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BELLSOUTH TELECOMMUNICATIONS, INC.  
REBUTTAL TESTIMONY OF JOHN A. RUSCILLI  
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
DOCKET NO. 010098-TP  
JULY 18, 2001

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is John A. Ruscilli. I am employed by BellSouth as Senior Director for State Regulatory for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. ARE YOU THE SAME JOHN A. RUSCILLI THAT FILED TESTIMONY IN THIS DOCKET ON JUNE 8, 2001?

A. Yes.

Q. WHAT IS THE PURPOSE OF THE TESTIMONY THAT YOU ARE FILING TODAY?

A. The purpose of my testimony is to rebut portions of the direct testimony filed on June 8, 2001 by Michael P. Gallagher on behalf of Florida Digital Network, Inc. ("FDN"). Specifically, I will rebut Mr. Gallagher's testimony addressing a

1 portion of Issue 1. In addition to my testimony, BellSouth is filing the rebuttal  
2 testimony of Mr. Tommy Williams, who will rebut Mr. Gallagher's testimony  
3 addressing a portion of Issue 1, and of Mr. Jerry Kephart who will rebut Mr.  
4 Gallagher's testimony addressing Issue 3 and Issue 10. It is my understanding that  
5 Issues 4(a), 4(b) and 8(a) and 8(b) have been withdrawn, and therefore, BellSouth  
6 will not address Mr. Gallagher's testimony on those issues.

7

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

11

12 Q. DOES MR. GALLAGHER'S TESTIMONY RELATE TO ISSUE 1?

13

14 A. No. As Mr. Williams notes in his rebuttal testimony, Mr. Gallagher's discussion  
15 of Issue 1 goes well beyond even a liberal interpretation of the issue. FDN  
16 appears to be using Mr. Gallagher's testimony as a "launching pad" for a litany of  
17 issues that are not set forth in FDN's Petition. BellSouth has filed an Objection  
18 and Motion to Strike the portion of Mr. Gallagher's testimony addressing Issue 1,  
19 and my testimony is being filed subject to, and without waiver of, that Objection  
20 and Motion.

21

22 Q. WHAT IS FDN ASKING THE COMMISSION TO DO WITH RESPECT TO  
23 THIS ISSUE?

24

25 A. FDN's primary focus is to require BellSouth to unbundle its packet switching

1 network throughout the state of Florida. As explained below, this request is  
2 contrary to orders of both the FCC and this Commission.

3  
4 Q. ARE THE POTENTIAL UNBUNDLING OF PACKET SWITCHING AND THE  
5 POTENTIAL CREATION OF AN UNBUNDLED DATA PLATFORM  
6 CURRENTLY BEING ADDRESSED BY THE FCC?

7  
8 A. Yes. In the *Third Further Notice of Proposed Rulemaking* in CC Docket No. 98-  
9 147 and *Sixth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98  
10 (“FNPRM”), the FCC has asked for and received comments on its decision not to  
11 order the unbundling of packet switching. In the same proceeding, the FCC has  
12 asked for and received comments on whether to require ILECs to unbundle the  
13 equipment used in the provision of advanced services. In light of this pending  
14 proceeding before the FCC, there is no reason for this Commission to either create  
15 a new UNE (one that the FCC did not create in the *UNE Remand Order* and that  
16 this Commission did not create in the generic cost docket<sup>1</sup>) or to order the  
17 unbundling of packet switching (which the FCC declined to do in its *UNE*  
18 *Remand Order* and which this Commission declined to do in its orders in the  
19 Intermedia and ICG Telecom arbitrations).

20  
21 Q. IS BELLSOUTH CURRENTLY REQUIRED TO UNBUNDLE ITS PACKET  
22 SWITCHING NETWORK?

23  

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<sup>1</sup> *In re: Investigation into Pricing of Unbundled Network Elements*, Docket No. 990649-TP.

