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June 27, 2002

BY COURIER

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 0100198-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Digital Network, Inc. in the above-referenced docket is an original and fifteen copies of the Opposition of Florida Digital Network, Inc. to BellSouth's Motion for Reconsideration or Clarification as well as 15 copies of Florida Digital's Cross-Motion for Reconsideration.

Please date stamp and return the enclosed extra copy of this filing. Should you have any questions concerning this filing, please do not hesitate to call me on 202-295-8458.

Respectfully submitted,

Michael C. Sloan

Michael C. Sloan

Enclosures

cc: Parties of record.

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BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996	)	Docket No. 010098-TP Dated: June 27, 2002

FLORIDA DIGITAL NETWORK, INC.'S OPPOSITION TO BELLSOUTH'S PETITION FOR RECONSIDERATION OR CLARIFICATION

Pursuant to Rule 25-22.060 of the Florida Administrative Code, Florida Digital Network, Inc. ("FDN") respectfully submits this opposition to BellSouth's Petition for Reconsideration or Clarification of the Commission's Final Order on Arbitration ("Order") in the above captioned proceeding. A Motion for Reconsideration must identify points of fact or law that were *overlooked or not considered* in rendering the Order.[1] As demonstrated below, the Commission has already considered, and rejected, the points of fact and law raised in BellSouth's Petition for Reconsideration. Thus, BellSouth overlooks the well-established rule that a motion for reconsideration should not reargue matters that have already been considered.[2] BellSouth's Petition largely parrots the same arguments that the Commission already considered and rejected in its initial Order, and thereby fails to meet the Commission standard for a motion for reconsideration, which must be "based upon specific factual matters set forth in the record and

[1] *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *see also Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962).

[2] *See Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959).

susceptible to review," and not "based upon an arbitrary feeling that a mistake may have been made."[3]

Unable to establish a sufficient case for reconsideration, BellSouth next seeks to undermine the effectiveness of the Commission's Order by seeking sweeping "clarifications." Some of these "clarifications" would eviscerate the meaning of the Order, while others would permit BellSouth to engage in slightly more subtle forms of discrimination than the outright exclusionary discrimination that is outlawed by the Order. These proposed clarifications must be rejected if the Order is to retain the effect necessary to discharge the Commission's statutory obligation to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services for Florida consumers.

I. BELLSOUTH'S PETITION FOR RECONSIDERATION

A. The Commission Has the Authority in *This* Proceeding to Impose Any Lawful Remedy to the Issues Raised by Consideration of FDN's Petition.

BellSouth's first argument in its Petition is the suggestion that the Commission lacks authority to address a violation of state law in a Section 252 arbitration proceeding. BellSouth asserts that "the Commission has no authority to [determine whether it offers DSL services in compliance with state law] in the context of this arbitration proceeding because section 252 of the Act only allows the Commission to arbitrate issues regarding 'a request for interconnection, services, or network elements pursuant to Section 251.'"[4] BellSouth's argument fails for at least two reasons: first, FDN's request is inextricably related to its rights under Section 251, and

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[3] *See Stewart Bonded Warehouse, Inc.*, at 317.

[4] BellSouth Petition for Reconsideration at 3-4.

second, nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252.

1. The Relief Ordered by the Commission is Properly within the Scope of this Arbitration because it is Intended to Address FDN's Ability to Exercise its Rights under the 1996 Act.

While the Commission's mandate in Section III of the Order is primarily designed to benefit Florida consumers, it clearly also relates directly to FDN's ability to make effective use of its right to UNEs and interconnection under the 1996 Act. BellSouth's ongoing violation of state law frustrates FDN's ability to attract and retain customers, thereby undermining the purpose of the 1996 Act to promote competition for local telecommunications services and also the Florida Legislature's mandate to this Commission "to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services."[5] The arbitration process would be thoroughly undermined if the Commission were deprived of the authority to craft entire contracts, complete with all of the practical provisions that are necessary to ensure that the agreement can actually be used effectively by an ALEC to compete in the local telecommunications market.

BellSouth made the same argument to the Tennessee Regulatory Authority ("TRA") regarding the circumscribed scope of interconnection arbitration proceedings, and the TRA explicitly rejected BellSouth's argument. The TRA found that "it is within the scope of the Act to require BellSouth in a Section 252 arbitration to commit to" provisions that are not specified by the Act, but are instead "relates to interconnection and is designed to ensure that such

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[5] Fla. Stat. Ann. § 364.01(4)(b).

interconnection is provided . . . on nondiscriminatory terms."[6] This Commission has similarly already determined in its Order that the "underlying purpose of [its] requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes."[7] Thus, the Commission has already considered – and rejected – the argument that the relief ordered is not related to FDN's rights under Section 251.

State commissions have broad discretion to determine that an issue for arbitration, and proposed resolutions therefor, relate to Section 251 of the Act for purposes of an arbitration. In rejecting arguments by Ameritech to narrow the scope of state commission authority, a federal district court wrote that "state commissions are accorded considerable latitude to resolve issues within the compass of the pricing and arbitration standards, even if these matters are not specifically identified by parties as open issues in their petitions for arbitration."[8] The court found that it is a "common sense notion" that states must be able to address such issues as may be needed to "resolve fundamental elements necessary to make an interconnection agreement a working document," and that depriving states of this jurisdiction would cause "the considerable public and private resources invested in arbitrating agreement provisions [to be] squandered" when commissions were forced to leave important issues unresolved.[9] In this arbitration, the

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[6] See *In re ICG Telecom Group, Inc.*, 2000 WL 33529048, *4 (Tenn. R.A.) Docket No. 99-00377 (August 4, 2000) (observing that "a state commission has the authority to resolve in an arbitration proceeding 'any open issues' relating to interconnection, whether or not those issues are expressly covered by Section 251.") (quoting *US West Communications, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp.2d 968, 985 (D. Minn. 1999).

[7] Order at 10.

[8] *TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin*, 980 F.Supp. 992, 1000 (W.D. Wis. 1997).

