acknowledges that it is *not* asking the Commission to order BellSouth to resell its FastAccess Internet Service. Instead, FDN is only asking the Commission to require

BellSouth to offer its federally-tariffed DSL service (the pipe) for resale at the wholesale discount. (*See Id.*; Tr. at 152-53; Gallagher Direct at 36).[19]

BellSouth, however, is not required to offer its federally-tariffed DSL service for resale at the wholesale discount. Section 251(c)(4) of the 1996 Act requires BellSouth to "offer for resale at wholesale rates any telecommunications service that [it] provides *at retail* to subscribers who are not telecommunications carriers." Earlier this summer, the D.C. Circuit Court of Appeals affirmed the FCC's decision that

> while an incumbent LEC DSL offering to residential and business end-users is clearly a retail offering designed for and sold to the ultimate end-user, an incumbent LEC offering of DSL service to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offerings is not a retail offering. Accordingly, . . . DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4) . . . . [H]owever, . . . section 251(c)(4) does not apply where the incumbent LEC offers DSL services as an input component to Internet Service Providers who combine the DSL service with their own Internet Service.

See Association of Communications Enterprises v. FCC, 253 F.3d 29, 31 (D.C. Cir. 2001).

Nothing in the record suggests that BellSouth's federally-tariffed DSL service is a retail offering. To the contrary, BellSouth witness Mr. Ruscilli testified that BellSouth's federally-tariffed DSL service is offered only on a wholesale basis, and he explained that a customer that wants to obtain high-speed Internet access from an Internet

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[19] Even if FDN sought to purchase BellSouth's FastAccess Internet service for resale to its end users, it would not be entitled to do so. As both Mr. Ruscilli and FDN's witness testified, BellSouth's FastAccess Internet service is an enhanced service, as opposed to a telecommunications service. (See Tr. at 217; Gallagher Direct at 36). The resale provisions of the 1996 Act, however, apply solely to telecommunications services. *See* 47 U.S.C. §251(b)(1), (c)(4)(A). BellSouth, therefore, is not required to offer FDN its FastAccess Internet service for resale.

service provider other than BellSouth cannot order the DSL service on a stand-alone basis. (*See* Tr. at 269). Instead, that customer

> could . . . contact Earthlink or another ISP that advertises that they offer some sort of DSL or high-speed access type service [and] place an order with them. And then that particular carrier would . . . check and see if it was available in that particular customer's community and then at that address, and see if facilities were available and provide service that way.
>
> Comm'r Deason: So then it would be incumbent upon the alternative ISP then to actually make arrangements with BellSouth to install the DSL capability for that particular location?
>
> Mr. Ruscilli: That's correct. That's what they are buying out of [BellSouth's] FCC tariff.

(Tr. at 220-221). The testimony of FDN's witness was entirely consistent with Mr. Ruscilli's testimony on this point: "the [end user] cannot get the DSL service from BellSouth directly. The DSL service is only being offered to the Internet provider, so the only way the [end user] can get the tariffed DSL service is through an Internet provider." (*See* Tr. at 141). It is undisputed, therefore, that BellSouth offers its DSL service only on a wholesale basis. Under the *Association of Communications Enterprises* decision discussed above, therefore, BellSouth is not required to offer its DSL service for resale at the wholesale discount.

As FDN's witness notes, the D.C. Circuit recently held that an ILEC may not "sideslip §251(c)'s [resale] requirements by simply offering telecommunications services through a wholly owned affiliate."[20] *See Association of Communications Enterprises v.*

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[20] On a related note, Commissioner Jaber asked Mr. Ruscilli whether it was possible that BellSouth.net was established "just for the purpose of ensuring that the FastAccess service and the Internet provisioning wouldn't look like a wholesale function and, therefore, constitute an unbundled network element." (*See* Tr. 237). Mr. Ruscilli explained that this could not be the case because

FCC, 235 F.3d 662, 666 (D.C. Cir. 2001)[21] (cited in Gallagher Direct at 35-36). Relying on this decision, FDN argues that BellSouth should be required to offer its federally-tariffed DSL service for resale at the wholesale discount because, according to FDN, BellSouth "does sell retail DSL through an ISP that it owns and controls." (*See* Gallagher Direct at 34). As is apparent from the cross-examination of BellSouth witness John Ruscilli, FDN believes that BellSouth.net, Inc. ("BellSouth.net"), an affiliate of BellSouth, is an ISP that provides service to end users. Once again, FDN is simply mistaken.