1 A. No. In its *UNE Remand Order*,<sup>2</sup> the FCC stated that “[t]he packet switching  
2 network element includes the necessary electronics (e.g. routers and DSLAMS).”  
3 *Id.* at ¶304 (emphasis added). The FCC then expressly stated “we decline at this  
4 time to unbundle the packet switching functionality, except in limited  
5 circumstances.” *Id.* at ¶306 (emphasis added). These limited circumstances are  
6 set forth in Rule 51.319(c)(5), which states that an ILEC must provide unbundled  
7 packet switching only where all of the following conditions are satisfied:

8 (i) The incumbent LEC has deployed digital loop carrier systems, including  
9 but not limited to, integrated digital loop carrier or universal digital loop  
10 carrier systems; or has deployed any other system in which fiber optic  
11 facilities replace copper facilities in the distribution section (e.g., end  
12 office to remote terminal, pedestal or environmentally controlled vault);

13 (ii) There are no spare copper loops capable of supporting the xDSL services  
14 the requesting carrier seeks to offer;

15 (iii) The incumbent LEC has not permitted a requesting carrier to deploy a  
16 Digital Subscriber Line Access Multiplexer at the remote terminal,  
17 pedestal or environmentally controlled vault or other interconnection  
18 point, nor has the requesting carrier obtained a virtual collocation  
19 arrangement at these subloop interconnection points as defined under §  
20 51.319(b); and

21 Q. The incumbent LEC has deployed packet switching capability for its own  
22 use.

23

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<sup>2</sup> See *Implementation of the Local Competition Provisions in the Telecommunication 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*”).

1 Q. WHEN THE FCC DECIDED NOT TO ORDER INCUMBENTS TO  
2 UNBUNDLE PACKET SWITCHING FUNCTIONALITY, DID IT CONSIDER  
3 THE EFFECTS THAT DECISION MAY HAVE ON COMPETITION IN THE  
4 ADVANCED SERVICES MARKET?

5  
6 A. Yes. Throughout the *UNE Remand Order*, the FCC demonstrated an acute  
7 awareness of and concern for advanced services. The FCC supported its decision  
8 to unbundle dark fiber, for instance, by noting, “unbundling of dark fiber is  
9 essential for competition in the provision of advanced services.” *Id.* at ¶196. The  
10 FCC also noted that “access to the subloop will facilitate rapid development of  
11 competition, encourage facilities-based competition, and promote the deployment  
12 of advanced services,” *Id.* at ¶207, and it clarified that incumbents are required to  
13 “provide loops with all their capabilities intact, that is, to provide conditioned  
14 loops, wherever a competitor requests, even if the incumbent is not itself offering  
15 xDSL to the end-user customer on that loop.” *Id.* at ¶191. It is clear, therefore,  
16 that the FCC was interested in establishing UNEs in a manner that allows CLECs  
17 to offer advanced services.

18  
19 It is equally clear, however, that the FCC recognized that ALECs can provide their  
20 own xDSL services without having unbundled access to BellSouth’s packet  
21 switching functionality. In Paragraph 190, for instance, the FCC states that:

22 *Unbundling basic loops, with their full capacity preserved, allows*  
23 *competitors to provide xDSL services.*

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*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, the one exception to this rule 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.* As I noted above, the FCC then declined to require incumbents to unbundle the packet switch network element, which includes the DSLAM.

Q. WHEN THE FCC ENTERED ITS *UNE REMAND ORDER*, WAS IT AWARE OF THE USE OF IDLC BY INCUMBENTS?

A. Yes. The FCC noted “carriers need unbundled subloops to serve subscribers currently served by IDLC loops.” *Id.* at ¶217. More specifically, the FCC explained,

*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*

1                    *subloop can be diverted to the competitive LEC's feeder, before the signal*  
2                    *is mixed with the traffic from the incumbent LEC's other distribution*  
3                    *subloops for transport through the incumbent's IDLC feeder.*  
4                    *Accordingly, we find that denying access at this point may preclude a*  
5                    *requesting carrier from competing to provide service to customers served*  
6                    *by the incumbent's IDLC facilities. This would particularly affect*  
7                    *consumers in rural areas, where incumbent LECs use the greatest*  
8                    *proportion of DLC loops.*

9                    *Id.*

10  
11                    Q.        AT PAGE 12 OF HIS DIRECT TESTIMONY, MR. GALLAGHER CLAIMS  
12                    "BELLSOUTH'S EXISTING NETWORK IN FLORIDA IS VERY DIFFERENT  
13                    FROM THE FCC'S CONCEIVED MODEL, WITH MORE FAR MORE (SIC)  
14                    FIBER AND DLCs." WHEN THE FCC RELEASED ITS *UNE REMAND*  
15                    *ORDER*, WAS IT AWARE OF THE ROLE THAT DSLAMS COLLOCATED IN  
16                    REMOTE TERMINALS PLAY IN THE PROVISION OF XDSL SERVICE?  
17