[9] *Id.*

Commission has determined that relief is needed to ensure that FDN has a meaningful ability to exercise its rights under the 1996 Act, concluding that "[w]e believe that FDN has demonstrated that [BellSouth's practice of refusing to sell DSL] raises a competitive barrier in the voice market for carriers that are unable to provide DSL service."[10] Therefore, the relief established by Section III of the Order is clearly related to FDN's rights under Section 251 and is essential to ensure that the interconnection agreement will, as a practical matter, allow FDN's meaningful participation in this market, in furtherance of the policy objectives of state and federal law. Accordingly, the Commission may properly exercise its "considerable latitude to resolve issues" that relate to FDN's rights under the Act.

2. The Federal Act Does Not Strip the Commission of Jurisdiction to Consider its Own State Laws in Section 252 Arbitrations.

Even if the Commission had not found that the terms established in Section III of the Order relate to FDN's rights under Section 251 of the Act – which they do – the Commission would still have the authority and jurisdiction to award the relief it ordered. Nothing in the Act requires state commissions to erect a wall between its role in conducting arbitrations under Section 252 and its other responsibilities under state law. BellSouth conveniently ignores Section 252(e)(3), entitled "Preservation of Authority," which provides that "nothing in this section shall prohibit a state commission from establishing or enforcing other requirements of state law in its review of an agreement."[11] The very purpose of having Section 252 arbitrations

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[10] Order at 8.

[11] 47 U.S.C. § 252(e)(3).

conducted by state commissions, rather than the FCC, is to allow for incorporation of considerations emanating from state law.

Based in part on this preservation of state authority, and in part on the need to ensure that state commissions can craft interconnection agreements that are complete, as discussed above, a federal court in *US West Communications, Inc. v. Minnesota Pub. Utils. Comm'n* (*"US West"*) found that Section 252 arbitrations "are not limited to issues explicitly enumerated in § 251 or the FCC's rules, but rather are limited to the issues which have been the subject of negotiations," and that "if an issue has been designated by the parties as in need of resolution, the commission has an obligation to address that issue."[12] Therefore, the 1996 Act "does not confine the resolution of the issues to the requirements of § 251."[13] The issue designated for resolution in this arbitration is, "[f]or purposes of the new interconnection agreement, should BellSouth be required to provide xDSL service over UNE loops when FDN is providing voice service over that loop?"[14] Under the *US West* standard described above, the Commission may implement *any* resolution of this issue that is consistent with its authority under Section 252 of the Act *or* its independent authority under state law.

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[12] *See US West Communications, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F. Supp.2d 968, 985 (D. Minn. 1999).

[13] *Id.*

[14] Prehearing Order at 8. BellSouth's claim in footnote 3 of its Petition that FDN did not raise this issue in its Arbitration Petition is clearly erroneous. FDN's Petition specifically noted that, at a minimum, BellSouth should be required to permit the use of its wholesale ADSL service, which is sold to ISPs, to be provisioned on a UNE loop used by FDN. *See* FDN Arbitration Petition at 4-5. BellSouth's response to FDN's Petition countered that "BellSouth has absolutely no obligation to provide xDSL service when, as here, BellSouth is not the voice provider." BellSouth Response at 5. Therefore, it is clear that this issue was properly identified as an open issue for resolution in this proceeding, and that both parties have understood that one of the options under consideration was a requirement that BellSouth provide xDSL service on ALEC UNE loops.

Thus, in addition to the authority to grant the disputed relief based on its relationship to FDN's Section 251 rights, as set forth in Section I(A)(1) of this opposition above, the Commission may also sustain its award on the basis of any authority it has under state law to impose the conditions. On this count, BellSouth cannot seriously dispute the Commission's authority. Section 364.058 of the Florida statutes vests the Commission with independent authority "to consider and act upon any matter with its jurisdiction" either "upon petition *or its own motion.*" In its Order, the Commission recognized that one of its primary mandates from the Legislature is to adopt policies that promote competition by ensuring the availability of the widest possible range of consumer choice in the provision of all telecommunications services.[15] Even BellSouth concedes that this issue could be a legitimate matter for the Commission's consideration, noting that that FDN is "free" "to file a complaint case against BellSouth under state law."[16] Because it has jurisdiction to consider this issue in some proceeding, under the *US West* standard discussed above, Section 252 permits its consideration in *this* proceeding because the relief granted is designed to address a problem raised in FDN's Arbitration Petition. The Commission therefore need not bow to BellSouth's dilatory suggestion that the Commission must conduct a completely new and separate complaint proceeding before it can protect Florida consumers from the ongoing violation of state law it has uncovered in this proceeding.

It is the issue, and not every proposed solution therefor, that must be identified in the arbitration petition. Even though the resolution proposed by FDN evolved during the course of the proceeding to encompass additional remedies, the underlying issue – the ability to support

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[15] Order at 9.

[16] BellSouth Petition for Reconsideration at 4.

xDSL service on FDN UNE loops – remained constant throughout the proceeding, from the initial petition for arbitration to the final briefing. Moreover, FDN's Petition clearly identified as a minimum solution for relief that BellSouth be required to allow its wholesale ADSL service to be provided on ALEC UNE loops.[17] It is therefore irrelevant that FDN's prefiled testimony largely focused on UNE-based solutions to this issue, rather than the imposition of the partial solution ultimately adopted by the Commission's Order. BellSouth's citations to Mr. Gallagher's prefiled testimony, which address UNE and resale solutions, are a red herring that should be disregarded in the Commission's disposition of BellSouth's petition for reconsideration.

Courts have affirmed the approach that the open issues eligible for arbitration are the underlying *problems* raised in the Section 252 arbitration petition, and not every possible *solution* to these problems.[18] For example, Ameritech appealed an arbitration decision of the Michigan Public Service Commission that adopted benchmarks and penalties, even though that specific remedy was not raised in the petition or the response, but was instead proposed by MCI for the first time one week before the arbitration hearing. The Court rejected as "disingenuous" Ameritech's claim that the issue was not sufficiently raised in a timely manner.[19] The Court found that while MCI's Petition for Arbitration did not include the specific relief ultimately granted by the Commission, it was sufficient that the Petition identified as an issue the quality of

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[17] FDN Petition at 5.