As BellSouth witness Mr. Ruscilli noted, BellSouth.net does not provide service to end users. (*See* Tr. at 223; Exhibit 5, Item No. 68). BellSouth.net is not, and never has been, an Internet service provider,[22] (*see* Ex. 10), nor does BellSouth have a separate affiliate that provides Internet access service. (*See* Ex. 10, Item No. 9(a)). Instead, BellSouth's FastAccess Internet Service is sold by BellSouth Telecommunications, Inc. as a non-regulated Internet access service offering. (*See* Exhibit 3, Item No. 8(b)). BellSouth Telecommunications, Inc. uses its tariffed, wholesale DSL service to provide its FastAccess Internet Service, and it accounts for

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BellSouth.net was formed when BellSouth began providing dial-up Internet access -- long before BellSouth began offering its FastAccess Internet service. (*Id*).

[21] This is not the same case as discussed above – the D.C. Circuit issues opinions this year in two separate cases between the Association of Communications Enterprises and the FCC.

[22] At one point during cross-examination, Mr. Ruscilli erroneously stated that BellSouth is not an ISP. (*See* Tr. at 213). Later, Mr. Ruscilli acknowledged this mistake and deferred to Exhibit 10, which states that BellSouth.net is not, and never has been, an Internet service provider and that BellSouth Telecommunications, Inc. is the Internet service provider. (*See* Tr. at 233-34). Mr. Ruscilli also confirmed that Exhibit 5, Item No. 68 accurately describes the manner in which BellSouth's FastAccess Internet service is provided. (Tr. at 234-35).

the costs of this DSL service at the tariffed rates in accordance with applicable FCC requirements. (*See* Tr. at 216, 223-24; Exhibit 5, Item No. 68). FDN, therefore, is simply wrong when it states that BellSouth is selling its FastAccess Internet Service through an affiliate, and its reliance on the D.C. Circuit's January 9, 2001 decision in *ASCENT v. FCC* is misplaced. BellSouth, therefore, is not required to open its federally-tariffed DSL service for resale at the wholesale discount.

CONCLUSION

For the reasons set forth above, BellSouth requests that the Commission adopt BellSouth's position on the unresolved issue in this proceeding.

Respectfully submitted this 26th day of September, 2001.

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Attachment A

BST - Line Splitting/Line Sharing Collaborative Meeting
Meeting Notes – August 23, 2001

ATTENDEES:	Al Tousek	Diann Hammond	Debbie Timmons	Darryl Millard	Larry Thomas
Via Bridge:	Richard McDaniel	Dan Peer	Craig Uptagrafft	Michael Holt	Margaret Largent
	Theresa Hall	Melissa Mathews	Beth Gunn	Erick Gamble	Tommy Williams
	Colette Davis	Mark Myslinski			

FROM: Al Tousek – PMSI • Project Mentors

Notes:
A general announcement was made regarding the product availability date. Webshoppe had requested last week to investigate the feasibility of accelerating the original announced date of November 30. Due to the existing SME resource availability restrictions and the Labor Day holiday week the decision was made to maintain the present availability date.

1. **Remote Site HFS Line Sharing**
   Larry Thomas, collocation project manager, joined the meeting for the issues/action items discussion.
   - **Issues/Action Items Review**
     The following collocation issues were addressed in detail:
     0809-01 – What is the collocation process when an RT targeted by a DLEC has no space available?
     The collocation process for remote sites where there is no space available is basically the same as the process followed in the CO. Physical, virtual and adjacent collocation options are all available at remote sites.
     Adjacent collocation is restricted as in some cases where the BellSouth lease restricts the use of the land to BellSouth only. In these instances BellSouth would attempt to negotiate a modification to the lease to allow the presence of a third party cabinet.
     Construction of additional BellSouth cabinets is an option where space is available.