18                    A.        Yes. Despite Mr. Gallagher's assertions, the following language from the *UNE*  
19                    *Remand Order* clearly establishes that the FCC was well aware that an ALEC  
20                    would quite often have to collocate a DSLAM at a remote terminal in order to  
21                    provide xDSL service over a UNE loop:

22                    *competitors seeking to offer services using xDSL technology need to*  
23                    *access the copper wire portion of the loop. In cases where the incumbent*  
24                    *multiplexes its copper loops at a remote terminal to transport the traffic to*  
25                    *the central office over fiber DLC facilities, a requesting carrier's ability to*

1           offer xDSL service to customers served over those facilities will be  
2           precluded, unless the competitor can gain access to the customer's  
3           copper loop before the traffic on that loop is multiplexed. Thus, we note  
4           that the remote terminal has, to a substantial degree, assumed the role and  
5           significance traditionally associated with the central office. In addition, in  
6           order to use its own facilities to provide xDSL service to a customer, a  
7           carrier must locate its DSLAM within a reasonable distance of the  
8           customer's premises, usually less than 18,000 feet. In both of these  
9           situations, a requesting carrier needs access to copper wire relatively  
10          close to the subscriber in order to serve the incumbent's customer.

11          *Id.* at 218 (emphasis added).

12  
13       Q.     AFTER MAKING THESE STATEMENTS, HOW DID THE FCC ADDRESS  
14           THE PROPOSED UNBUNDLING OF PACKET SWITCHING  
15           FUNCTIONALITY?

16  
17       A.     The FCC expressly declined to unbundle the packet switching functionality  
18           (which it defined to include DSLAMs) except in very limited circumstances. The  
19           FCC came to this conclusion after carefully considering the manner in which  
20           proposed unbundled elements would affect an ALEC's ability to provide  
21           advanced services such as xDSL, recognizing how the existence of IDLC would  
22           impact the provisioning of advanced services such as xDSL, and noting that "the  
23           remote terminal has, to a substantial degree, assumed the role and significance  
24           traditionally associated with the central office." *Id.* at ¶304, ¶306. In support of  
25           this decision, the FCC stated,



1           *Both the record in this proceeding, and our findings in the '706*  
2           *Report' establish that advanced service providers are actively*  
3           *deploying facilities to offer advanced services such as xDSL across*  
4           *the country. Competitive LECs and cable companies appear to be*  
5           *leading the incumbent LECs in their deployment of advanced*  
6           *services.*

7           *Id.* at ¶307 (emphasis added). The FCC then described the xDSL offerings of  
8           several ALECs, and concluded,

9           *Marketplace developments like the ones described above suggest that*  
10          *requesting carriers have been able to secure the necessary inputs to*  
11          *provide advanced services to end users in accordance with their business*  
12          *plans. This evidence indicates that carriers are deploying advanced*  
13          *services to the business market initially as well as the residential and*  
14          *small business markets.*

15          *Id.*

16  
17        Q.     DID THE FCC EXPRESS ANY CONCERNS REGARDING THE IMPACT  
18                THAT A REQUIREMENT TO UNBUNDLE PACKET SWITCHING  
19                FUNCTIONALITY MAY HAVE ON THE DEVELOPMENT OF  
20                COMPETITION IN THE ADVANCED SERVICES MARKET?

21  
22        A.     Yes. In deciding not to require incumbents to unbundle packet switching  
23                functionality, the FCC acknowledged that the advanced services market is highly  
24                competitive, and it recognized that forcing ILECs to unbundle equipment used to  
25                provide competitive advanced services would only impede the further

1 development of competition:

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

11 (*Id.* ¶316.) (emphasis added.)

12

13 Q. DOES BELLSOUTH OFFER UNES THAT ALLOW FDN TO PROVIDE ITS  
14 OWN XDSL SERVICE IN FLORIDA?

15

16 A. Yes. As Mr. Williams explains in his rebuttal testimony, BellSouth offers UNEs  
17 that allow FDN to transport data from its packet switch to a DSLAM it collocates  
18 at a remote terminal, and BellSouth provides UNEs that allow FDN to transport  
19 data from a DSLAM it collocates at a remote terminal to its end user's premises.  
20 BellSouth, therefore, offers FDN all the UNEs it needs to provide its own xDSL  
21 service in Florida. Additionally, as Mr. Williams further explains in his rebuttal  
22 testimony, BellSouth will permit a requesting carrier to deploy a Digital  
23 Subscriber Line Access Multiplexer (DSLAM) at the remote terminal, pedestal or  
24 environmentally controlled vault or other interconnection point. In the unlikely  
25 event that BellSouth cannot accommodate such collocation of a DSLAM at a

1 given location (and that BellSouth is unable to provide a virtual collocation  
2 arrangement at these subloop interconnection points), BellSouth will provide  
3 unbundled packet switching to that particular location, as required by the FCC's  
4 UNE Remand Order.