[18] Indeed, FDN made this very point in its July 2001 Opposition to BellSouth's Motion to Strike at 2-3 ("The Petition identifies the *issue* before the Commission in this arbitration – *i.e.*, FDN's request for a product enabling it to provide DSL to all its prospective customers in Florida. Mr. Gallagher's testimony provides the *facts* relevant to this issue."). (See FPSC Docket No. 010098, Item No. 08775-01). The Commission agreed when it rejected BellSouth's Motion.

[19] *See MCI Telecommunications Corp. v. Michigan Bell Telephone Co.*, 79 F.Supp.2d 768, 774 (E.D. Mich. 1999).

Ameritech's service, and that therefore the Commission had not made a reversible error by finding that the adoption of performance measures was sufficiently related to addressing the quality of service issue. The Court denied Ameritech's appeal and found that the Michigan Commission had jurisdiction and authority to award the disputed relief.[20]

Therefore, because FDN properly identified as an issue for this proceeding the competitive injury that it suffers as a result of its customers' inability to obtain DSL service, the Commission has the authority to order BellSouth to provide DSL service on FDN UNE loops as a solution to this issue even if it were to have found that such relief was not related to Section 251 of the Act.

B. The FCC Has Not Preempted State Action On This Issue.

BellSouth next argues that the Commission overlooked the FCC's recent order in the Georgia/Louisiana Section 271 case that briefly mentioned the fact that the FCC's existing line sharing rules do not require ILECs to provide DSL on UNE loops over which CLECs provide voice services. While the *Georgia/Louisiana Order* is new, its findings are not. The Order largely reiterates the same findings that the FCC has issued in numerous prior orders dating back to its June 2000 *Texas 271 Order*.[21] Indeed, BellSouth relied upon one of these decisions, the FCC's *Pennsylvania 271 Order*, in its brief in this proceeding.[22] Similar to the *Georgia/Louisiana 271 Order*, the FCC declined to require Verizon Pennsylvania to provide

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[20] *Id.*

[21] See *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas,* Memorandum Opinion and Order, 15 FCC Rcd. 18354 (June 30, 2000) (*"Texas 271Order"*) at ¶ 330.

[22] BellSouth Br. at 34.

DSL service on CLEC UNE loops "in order to demonstrate compliance with" a Section 271 checklist item."[23] Therefore, BellSouth's citation to the *Georgia/Louisiana Order* merely reargues matters that have already been considered, which is inappropriate in a petition for reconsideration. This Commission rejected BellSouth's prior arguments that this line of FCC decisions preempted its own consideration of BellSouth's policy under state and federal law. In reaching its decision, the Order rejected BellSouth's argument that the FCC has dispositively addressed this issue, and recognized that the FCC has never decided this issue on its merits and that BellSouth's reliance on the FCC's *Line Sharing Reconsideration Order* was utterly misplaced.[24] The Commission clearly did not overlook this debate, and indeed held that it did not even rely upon the FCC's line sharing rules as a basis for its decision. The FCC 's issuance of another decision, consistent with past decisions already considered by the Commission, is not a new fact or point of law and cannot support a petition for reconsideration.

In any case, even if the Commission reconsidered the merit of BellSouth's prior arguments, the FCC's Section 271 decisions do not establish a compelling precedent because they are streamlined cases which the FCC has interpreted are only to measure whether the RBOC has met the specific points of the Section 271 checklist in accordance with *already-established*, generally-recognized precedent. The FCC generally avoids consideration of new regulations or RBOC standards of conduct in these proceedings, and instead defers their consideration to

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[23] BellSouth Br. at 34 (quoting *Verizon Pennsylvania Order*).

[24] *See* Order at 4-5, 6-8.

separate proceedings.[25] BellSouth's reply comments in the Georgia/Louisiana proceeding argued for the same treatment of this DSL issue, contending that that the question of whether ILECs should be required to provide xDSL services on CLEC UNE loops is a "question of general applicability and importance" and that a generic rulemaking proceeding, such as the *Triennial Review* docket, and "not this section 271 case, provides the appropriate forum to resolve this UNE [issue]."[26] While FDN would welcome any constructive attempt by the FCC to address this issue on a national basis, this matter may also be considered on a state-by-state basis, especially in Florida, where the unique facts of BellSouth's extensive Digital Loop Carrier deployments make this issue so important for ALECs. Not surprisingly, BellSouth neglected to mention that this arbitration is also an appropriate forum to address this still-unresolved issue.[27]

The FCC's discussion of this DSL issue in the *Georgia/Louisiana 271 Order* well illustrates the limited nature of the FCC's inquiry. The entire issue was addressed in the context of whether BellSouth was in compliance with the Operational Support Systems (OSS) checklist item under Section 271. Paragraph 157 relied upon by BellSouth in its Petition for Reconsideration appears under the heading "Other Ordering Issues" and a section addressing

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[25] *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri,* Docket 01-194, Memorandum Opinion and Order, FCC 01-338 (rel. Nov. 16, 2001) at ¶ 82 ("because Commission precedent does not address the specific facts or legal issues raised here, we decline to reach a conclusion in the context of this Section 271 proceeding. We note that the Commission has typically deferred resolution of such novel interpretive issues to separate proceedings.") (citing numerous other Section 271 Orders).

[26] *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* FCC Docket 02-35, BellSouth Reply Comments at 41 (March 28, 2002).

[27] Although the relief set forth in the Commission's Order will have generally applicable effects, Section 252 requires the Commission to address this issue in this proceeding. Therefore, the Commission should not defer its consideration to a generic proceeding.

whether BellSouth's OSS system should have a new Uniform Service Order Code (USOC) for DSL. The FCC's consideration of this issue is clearly within the context of whether BellSouth had met the standards of a specific checklist item under already-existing precedent, and not an exhaustive evaluation of whether BellSouth's policy would be sustained in an Section 208 complaint case with a complete evidentiary record.