     0816-02 - Collaborative requested that the item requesting BST to provide information documenting the number of customers served from an RT
     The Georgia xDSL Data Coalition Settlement addresses this item whereby BellSouth was ordered to provide the following information: 1) the address of the RT, 2) the CLLI code of the RT, 3) the carrier serving area of the RT, 4) which RTs subtend a particular CO, and 5) the number & addresses of the customers served by the RT. BellSouth is awaiting the ruling from a CPNI attorney regarding the possible conflicts of item 5 with CPNI rules. The information is available today on "order of request" basis. The data is provided on a CD in the format of the BellSouth systems extract. There is a maximum limit of 30 COs/DLEC/month with a maximum of 120 wire centers total per month for all CLECs. BellSouth is providing this information today for items 1-4. A contract addendum to the Interconnection Agreement is required in order to request this information. Any CLEC/DLEC interested in obtaining this information should contact their contract negotiator. BellSouth will make this information available in all states.

     0816-03 - What documentation can BST provide to cross reference the RT CLLI codes back to the serving COs?
     This item was also addressed in the Georgia xDSL Settlement, which ruled that information regarding the RTs subtended, by a particular CO has to be provided. This information is also available via the ad hoc information request as discussed above in 0816-02.

     Refer to the attached updated issues/action items log

2. Line Sharing

- **Test Set Discussion**

  Tommy Williams, Senior Product Manager, joined the collaborative for this discussion and provided the group some background regarding testing in the line sharing environment at BellSouth. Testing has always been a widely discussed subject throughout the history of the collaborative addressing such subjects as test access, cooperative testing, etc. Last fall BellSouth identified the requirement to test for the presence of the internal wiring for the line sharing environment. A test set was developed, designed, purchased and deployed in the January time frame. This test set known as Line Sharing Verification Transmitter (LSVT) is fully deployed in BellSouth with procedures throughout the BellSouth region.

  Covad reported that on occasion CO techs have utilized the SunSet test set used by BellSouth in the ADSL environment by mistake. Covad believes this test set to have more capabilities than the LSVT set and wants the option to request this unit be used in addition to the LSVT.

  Tommy Williams requested specific instances where the SunSet unit was used and what capability the unit demonstrated that the LSVT could not. Erick Gamble indicated that the request from Georgia PSC Commissioner Burgess was to identify the differences in the two test sets and specifics were required to accomplish this evaluation. Covad added that commissioner Burgess also requested that the issue be brought before the CLEC community in order to obtain their inputs as well.

  Covad indicated that the requested specifics were not readily available but agreed to provide them to BellSouth for evaluation by the end of business on Friday, August 24..

  Covad further reinforced their position that they want the option to request the use of the SunSet unit on trouble tickets.

  BellSouth asked Covad to identify what information does the SunSet unit provide over the LSVT unit.

  Covad indicated they currently have no test set equipment.

  Tommy Williams indicated that test compatibility across all the CLEC/DLEC equipment has always been the concern of BellSouth.

  Covad indicated that their equipment is compatible with the BellSouth network and the SunSet test set.

  Inputs were solicited from the other DLECs present. Duro reported that they are not in a position to comment. BellSouth agreed to distribute the Covad inputs to the collaborative.

  Covad requested that BellSouth provide the technical specifications for both the SunSet and LSVT test sets to the collaborative. Tommy Williams agreed that BellSouth would provide overviews of both products to the collaborative.

- **% DLC Report**

  The %DLC report was presented, reviewed and accepted.

  A change request has been submitted to mechanize the report. An action item was opened to track this activity.

  This report will be posted on the Collaborative web site.