5  
6 Q. HAS THE FLORIDA PUBLIC SERVICE COMMISSION PREVIOUSLY  
7 ADDRESSED WHETHER BELLSOUTH MUST UNBUNDLE PACKET  
8 SWITCHING FUNCTIONALITY?

9  
10 A. Yes. The Commission declined to require BellSouth to provide unbundled packet  
11 switching in two arbitration proceedings. In Order No. PSC-00-1519-FOF-TP in  
12 Docket No. 99-1854-TP (BellSouth –Intermedia Arbitration) at page 34, for  
13 instance, the Commission found “that BellSouth shall only be required to  
14 unbundled its packet switching capabilities under the limited circumstances  
15 identified in FCC Rule 51.319(c)(5).” Similarly, in Order No. PSC-00-0128-  
16 FOF-TP in Docket No. 99-0691-TP (BellSouth –ICG Telecom Arbitration) at  
17 page 7, the Commission found that “packet-switching capabilities are not UNEs”.

18  
19 Additionally, in Docket No. 990649-TP (the generic cost docket), the  
20 Commission found that “there are no other elements or combinations of elements  
21 that we shall require BellSouth to unbundle at this time.” *See* Order No. 990649-  
22 TP at page 368.

23  
24 Q. HAS THE FLORIDA PUBLIC SERVICE COMMISSION PREVIOUSLY  
25 ADDRESSED WHETHER BELLSOUTH MUST PROVIDE ITS ADSL

1 SERVICE OVER A UNE LOOP THAT AN ALEC IS USING TO PROVIDE  
2 VOICE SERVICE TO THE ALEC'S CUSTOMER?

3  
4 A. Yes. In Order No. PSC-01-0824-FOF-TP that was entered in the in MCI  
5 WorldCom Arbitration (Docket No. 000649-TP), the Commission found at  
6 section XIII, page 51,

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

15  
16 \* \* \*

17  
18 *We believe the FCC requires BellSouth to provide line sharing only over*  
19 *loops where BellSouth is the voice provider. If WorldCom purchases the*  
20 *UNE-P, WorldCom becomes the voice provider over that loop/port*  
21 *combination. Therefore, BellSouth is no longer required to provide line*  
22 *sharing over that loop/port combination.*

23  
24  
25

1 Q. DOES THIS COMMISSION HAVE THE AUTHORITY TO ORDER A NEW  
2 UNE OR TO ORDER THE UNBUNDLING OF THE PACKET SWITCHING  
3 FUNCTIONALITY?

4  
5 A. Yes. The Supreme Court's *Iowa Utilities Board* decision and the FCC's *UNE*  
6 *Remand Order*, however, are absolutely clear that a pre-condition to compelled  
7 unbundling is a finding of impairment for the services at issue based on a careful  
8 analysis of available alternatives. This Commission, therefore, may establish a  
9 new UNE only if the carrier seeking the new UNE carries the burden of proving  
10 the impairment test set forth in the FCC's *UNE Remand Order*.

11  
12 Q. DOES FDN'S REQUEST COMPLY WITH THE IMPAIRMENT STANDARD?

13  
14 A. No. The statutory impair standard requires consideration of whether a carrier's  
15 ability to "provide the services it seeks to offer" would be impaired without access  
16 to a particular unbundled element. As Mr. Williams explains in his rebuttal  
17 testimony, BellSouth offers UNEs to ALECs like FDN that allow ALECs to  
18 transport their data signals from their packet switches to the remote terminal and  
19 from the remote terminal to the customer premises.

20  
21 Q. IS FDN NONETHELESS IMPAIRED IN ITS ABILITY TO OFFER ITS OWN  
22 XDSL SERVICE IF BELLSOUTH DOES NOT UNBUNDLE ITS PACKET  
23 SWITCHING FUNCTIONALITY AND ITS DSLAMS IN ADDITION TO  
24 UNBUNDLING ITS LOOPS?