Furthermore, the FCC has never considered the issue of whether BellSouth should be required to provide DSL in Florida, based upon the unique facts and highly developed record in this proceeding. This distinction is far more than a technicality; the record in this case offers strong support for such a requirement even if it were not appropriate nationally, given the extremely high percentage of DLC systems that BellSouth has deployed in Florida. For example, one of the primary reasons that the FCC 271 Orders suggested a DSL service requirement might not be needed is because of the availability of line splitting as an alternative option for ALECs.[28] The record of this case shows, however, that in BellSouth's region of Florida, line splitting would be a completely ineffective strategy for an ALEC. Line splitting is an arrangement in which an ALEC voice provider and a ALEC DSL provider share a single UNE loop to provide service to an end-user. In its 271 decisions, the FCC found that a UNE voice provider such as AT&T could enter into a line splitting arrangement with a DSL ALEC such as Covad in order to mitigate the effects of an ILEC's refusal to provide DSL services on its UNE lines.[29] The record in this case clearly demonstrates, however, that line splitting is not

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[28] *See, e.g., Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* Docket 02-35, Memorandum Opinion and Order, FCC 02-147 (rel. May 15, 2002) at ¶ 157.

[29] *Id.*

possible today on a single BellSouth UNE loop that passes through a Digital Loop Carrier, because not a single CLEC has collocated a DSLAM or xDSL line card at a BellSouth remote terminal.[30] Therefore, unlike many other parts of the country where CLECs offer DSL services at more than insignificant levels, in BellSouth's Florida region, it is the only carrier that is capable today of providing DSL services to the vast majority of consumers. The FCC did not have before it the complete record established in this proceeding of the prevalence of DLCs in BellSouth's Florida network, or the difficulties faced by CLECs in attempting to provide xDSL services at on these DLC loops.

Finally, even if the FCC had effectively decided that BellSouth's exclusionary policy did not violate Sections 201 and 202 of the Federal Act, it has not even come close to issuing the clear and unequivocal statement that it has occupied the field on this issue, which is the necessary standard to find that the FCC has preempted state action on this issue.[31] The Commission may therefore still properly base its decision on applicable state law. If BellSouth still wishes to petition the FCC or a court for preemption of this Arbitration Order, it is free to do so. However, the Commission need not "pre-preempt" itself by speculating that the FCC might have intended to rule dispositively on this issue, especially when all of the evidence indicates that it has not so intended. A finding of preemption would be especially inappropriate given that the FCC has specifically encouraged state commissions to take an active role in the promoting xDSL competition, including going beyond its own requirements, by holding that "states are free to impose additional, pro-competitive requirements consistent with the national framework

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[30] Tr. at 353.

[31] *See Louisiana Public Serv. Comm'n v. F.C.C.*, 106 S.Ct. 1890, 1898-99 (1986).

established" in the *Line Sharing Order*.[32] Therefore, the Commission may properly base its decision in Section III of its Order on state law.

C. Section 706 of the 1996 Act is Not Inconsistent with the Commission's Order.

BellSouth's Petition argues that the Commission overlooked the "fact" that Section 706 of the Act does not support its decision in Section III of the Order. BellSouth's argument is overstated, given that the Commission by no means needs to depend on Section 706 in order to justify its decision. In any case, the Commission's Order is entirely consistent with Section 706. While it is true that one of the significant factors motivating the Commission's decision was to foster competition in the basic services market, the Order will support the deployment and adoption of advanced services by removing a significant barrier that today limits consumer choice. Furthermore, even if Section 706 does not support the Commission's Order, BellSouth has not demonstrated in any way that the Order is *inconsistent* with Section 706. Therefore, BellSouth's Section 706 argument does not offer any points of law that support any change to the Commission's ultimate findings in this proceeding.

D. The Commission Did Not Overlook BellSouth's Inflated Claims of Hardship.

BellSouth argues that the Commission overlooked the alleged fact that its costs of providing ADSL service would increase if forced to sell the service on telephone lines where it was not the voice provider. The Commission did not overlook BellSouth's claims; it considered and rejected them. In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.[33]

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[32] Tr. at 37; *Line Sharing Order* at ¶ 159.

[33] *Sherwood v. State*, 111 So. 2d 96 (Fla. 3d DCA 1959).

During the proceeding, BellSouth placed considerable emphasis on its contention that its costs would increase because its existing OSS databases were based on BellSouth-assigned telephone numbers. FDN offered controverting evidence that "[o]ther Regional Bell Operating Companies are modifying their databases to enable DSL qualification to be performed based upon circuit identification numbers in addition to telephone numbers."[34] BellSouth did not rebut this testimony with any credible evidence. The Commission rejected BellSouth's argument that nondiscriminatory provision of DSL "would result in increased costs and decreased efficiency," concluding that "[t]he record does not, however, reflect that BellSouth cannot provision its FastAccess service over an FDN voice loop or that doing so would be unduly burdensome."[35] BellSouth has offered no new points of law, or points of fact which are in the record, that that the Commission has not already considered and that therefore could support a motion to reconsider.

BellSouth's brief assertion of new facts on page 8 of its Petition does not offer any citations to the record and does not appear to be supported by any record evidence. It is not appropriate in a pleading, especially one filed after the close of evidence, to allege facts that are not supported by the record. FDN has not had the opportunity to cross-examine or counter this extra-record evidence; under Commission rules, these arguments should be stricken. Even if the Commission attempted to consider them on their merits without the benefit of record evidence, however, BellSouth's arguments are not compelling. First, there is no evidence in the record that proves that "the costs of providing ADSL service on a stand-alone basis would necessarily entail the costs of providing basic telephone service." BellSouth would only be provisioning ADSL

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[34] Tr. at 81.