Refer to the attached %DLC report

- **Carrier Notification Update**
  The Manual DLEC Notification Process CLEC Information Package was presented, reviewed and accepted by the collaborative.

  This document will be posted on the collaborative web site.
  Refer to the attached Manual DLEC Notification Process CLEC Information Package
- **Issues/Action Items Update**
  Issues/action items were reviewed and updated.
  Refer to the attached updated issues/action items log

3. **Line Splitting**
   - **Ordering Mechanization Follow-up**
     No update available at the time of the meeting.
   - **Product Matrix Discussion**
     Matrix was presented and discussed. It was agreed the format looked good. The document will be posted on the collaborative web site as a work in progress.

     The line splitting option of taking a UNE-P to line splitting with BellSouth owning the splitter has not been previously discussed and has to be included in the prioritization. Since ATT was not present a call for reprioritization will be made at the next collaborative.
     Refer to the attached updated Product Matrix
   - **Collaborative ETET Status Update**
     The LSOD has been submitted to CRSG and is in process.

4. **Next Meeting Agenda Inputs**
   Line splitting prioritization
   Test set discussion follow-up
   Remote Site Order Document (RSOD)
   RS Provisioning process review
   Next meeting will be planned as a conference call.

❑ **Attached Items:**

1. Updated RS Issues/Action Items Log
2. Updated Line Sharing Issues/Action Items Log
3. % DLC Report
4. Manual DLEC Notification Process
5. Line Splitting Product Matrix
6. Test Set Overview Document

❑ **Next Scheduled Meeting:**

12 00 Noon EDT Thursday, August 30, 2001 Conference Call

Attachment B

DSL to Business Customers

	Zone 1	Zone 2	Zone 3	Average
BellSouth FastAccess[1]	$79.00	$79.00	$79.00	$79.00
Per-Customer Hybrid Loop	$52.76[2]	$58.68[3]	$109.40[4]	$58.48
Margin	$26.24	$20.32	-$30.40	$20.52
% Margin	49.7%	34.6%	-27.8%	35.1%
% BellSouth Access Lines[5]	29%	68%	3%	

[1] *See* Tr. at 72.

[2] This $52.76 figure was calculated in the same manner as the Zone 1 figures set forth in the pre-filed testimony of FDN's witness, only using the cost figures that appear in BellSouth's late-filed Exhibit No. 51. (*See* Tr. at 630-31). As FDN's witness noted during the hearing, this results in a slight increase in the cost of the hybrid loop over the cost set out in FDN's pre-filed testimony. The Zone 1 DSLAM Monthly Charges are $524.97. (*See* Late-Filed Exhibit 51, Item A.20.System). The Zone 1 DS1 Monthly Charges are $150.08 (*Id.*, Item A.20.DS1). The Zone 1 Distribution Subloop Monthly Charges are $169.12, which consists of 16 subloops at $10.57 apiece. (*Id.*, Item A.2.2; A.20.Activation). The Total Monthly Recurring Charges are $844.17, which is simply the sum of the DSLAM Monthly Recurring Charges, the DS1 Monthly Charges, and the Distribution Subloop Monthly Charges. The Average Monthly Cost Per Subscriber of $52.76 that is set forth in the chart above is the $844.17 Total Monthly Recurring Charges divided by 16 customers.

[3] This $58.68 figure was calculated in the same manner as the corresponding Zone 1 and Zone 3 figures set forth in the pre-filed testimony of FDN's witness, only using the cost figures that appear in BellSouth's late-filed Exhibit No. 51. (*See* Tr. at 630-31). The Zone 2 DSLAM Monthly Charges are $549.82. (*See* Late-Filed Exhibit 51, Item A.20.System). The Zone 2 DS1 Monthly Charges are $174.92 (*Id.*, Item A.20.DS1). The Zone 2 Distribution Subloop Monthly Charges are $214.08, which consists of 16 subloops at $13.38 apiece. (*Id.*, Item A.2.2; A.20.Activation). The Total Monthly Recurring Charges are $938.82, which is simply the sum of the DSLAM Monthly Recurring Charges, the DS1 Monthly Charges, and the Distribution Subloop Monthly Charges. The Average Monthly Cost Per Subscriber of $58.68 that is set forth in the chart above is the $938.82 Total Monthly Recurring Charges divided by 16 customers.