25

1 A. No. The FCC squarely addressed this question in its *UNE Remand Order*,  
2 explaining:

3 *We recognize that equipment needed to provide advanced services, such as*  
4 *DSLAMs and packet switches are available on the open market at*  
5 *comparable prices to incumbents and requesting carriers alike.*  
6 *Incumbent LECs and their competitors are both in the early stages of*  
7 *packet switch deployment, and thus face relatively similar utilization rates*  
8 *of their packet switching capacity.* *Packet switching utilization rates will*  
9 *differ from circuit switching utilization rates because of the incumbent*  
10 *LEC's monopoly position as a carrier of last resort. Incumbent LEC*  
11 *switches, because they serve upwards of 90 percent of the circuit switched*  
12 *market, may achieve higher utilization rates than the circuit switched*  
13 *market, may achieve higher utilization rates than the circuit switches of*  
14 *requesting carriers. Because the incumbent LEC does not retain a*  
15 *monopoly position in the advanced services market, packet switch*  
16 *utilization rates are likely to be more equal as between requesting carriers*  
17 *and incumbent LECs. It therefore does not appear that incumbent LECs*  
18 *possess significant economies of scale in their packet switches compared*  
19 *to the requesting carriers.*

20 *Id.* at ¶308. (Emphasis added.).

21  
22 The FCC went on to unquestionably state, “We further decline to unbundle  
23 specific packet switching technologies incumbent LECs may have deployed in  
24 their networks.” *Id.* at ¶311.

25

1           Additionally, the FCC has acknowledged that there is “burgeoning competition”  
2           to provide advanced services, *Id.* at ¶316, and this “burgeoning competition”  
3           exists without unbundled access to ILEC advanced services equipment.

4           The existence of this competition alone precludes a finding of impairment. As the  
5           FCC said in the *UNE Remand Order*, “we find the marketplace to be the most  
6           persuasive evidence of the actual ability of alternatives as a practical, economic,  
7           and operational matter.” *Id.* at ¶66. This competition, however, is not all that  
8           supports the decision not to unbundle packet switching functionality. This  
9           decision also is supported by a number of other FCC findings, including that the  
10          advanced services business is “nascent,” that the pre-conditions of natural  
11          monopoly are absent, that several technologies are well positioned to provide  
12          advanced services to the end-user customer, and that ILECs, if anything, trail in  
13          the deployment race.<sup>3</sup>

14  
15          Clearly, FDN is not impaired by the fact that neither packet switching  
16          functionality nor the DSLAM is available as a UNE because FDN can purchase,  
17          install, and utilize these elements just as easily and just as cost-effectively as  
18          BellSouth. It can then use this equipment in combination with either its own  
19          facilities, facilities it obtains from a third party, or UNEs it obtains from  
20          BellSouth to provide its own xDSL service to its customers.

21  

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<sup>3</sup>           *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*, CC Docket No. 98-146, *Second Report*, FCC 00-290, released August 21, 2000, at ¶¶ 70, 94-111.

1 Q. ARE THERE OTHER FACTORS THAT THE COMMISSION NEEDS TO  
2 CONSIDER IN DETERMINING WHETHER FDN'S REQUEST MEETS THE  
3 IMPAIR STANDARD?  
4

5 A. Yes. The Commission must analyze the effects unbundling will have on  
6 investment and innovation in advanced services.<sup>4</sup> There are important differences  
7 between the effects of unbundling elements used to provide traditional  
8 telecommunications services and the effects of unbundling new investment used  
9 to provide advanced services. As the FCC has noted, "[i]nvestments in facilities  
10 used to provide service to nascent markets are inherently more risky than  
11 investments in well established markets. Customer demand for advanced services  
12 is also more difficult to predict accurately than is the demand for well established  
13 services."<sup>5</sup> An important part of the FCC's reasoning to not unbundle advanced  
14 services equipment, even though traditional services equipment had been  
15 unbundled, was to avoid stifling competition and to encourage innovation.<sup>6</sup> This  
16 fact remains all the more relevant today.  
17

18 Further, the Commission's analysis of whether newly deployed advanced services  
19 facilities can properly be unbundled also must take into the account the fact that  
20 ALECs and other entities can also choose to invest in deploying similar facilities.

---

<sup>4</sup> Even a conclusion that carriers would be impaired in their ability to offer advanced services without unbundling would not be sufficient to lead to UNE treatment of facilities used for advanced services. The FCC's multi-part "impairment" test requires consideration of the effect of unbundling on investment and innovation, and the results of that analysis may determine the outcome. Thus, the Commission has determined that packet switching should not be unbundled due to the negative effects unbundling would have on ILEC investment in packet technologies.