[35] Order at 10.

service on loops for which it would receive compensation for *both* the low-frequency voice and the high-frequency data portions of the loop. The voice ALEC would be paying BellSouth for the entire cost of the loop under UNE pricing, and BellSouth would be able to obtain additional revenues for the DSL service while paying nothing back to the ALEC for its use of the high-frequency portion. At worst, BellSouth is no more disadvantaged financially than in any other instance in which it loses a retail voice customer to a UNE-based competitor. Moreover, BellSouth would have an advantage over ALECs that are using line sharing, which pay BellSouth for their portion of the loop.[36]

There is also no support in the record for BellSouth's attempt to analogize its economics to those of cable modem providers. In addition to the complete lack of evidence regarding the economics of retail DSL or cable, this analogy is not appropriate because, unlike stand-alone cable modem service, stand-alone BellSouth ADSL service would still be provisioned over a loop that is also being used to carry voice service, and BellSouth would still be receiving significant revenue from both the voice and DSL services on the line even if it were not the retail voice provider. In any case, an analogy to cable by no means establishes any degree of reasonableness; it is likely that cable operators charge more to non-cable subscribers at least in part not because of higher costs but to dissuade their video customers from discontinuing their cable service or switching to competing providers such as DirecTV. Thus, BellSouth's analogy to cable services is both erroneous and irrelevant.

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[36] Of course, the record demonstrates that the number of ALEC line shared lines in BellSouth's territory in Florida represents less than 1% of the DSL market, and is severely constrained because in most cases the ALEC would have to collocate a DSLAM at a BellSouth remote terminal, something that no ALEC in Florida has been able to do.

E. BellSouth Has Market Power Over Many Florida Consumers.

BellSouth argues that the Commission overlooked the availability of cable modem services to consumers who purchase FDN voice service. The record demonstrates, however, that nearly all business customers and many residential customers do not have access to cable modem services, and that it is likely that for the foreseeable future there will be many consumers who could purchase DSL but who will not be able to obtain high-speed cable modem services.[37] Even BellSouth's own testimony, through the Precursor Study appended to Mr. Williams' Rebuttal Testimony, demonstrates these facts. The Precursor study warns that DSL is almost the exclusive broadband provider to small and medium enterprises, *less than 1%* of which obtain cable broadband services.[38] The Study notes that this group represents 85% of U.S. business firms "and need[s] broadband most."

The Precursor study also indicates that in the foreseeable future, cable modem providers are unlikely to deploy broadband access to approximately 25% of their total residential footprint, Therefore, even once ongoing deployment phases are complete, thousands, if not millions of Florida consumers will not be able to purchase cable modem services.[39] For the 90%+ of customers in BellSouth's region who are served by Digital Loop Carriers, BellSouth is therefore these customers only wireline broadband option. A degree in economics is not needed to reach

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[37] Exhibit TGW-1 (Williams Rebuttal Testimony) at 1-2; see also Tr. 166-167, *see also* FDN Br. at 17

[38] Exhibit TGW-1 (Williams Rebuttal Testimony) at 2.

[39] Although not admitted in the record, the Commission could look as an illustrative example to market statistics available from California to assist its understanding of the facts in the record of this case. According to the California Public Utilities Commission, only 15% of Californians have a choice between DSL and cable, and 45% of consumers in SBC territory who have access to wireline broadband have DSL as their only wireline broadband choice. *See* FCC Broadband Docket, Comments of the California Public Utilities Commission; *see also*

the conclusion that for customers who cannot obtain cable modem service and have only BellSouth as a choice of DSL provider, BellSouth has commanding leverage. The largest category of these customers, small and medium sized businesses, is critical to FDN's business plan in the voice services market.[40] As things currently stand, if these customers want to obtain broadband, they are effectively forced to purchase BellSouth's voice services and can not obtain service from FDN. The record therefore fully supports the conclusion in the Order that BellSouth's exclusionary DSL offering "creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another ALEC as their voice service provider" and "unreasonably penalizes customers who desire to have access to voice service from FDN and DSL service from BellSouth" in contravention of Sections 364.01(4) and 364.10 of Florida Statutes and Section 202 of the Federal Act.[41] Because the Commission's Order is fully supported by the record, BellSouth cannot reasonably assert that the Commission overlooked evidence of cable modem alternatives in reaching its decision.

Finally, the D.C. Circuit's decision in *USTA v. FCC,* relied upon heavily by BellSouth, is not applicable to the Commission's consideration of this Petition. The decision has not become effective, and there is a significant probability that it never will.[42] The court's decision

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Communications Daily, Vol. 22, No. 100 at 5 (May 23, 2002) (describing Congressional testimony of California PUC Chairman Lynch).

[40] *See. e.g.,* Tr. at 89.

[41] Order at 10.

[42] The DC Circuit has not issued its mandate in the *USTA* case, so the decision is not effective at this time. The decision remains subject to possible petitions for rehearing, rehearing *en banc*, or *certiorari*, any of which could be accompanied by a motion to stay the mandate. Some parties to the case have already indicated that they plan to petition the Supreme Court for review of the decision, and have urged the FCC to do likewise. Many observers

addressed the impairment standard for establishing new UNE obligations, while the subject of this Petition does not involve unbundling rules. Moreover, the Order specifically states that it did not rely upon the FCC's *Line Sharing Order* in reaching its conclusions. Therefore, the *USTA* decision is irrelevant to the Commission's disposition of BellSouth's Petition for Reconsideration.

F. BellSouth's Exclusionary DSL Offering Is Not Harmless.

BellSouth's final argument may be its most absurd. BellSouth contends that even if it does have leverage over the selection of voice carrier by certain customers, that this leverage is harmless and should not concern the Commission because only a relatively small percentage of voice customers purchase DSL services. On the contrary, the record demonstrates that the real-world impact of BellSouth's exclusionary DSL offering is causing significant injury to FDN today. FDN's CEO, Mr. Gallagher, testified that FDN is "running out of customers to sell to who don't have BellSouth DSL"[43] and that it loses customers "every day"[44] as a result of its inability to offer DSL service or allow customers to keep their BellSouth-based service. BellSouth's DSL policies are especially damaging to FDN in its critical small and medium sized business market. As discussed above, the record demonstrates that these companies "need broadband most" and that BellSouth is virtually their exclusive broadband option.