[4] This $109.40 figure was calculated in the same manner as the Zone 3 figures set forth in the pre-filed testimony of FDN's witness, only using the cost figures that appear in BellSouth's late-filed Exhibit No. 51. (*See* Tr. at 630-31). As FDN's witness noted during the hearing, this results in a slight increase in the cost of the hybrid loop over the cost set out in FDN's pre-filed testimony. The Zone 3 DSLAM Monthly Charges are $795.65. (*See* Late-Filed Exhibit 51, Item A.20.System). The Zone 3 DS1 Monthly Charges are $420.75 (*Id.*, Item A.20.DS1). The Zone 3 Distribution Subloop Monthly Charges are $533.92, which consists of 16 subloops at $33.37 apiece. (*Id.*, Item A.2.2; A.20.Activation). The Total Monthly Recurring Charges are $1,750.32, which is simply the sum of the DSLAM Monthly Recurring Charges, the DS1 Monthly Charges, and the Distribution Subloop Monthly Charges. The Average Monthly Cost Per Subscriber of $109.40 that is set forth in the chart above is the $1,750.32 Total Monthly Recurring Charges divided by 16 customers.

[5] FPSC Order No. PSC-01-1181-FOF-TP, Docket No. 990649-TP, Appendix B.

Attachment C

Voice and DSL to Business Customers

	Zone 1	Zone 2	Zone 3	Average
BellSouth Complete Choice[6]	$52.00	$52.00	$52.00	$52.00
BellSouth FastAccess[7]	$75.00	$75.00	$75.00	$75.00
Total BellSouth Retail	$127.00	$127.00	$127.00	$127.00
Per-Customer Hybrid Loop	$52.76[2]	$58.68[3]	$109.40[4]	$58.48
Per-Customer UNE-P	$19.59[8]	$23.71[9]	$38.52[10]	$22.96
Total ALEC Cost	$72.35	$82.39	$147.92	$81.44
Margin	$54.65	$44.61	-$20.92	$45.56
% Margin	75.5%	54.1%	-14.1%	55.9%
% BellSouth Access Lines[5]	29%	68%	3%	

[6] *See* Tr. at 703; BellSouth General Subscriber Service Tariff A3.45.2

[7] A business customer that subscribes to Complete Choice for business gets five dollars off the business FastAccess rates and, therefore, pays $75 a month for FastAccess. (*See* Tr. at 72).

[8] *See* Brief, Chart following footnote 7.

[9] *See* Brief, Chart following footnote 7.

[10] *See* Brief, Chart following footnote 7.

Attachment D

Voice and DSL to Residential Customers

	Zone 1	Zone 2	Zone 3	Average
BellSouth Complete Choice[11]	$30.00	$30.00	$30.00	$30.00
BellSouth FastAccess[12]	$45.00	$45.00	$45.00	$45.00
Total BellSouth Retail	$75.00	$75.00	$75.00	$75.00
Per-Customer Hybrid Loop	$52.76[2]	$58.68[3]	$109.40[4]	$58.48
Per-Customer UNE-P	$19.59[8]	$23.71[9]	$38.52[10]	$22.96
Total ALEC Cost	$72.35	$82.39	$147.92	$81.44
Margin	$2.65	-$7.39	-$72.92	-$6.44
% Margin	3.7%	-9.0%	-49.3%	-7.9%
% BellSouth Access Lines[5]	29%	68%	3%	

[11] *See* Tr. at 711; BellSouth General Subscriber Service Tariff A3.4.3.

[12] A residential customer that subscribes to Complete Choice gets five dollars off the residential FastAccess rates and, therefore, pays around $45 a month for FastAccess service. *See* Tr. at 627.