<sup>5</sup> *UNE Remand Order*, ¶ 316.

<sup>6</sup> *Id.*



1 Thus, ALECs can choose to install ATM switches and DSLAMs, just as  
2 BellSouth has done, and will continue to do. ALECs are not impaired by  
3 implementing this strategy. BellSouth invests significant resources in deploying  
4 equipment necessary to provide advanced services. It would be inherently unfair  
5 to allow ALECs to simply use the ILEC's equipment as unbundled network  
6 elements where the ALEC is not impeded in deploying its own equipment.  
7 Indeed, where an ALEC can deploy its own equipment, parity demands that the  
8 ALEC should deploy such equipment and not ride the investment and risk of the  
9 ILEC.

10  
11 Based on these factors, the Commission cannot require the unbundling of network  
12 elements used to provide advanced services. To do so would read the "necessary  
13 and impair" standard completely out of the 1996 Act. Moreover, it would have a  
14 chilling effect on BellSouth's incentives to invest in the technologies upon which  
15 advanced services depend. ALECs will not have any incentive to invest in  
16 equipment to provide advanced services if they can ride the backs of, and shift  
17 investment risks to, the ILECs. Conversely, an ILEC's incentive to invest in new  
18 and innovative equipment will be stifled if its competitors, who can just as easily  
19 invest in the equipment, can take advantage of the equipment's use without  
20 incurring any of the risk. C. Michael Armstrong of AT&T made exactly this  
21 point in a speech, entitled *Telecom and Cable TV: Shared Prospects of the*  
22 *Communications Future*, which he delivered to the Washington Metropolitan  
23 Cable Club in November of 1998:

24 *No company would invest billions of dollars . . . if competitors which have*  
25 *not invested a penny of capital nor taken an ounce of risk can come along*

1                    *and get a free ride in the investments and risks of others.*

2

3 Q. PLEASE COMMENT ON MR. GALLAGHER'S ATTEMPTS TO COMPARE  
4 UNBUNDLED CIRCUIT SWITCHING TO UNBUNDLED PACKET  
5 SWITCHING.

6

7 A. As I mentioned above, the FCC has already determined that significant differences  
8 between packet switching functionality and circuit switching functionality render  
9 any such comparison inappropriate in the context of an "impairment" analysis.  
10 *UNE Remand Order* at ¶308. Packet switching is a much newer technology that  
11 can, and is being deployed by ALECs just as BellSouth is deploying it.

12

13 Q. ON PAGE 28, MR. GALLAGHER STATES THAT "EXCEPT FOR THE  
14 'IMPAIR' STANDARD I DESCRIBED ABOVE, THE FCC HAS NOT ISSUED  
15 A GENERALLY APPLICABLE TEST TO DETERMINE WHETHER PACKET  
16 SWITCHING SHOULD BE UNBUNDLED." DO YOU AGREE?

17

18 A. No. As Mr. Gallagher goes on to point out, "in the 1999 *UNE Remand Order*, the  
19 FCC created a four-part test setting forth one set of circumstances where packet  
20 switching clearly must be unbundled." BellSouth agrees that the FCC set forth  
21 this four-part test as the exception to its generally applicable rule that packet  
22 switching is not required to be unbundled. The FCC, however, clearly stated that  
23 an incumbent has no obligation to unbundle packet switching functionality "if it  
24 permits a requesting carrier to collocate its DSLAM in the incumbent's remote  
25 terminal, on the same terms and conditions that apply to its own DSLAM." *Id.* at

1 ¶313 (emphasis added.). As Mr. Williams explains in his rebuttal testimony,  
2 BellSouth will permit FDN to collocate its DSLAM in BellSouth's remote  
3 terminal on the same terms and conditions that apply to BellSouth's own  
4 DSLAM. If BellSouth is not able to accommodate such collocation at a given  
5 remote terminal, BellSouth will unbundle packet switching functionality at that  
6 terminal.