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believe that the decision, which is strikingly different from the Supreme Court's recent decision in *Verizon v. FCC*, __U.S.L.W __(2002), would be overturned on appeal. See Letter from Hon. Robert H. Bork to Chairman Michael Powell (June 10, 2002) at 1 ("I believe that if the Commission were to seek certiorari [of the *USTA* decision], it is highly likely that the Supreme Court would grant the petition and reverse the court of appeals' decision.").

[43] Tr. at 108.

[44] Tr. at 110.

Moreover, the impact of BellSouth's policy will increase significantly as broadband acceptance grows. BellSouth's own witness, Mr. Ruscilli, testified that DSL is "growing at great leaps and bounds."[45] As a result of the even greater importance of broadband in the future, FDN will not be able to attract and sustain investment if it cannot demonstrate to investors a viable broadband strategy, even if its focus remains in the voice market. Mr. Gallagher testified that because demand for broadband will continue to increase, FDN would lose support from investors unless it develops a viable DSL strategy, without which it would eventually lose its customer base.[46] Under current tight capital market conditions, Mr. Gallagher concluded that the DSL issue is "quickly becoming a life or death matter for FDN."[47]

The percentage of Floridians who purchase DSL today is therefore not reflective of the tremendous importance of this issue to FDN's survival. Moreover, BellSouth could argue that many terms in an interconnection agreement only affect a small number of customers. Collectively, however, these issues will determine whether an ALEC will be able to compete effectively with BellSouth under its agreement. ALECs could not survive if always forced to wait until BellSouth has cemented its monopoly on an even larger portion of the Florida market before an issue becomes "substantial." The Commission has properly recognized that BellSouth's exclusionary DSL policy "has a direct, harmful impact on the competitive provision of local telecommunications service."[48] The Commission clearly has not overlooked the real-

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[45] Tr. at 240.

[46] Tr. at 111.

[47] Tr. at 112.

[48] Order at 9.

world impact of BellSouth's policies on FDN's ability to compete in the voice services market. Therefore, the final argument of BellSouth's Petition for Reconsideration must be rejected.

G. BellSouth Has Not Met the Commission Standard For Reconsideration.

For the reasons set forth above, BellSouth has failed to offer any points of fact or law that have not already been considered and rejected by the Commission. BellSouth's Petition for Reconsideration must therefore be denied.

II. GRANT OF BELLSOUTH'S PETITION FOR CLARIFICATION WOULD UNDERMINE THE COMMISSION'S OBJECTIVES

A. BellSouth's Proposal for Provisioning DSL on a Separate Loop is Harmful, Inefficient, and Designed to Frustrate Consumer Choice

Unable to offer any compelling arguments for overturning the Commission's Order, BellSouth is already seeking ways to undermine it. In its Petition for Clarification, BellSouth seeks permission from the Commission to allow it to offer inferior and more expensive DSL provisioning to customers who have had the audacity to elect to receive their voice services from FDN. BellSouth proposes to provide ADSL on these lines over a separate loop on different rates, terms and conditions than the ADSL services that it provides for loops on which BellSouth is the voice carrier. Given that BellSouth is not voluntarily changing its existing practice of intentional discrimination, the Commission should remain wary of any proposal in which BellSouth would treat these lines differently, as such differences may be a means of accomplishing discrimination indirectly now that it will no longer be permitted to discriminate explicitly. Indeed, BellSouth is attempting just that with its proposed "clarifications," which would cause numerous significant and unnecessary problems for consumers who attempt to purchase FDN voice services and BellSouth-based DSL services. Because BellSouth-based DSL

service is the only viable broadband option for many consumers, it is inevitable that frustration with the ability to combine these services with FDN services will result in customers deciding that they will not purchase, or continue to purchase, voice services from FDN.

First, BellSouth has not explained what it would do if no additional DSL-capable loops were available. It would be unreasonable to deny continued DSL service to the customer when it would be readily possible to continue to provide the DSL service on the voice loop. It is conceivable that BellSouth would not even provide a definitive answer to whether or not an alternative DSL-capable loop was available, forcing the customer to risk having their voice service converted and their DSL service disconnected, only later to find out that it could not be restored unless they switched their voice service back to BellSouth. Alternatively, FDN is concerned that BellSouth could attempt to impose charges for loop conditioning or new construction, or that the customer may be forced to endure rewiring of its jacks, premises equipment and local area networks, or other intrusive and/or burdensome processes.[49] Even if these impositions are done solely at the direction of BellSouth, consumers will associate them as a negative consequence of selecting an ALEC as their voice services provider.

The FCC explained numerous additional disadvantages of the use of separate loops for ADSL in its *Line Sharing Order*:[50]

> There are several reasons why purchasing or self-provisioning a second loop is not possible as a practical, operational or economic matter. First, second loops are not

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[49] See *Line Sharing Order* at ¶ 42 (explaining that the use of a second line for DSL is a disadvantage because of the burden of "incurring the installation and additional monthly expense of acquiring an additional telephone line" as well as other "complications and expenses, including the need to arrange for a technician to install service, that do not arise if they procure the exact same service from the incumbent LEC" over a single loop that is already in service.).

[50] *Line Sharing Order* at ¶ 38.

> ubiquitously available. ... Where a customer premises is only addressed by one copper loop, or where end users have exhausted the facilities that serve them by installing multiple phone, modem, and fax lines, end users will have no additional facilities available at their premises which a competitive xDSL service provider could use to provide service. In those situations, competitive xDSL service providers are precluded from providing the services they seek to offer, and consumers are deprived of the benefits of competition. This is particularly a problem in rural areas, where spare copper facilities are less common. ... Thus, [the use of separate loops] reduces the efficient use of existing loop plant and diminishes the scope of potential customers to whom competitive LECs can market xDSL-based service, thereby limiting the competitive choices available to consumers for whom additional copper loops are not available. In addition, such lack of access can accelerate the depletion of copper loops in entire communities, necessitating inefficient capital expenditures that will increase costs imposed on consumers and competitors alike.