7  
8 On page 29 of his testimony, Mr. Gallagher seems to suggest that if each of these  
9 four conditions discussed above exist anywhere in the State of Florida, BellSouth  
10 is somehow required to provide unbundled packet switching everywhere in the  
11 State of Florida. That simply is not the case. As the FCC stated in its *UNE*

12 *Remand Order*:

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

22 *Id.* at ¶313 (emphasis added). Clearly, the FCC intended for this exception to the  
23 rule to apply only in *limited situations*. Requiring the statewide unbundling of  
24 packet switching if an ALEC can find one remote terminal to which this exception  
25 applies would impermissibly ignore the FCC's intent by allowing the limited

1 exception to swallow the general rule.

2

3 Moreover, FDN's allegation, on page 30, that "CLECs are denied collocation of  
4 DSLAM functionality" is wrong. As Mr. Williams explains in his rebuttal  
5 testimony, BellSouth has not denied FDN, or any other ALEC, the ability to  
6 collocate a DSLAM in a remote terminal in Florida.

7

8 Q. IN SECTION III OF HIS TESTIMONY, WHICH BEGINS ON PAGE 32, MR.  
9 GALLAGHER ARGUES THAT "BELLSOUTH IS REQUIRED BY SECTION  
10 251(c)(4) OF THE FEDERAL ACT TO OFFER ITS HIGH-SPEED DATA  
11 SERVICE FOR RESALE." PLEASE COMMENT.

12

13 A. Again, Mr. Gallagher is mistaken. In fact, the United States Court of Appeals for  
14 the District of Columbia Circuit issued a decision in a case right on point.<sup>7</sup> The  
15 Court states in its Background discussion:

16

17 *At issue in this case is that part of the 'Second Report and Order' in which*  
18 *the Commission addressed the question whether the resale requirement of*  
19 *§251(c)(4)(A) applies to an ILEC's offering of advanced services. As the*  
20 *Commission acknowledged, it had previously determined that advanced*  
21 *services constitute 'telecommunications service' and that the end-users and*  
22 *ISPs to which the ILECs offer such services are 'subscribers who are not*  
23 *telecommunications carriers' within the meaning of §251(c)(4)(A). The*

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<sup>7</sup> *Association of Communications Enterprises, Petitioner v. Federal Communications Commission and United States of America, Respondents, On Petition for review of an Order of the Federal Communications Commission, Case No. 00-1144; decided June 26, 2001.*

1           *remaining issue, therefore, was whether an ILEC's offering of certain*  
2           *advanced services, including DSL, is made 'at retail' so as to trigger the*  
3           *discount requirement. The Commission ultimately concluded that while an*  
4           *incumbent LEC DSL offering to residential and business end-users is*  
5           *clearly a retail offering designed for and sold to the ultimate end-user, an*  
6           *incumbent LEC offering of DSL services to Internet Service Providers as*  
7           *an input component to the Internet Service Provider's high-speed Internet*  
8           *service offering is not a retail offering. Accordingly, . . . DSL services*  
9           *designed for and sold to residential and business end-users are subject to*  
10          *the discounted resale obligations of section 251(c)(4) . . . [H]owever, . . .*  
11          *.section 251(c)(4) does not apply where the incumbent LEC offers DSL*  
12          *services as an input component to Internet Service Providers who combine*  
13          *the DSL service with their own Internet Service. (Emphasis added.)*

14  
15           *The Association of Communication Enterprises (ASCENT) petitioned for*  
16           *review of this determination, and various telecommunications and DSL*  
17           *providers intervened on behalf of the Commission.*

18  
19          In conclusion, the Court states:

20           *In sum, having considered ASCENT's objections, we find the Commission's*  
21           *Order in all respects reasonable.*

22  
23          Q.       ON PAGE 34, MR. GALLAGHER STATES, "FDN SEEKS TO BE ABLE TO  
24                RESELL THE TELECOMMUNICATIONS PORTION OF THIS SERVICE  
25                [BELLSOUTH FAST ACCESS INTERNET SERVICE]. . ." IS FDN

1 ENTITLED TO WHAT IT IS REQUESTING?

2

3 A. No. BellSouth Fast Access Internet Service is not a telecommunications service.  
4 It is an enhanced, non-regulated, non-telecommunications Internet Access Service  
5 that uses BellSouth's wholesale DSL telecommunications service. Mr.  
6 Gallagher's reference to this service as "BellSouth's retail DSL service" should  
7 not be allowed to confuse the issue. Regardless of how FDN refers to the service,  
8 BellSouth does not offer a tariffed retail DSL service, and based on the FCC's  
9 *Second and Report and Order* (CC Docket No. 98-147, *Deployment of Wireline*  
10 *Services Offering Advanced Telecommunications Capability* (1999)) referred to  
11 above, as well as the Court's Decision, BellSouth has no obligation to make  
12 available its wholesale telecommunications DSL service at the resale discount,  
13 pursuant to section 251(c)(4). BellSouth also has no obligation to make its  
14 Internet Access offering available at the resale discount because it is not a retail  
15 service.

16

17 Q. IS THE ASCENT V. FCC COURT DECISION, MENTIONED ON PAGE 35 OF  
18 MR. GALLAGHER'S TESTIMONY, RELEVANT TO THIS ISSUE?

19

20 A. No. The January 9, 2001 ruling ("Ascent Decision") by the United States Court of  
21 Appeals for the District of Columbia Circuit is inapplicable to this issue, and does  
22 not support the position put forth by Mr. Gallagher. FDN's strained reading of the  
23 January decision, in my opinion, is misguided. FDN has taken a statement out of  
24 context, and using it inappropriately for its advantage, concludes that the Court's  
25 ruling supports its position that BellSouth should be required to offer BellSouth

1 advanced data services for resale. Mr. Gallagher's conclusion based on the  
2 "Ascent Decision" is wrong. The decision being referred to by Mr. Gallagher  
3 deals with regulatory relief granted by the FCC regarding resale of advanced  
4 services if conducted through the separate affiliate established in the Ameritech  
5 and SBC merger. The Court ruled that an ILEC may not "sideslip §251(c)'s  
6 requirements by simply offering telecommunications services through a wholly  
7 owned affiliate." This is not what is at issue here, nor does the ruling require  
8 BellSouth to offer its advanced data services for resale at a wholesale discount, as  
9 Mr. Gallagher would have this Commission believe. Further, BellSouth has no  
10 separate affiliate for the sale of advanced services, and therefore, this decision  
11 does not apply to BellSouth.

12  
13 Q. PLEASE COMMENT ON MR. GALLAGHER'S DISCUSSION ON PAGES 38  
14 AND 39 THAT "THE *LINE SHARING RECONSIDERATION ORDER* DID NOT  
15 ENDORSE THE ILECS' REFUSAL TO SELL DSL SERVICES."

16  
17 A. Again, I disagree with Mr. Gallagher's conclusion that BellSouth is required to  
18 provide ADSL service when it is no longer the voice provider. Paragraph 26 of  
19 the *Line Sharing Reconsideration Order* states, in part:

20 *we deny AT&T's request for clarification that under the 'Line Sharing*  
21 *Order', incumbent LECs are not permitted to deny their xDSL services to*  
22 *customers who obtain voice service from a competing carrier where the*  
23 *competing carrier agrees to the use of its loop for that purpose. Although*  
24 *the 'Line Sharing Order' obligates incumbent LECs to make the high*  
25 *frequency portion of the loop separately available to competing carriers*

1            *on loops where incumbent LECs provide voice service, it does not require*  
2            *that they provide xDSL service when they are no[t] longer the voice*  
3            *provider. We do not, however, consider in this Order whether, as AT&T*  
4            *alleges, this situation is a violation of sections 201 and/or 202 of the Act.*

5  
6            As is apparent from the above, and contrary to Mr. Gallagher's allegation, the  
7            FCC did rule -- it denied AT&T's request, and it clearly stated that its orders do  
8            "not require that [incumbents] provide xDSL service when they are no longer the  
9            voice provider." *Id.*

10  
11    Q.    WHAT IS BELLSOUTH ASKING THIS COMMISSION TO CONCLUDE ON  
12    THIS ISSUE?

13  
14    A.    The clear intent of the FCC was that the packet switching functionality should not  
15    be unbundled (except in limited circumstances) and that all providers have the  
16    same opportunity to place whatever equipment they need to provide high speed  
17    data. If FDN chooses not to submit collocation requests, BellSouth cannot be  
18    held to blame for FDN's business decision not to collocate. The FCC rules state  
19    that packet switching does not need to be unbundled unless specific conditions are  
20    met, and the FCC goes on to specifically state that if collocation is available,  
21    packet switching does not have to be unbundled. As explained in detail in the  
22    testimony of Mr. Williams, BellSouth has collocation and UNE offerings that  
23    meet these guidelines.

24  
25    BellSouth requests that the Commission reach the same conclusion that both the



1 FCC and this Commission have reached in the past and deny FDN's request on  
2 this issue.

3

4 Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

5

6 A. Yes.

7

8 (#397189)

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