In addition to the factors outlined by the FCC, BellSouth's proposal to move its DSL service to a second loop would have even more disturbing consequences for consumers who already have BellSouth-based DSL service and wish to switch to FDN voice service. Because of the frequent problems and delays encountered in DSL provisioning, many if not most of these customers will be unwilling to switch to FDN services if they understand that their existing BellSouth-based DSL service will be disconnected and moved to an alternate loop, even if they were promised that the service outage would be short. The DSL provisioning process is notoriously slow, unpredictable, and fraught with errors and technical problems. Customers who have been through this process before will be especially reluctant to risk rocking the boat on a working connection. Even if new loops were deemed DSL-capable, not all loops transmit DSL with the same quality, so a customer who is satisfied with their connection would risk degraded service by changing to a new loop.

Once the precedent is established that BellSouth's provision to these customers could be on different rates, terms and conditions, the possibilities for BellSouth to discriminate would be endless. If the BellSouth DSLAM serving the customer was operating at capacity, when a

customer's DSL connection is disconnected and scheduled for reconnection because they switched to FDN voice service, BellSouth might not reserve the DSL port for the use of restoring service to that customer, but could instead allocate the port to one of their more loyal full-service customers. As another example, because the service had been disconnected, BellSouth might try to impose early termination penalties on any customers who had not yet met a term commitment.

On top of all of these problems, to add insult to injury, BellSouth then argues for the right to charge these customers more money for the inferior service. The bottom line for this proceeding is not to anticipate and attempt to resolve every possible form of discrimination made possible by the existence of a separate offering for non-BellSouth voice customers, but instead for the Commission to recognize that there is a substantial regulatory interest in trying to avoid opening this Pandora's box if at possible. As demonstrated below, because it is clearly possible and indeed more efficient for BellSouth to provide its ADSL service on the same loop, the Commission should reject BellSouth's request for permission to develop an inferior and discriminatory product offering in lieu of compliance with the Commission's Order to offer to provide ADSL service on FDN's UNE loops, on the same rates, terms and conditions applicable to the provision of ADSL service on its own retail-service loops.

B. Providing ADSL Service on ALEC UNE loops is Not Unduly Burdensome.

BellSouth devotes several pages of its Petition for Clarification repeating the same argument offered in the arbitration, and again in its Petition for Reconsideration, that "extremely onerous and costly" changes to BellSouth's provisioning systems would be needed to accommodate the provisioning of DSL services on an ALEC UNE loop. As set forth in Section I(D) of this pleading, the Commission has already rejected BellSouth's claims, finding that the

"record does not . . . reflect that BellSouth cannot provision its FastAccess service over an FDN voice loop or that doing so would be unduly burdensome."[51]

BellSouth's incessant complaining about the burdens of providing its DSL services on UNE loops is refuted not only by the record but also by common sense. CLECs have dedicated tremendous efforts for several years in order to obtain the right to line share on BellSouth's voice loops. If anything, BellSouth's costs in line sharing on an ALEC UNE loop are significantly lower than an ALEC's cost of line sharing on a BellSouth loop. BellSouth already has DSLAMs in place and would not have to incur costs for collocation, while at the same time BellSouth would still be receiving revenue from the voice service on the loop through the charges assessed to the ALEC for the UNE loop. The FCC *Line Sharing Order* found that the use of a second loop "would be materially more costly, and coincidentally less efficient," than the shared use of a single line for both voice and DSL by separate carriers, and as well as less compelling for small businesses and mass market residential consumers who desire a single line for both voice and data applications.[52] Therefore, the Commission should be highly skeptical that BellSouth has any *legitimate* basis for arguing that the use of separate loops would be less costly and more efficient. BellSouth therefore has not offered any compelling justification for its proposed "clarification" of the Commission's Order.[53]

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[51] Order at 10.

[52] *Line Sharing Order* at ¶ 39.

[53] FDN is baffled by BellSouth's argument that it is not required to "provide OSS systems" to FDN customers. FDN retail customers do not want OSS systems; they want DSL. BellSouth provides OSS to the ISPs who purchase wholesale DSL in order to sell it to BellSouth voice customers, and, upon the effectiveness of the Commission's Order, to FDN customers as well. BellSouth is required to support these OSS systems for its regulated wholesale DSL telecommunications services pursuant to the FCC's *Computer Inquiry* rules.

C. FDN's Right to Use the Full Loop is Not a Defense for BellSouth's Refusal to Negotiate Terms for its Use of the High-frequency Portion of the Loop to Provide ADSL Service.

BellSouth argues that in order to use the high frequency portion of the UNE loop, "it would need to negotiate with the ALEC that purchased the loop," and that, because "there are hundreds of ALECs," this negotiation process "would add tremendous complexity (not to mention time and expense) to the situation." BellSouth's statement appears to be oblivious to the basic tenets of the 1996 Act, which requires it to negotiate in good faith with carriers that wish to enter into interconnection agreements to exercise their rights under the Act. BellSouth cannot be excused from its obligations under Section 251 simply because the negotiation of contracts with ALECs would be complex and time-consuming. Moreover, there is no reason to believe that the burden of negotiating this provision with a CLEC that wanted BellSouth to provide DSL service on UNE loops is any greater than the burden of negotiating the many hundreds of other provisions in an interconnection. FDN is ready and willing to finalize negotiations of terms pursuant to the Commission's Order, and BellSouth is required by law to do so as well.

D. No Clarification is Dictated by Limitations on the Commission's Authority.

BellSouth appears to argue that the Commission must "clarify" that its order does not require BellSouth to provide its retail or wholesale DSL services to FDN customers. In support of this "clarification" – which would clearly gut the entire purpose of the Commission's Order – BellSouth argues that the Commission lacks jurisdiction to issue its chosen remedy because BellSouth's service is either an interstate telecommunications service or an unregulated information service.

The Commission found that it has the authority to impose conditions on BellSouth's retail FastAccess service, not because it is a regulated service, but because of its incidental impact on the local telecommunications market which it does regulate.[54] Moreover, even if BellSouth's retail FastAccess access service is "enhanced, nonregulated, nontelecommunications Internet access service", it is undisputed that BellSouth's *wholesale* DSL service sold to inter- and intrastate information services providers and provided to its own ISP operations is a regulated telecommunications service.[55] The Order's mandate for BellSouth to provide its wholesale FastAccess service on lines where FDN is the voice provider is clearly within the Commission's direct jurisdiction over these regulated telecommunications services.

The Commission is not precluded by the existence of BellSouth's FCC tariff from enforcing state law and its authority over the local telecommunications market. BellSouth has previously modified its FCC DSL tariff in order to comply with orders of other state commissions. In November 2000, the Kentucky Public Service Commission found that BellSouth's tiered pricing structure for wholesale DSL unreasonably discriminated against small ISPs.[56] The Kentucky Commission rejected BellSouth's argument that "because the claims of discrimination are based upon the terms and conditions of its FCC tariff, this Commission has no authority to address those claims."[57] The Commission found that intrastate uses of DSL service exist and "we do not concede that the FCC has preempted any state action here." The

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[54] *See* Order at 8-10.

[55] BellSouth Petition at 3, 6.

[56] *Iglou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, Case No. 99-484, Order (Kentucky P.S.C. November 30, 2000).

[57] *Id.* at 4.

Commission held that the "development of a broadband infrastructure and the resulting high-speed access market is critically important to Kentucky's economic future," and that because Kentucky statutes entrusted the Commission with oversight of this market, "we have specific authority to address complaints in regard to it and to ensure that unreasonable and discriminatory practices do not impede its development."[58] In April 2001, the Kentucky Commission issued a follow-up order which provided that BellSouth would file revisions to its FCC DSL tariff as a means of complying with the November 2000 order.[59] BellSouth promptly amended its FCC tariff to offer rates in compliance with Kentucky requirements.

The California Public Utilities Commission has also recently invoked its jurisdiction to enforce state laws violated by an ILEC's in its offering of a federally tariffed service.[60] The California Internet Service Providers Association filed a formal complaint against SBC alleging unlawful discrimination against ISPs that purchase wholesale DSL from SBC. SBC moved to dismiss, arguing that the Commission does not have jurisdiction over the DSL Transport services because those services are interstate services within the jurisdiction of the FCC and tariffed at the federal level. The hearing officer denied SBC's motion, finding that "the Commission has concurrent jurisdiction with the FCC over DSL Transport service," and that SBC had "not proven 'clear and manifest' congressional intent to preempt all state authority, given the savings clause in Section 414 and the provisions of Section 253(b) regarding safeguarding the rights of

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[58] *Id.* at 10-11.

[59] *Iglou Internet Services, Inc. v. BellSouth Telecommunications, Inc.,* Case No. 99-484, Order (Kentucky P.S.C. April 9, 2001).

[60] *California ISP Association, Inc., v. Pacific Bell Telephone Company; SBC Advanced Solutions, Inc.; and Does 1-20,* Case 01-07-027, Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendants' Motion To Dismiss (Cal. P.U.C. March 28, 2002).

consumers."[61] Similarly, the Florida Commission may exercise its concurrent jurisdiction over BellSouth's DSL services in support of the Order issued in this proceeding.

E. The Commission Should Reject BellSouth's Motion for Clarification.

The Commission should reject BellSouth's Petition for Clarification. BellSouth should be required to provide wholesale and retail DSL services on the same rates, terms and conditions that are applicable to telephone lines on which BellSouth is the voice carrier. To the extent that specific operational issues need to be addressed to implement the Commission's Order, the parties should first seek to resolve them in negotiations.

III. EXTENSION OF TIME FOR FILING A SIGNED AGREEMENT

FDN has no objection to BellSouth's proposal that the Commission extend the time for the parties to filed a signed interconnection agreement with the Commission until 30 days after the Commission has ruled on the pending motions for reconsideration or clarification.

IV. CONCLUSION

The Commission's Order adopted the least intrusive of the three options suggested by FDN to address the one issue singled out by FDN in this arbitration as a life or death matter for FDN's ability to provide services in the future to Florida consumers. Although the Commission adopted only FDN's least preferred option, even this is too much for BellSouth, which is apparently driven to forego revenues from selling its own services because such sales would also help FDN in a separate market. BellSouth is acting not only to preserve its total control of the DSL market in Florida but to eliminate voice competitors as well. The Commission has

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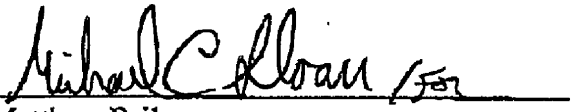
[61] *Id.* at 3.

dedicated tireless efforts to address this critical issue in two separate proceedings, but all of its potential progress on this issue will be stopped dead in its tracks if the Commission grants BellSouth's either of Petitions for Reconsideration or Clarification, unless the Commission also grants FDN's Cross-Motion for Reconsideration on the establishment of a new DSL UNE. Thus, to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services, the Commission should reject BellSouth's Petitions for Reconsideration and for Clarification.

Respectfully submitted this 27th day of June, 2001,



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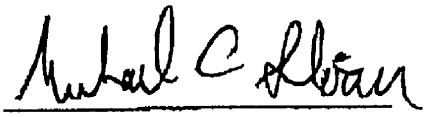
CERTIFICATE OF SERVICE

I hereby affirm that the foregoing Opposition to BellSouth's Petition for Reconsideration or Clarification has been served by electronic and first class mail upon BellSouth counsel James Meza and Patrick Turner on this June 27, 2002.



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