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September 26, 2001

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

Re: Docket No. 010098-TP (Florida Digital)

Dear Ms. Bayó:

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

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

Sincerely,



Patrick W. Turner (KA)

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

DOCUMENT NUMBER-DATE

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**CERTIFICATE OF SERVICE
DOCKET NO. 010098-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 26th day of September, 2001 to the following:

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**(+) Signed Protective/Non Disclosure
Agreement**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Digital Network,) Inc. for Arbitration of Certain Terms and) Resale Agreement with BellSouth) Telecommunications, Inc. Under the) Telecommunications Act of 1996) _____))	Docket No. 010098-TP Filed: September 26, 2001
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POST-HEARING BRIEF OF BELL SOUTH TELECOMMUNICATIONS, INC.

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

I. INTRODUCTION AND STATUTORY OVERVIEW

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

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

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

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

² 47 U.S.C. § 251(c)(1).

³ 47 U.S.C. § 252(b)(2).

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

⁵ 47 U.S.C. § 252(b)(2).

⁶ 47 U.S.C. § 252(b)(3).

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

II. SUMMARY OF BELLSOUTH'S POSITION

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

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

III. SUMMARY OF ARGUMENT

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

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

⁷ 47 U.S.C. § 252(b)(4).

⁸ 47 U.S.C. § 252(a).

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

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

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

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

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

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

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

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

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

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

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

IV. FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

(See Tr. at 340).

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

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

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

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

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

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

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

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

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

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

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

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

V. ARGUMENT

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

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

A. The FCC already has declined to unbundle DSLAMs.

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

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

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

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

See 47 C.F.R. §51.319(c)(5).

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

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

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

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

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

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

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

* * *

Without access to these loops, competitors would be at a significant disadvantage, and the incumbent LEC, rather than the marketplace, would dictate the pace of the deployment of advanced services.

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

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

When it declined to require that ILECs unbundle DSLAMs, the FCC was well aware of the use of DLC by incumbent LECs. The FCC noted “carriers need unbundled subloops to serve subscribers currently served by IDLC¹⁵ loops.” *Id.* at ¶217. More specifically, the FCC explained,

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

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

Id.

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

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

Id. at ¶218 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The FCC has concluded that "delays caused by the unavailability of unbundled network elements that exceed six months to one year may, taken together with other factors, materially diminish the ability of competitive LECs to provide the services that they seek to offer." *UNE Remand Order* at ¶189. In his prefiled testimony, FDN's witness stated that "collocat[ing] remote DSLAMs and construct[ing] or obtain[ing] lit fiber to the central office . . . in my estimation would require well more than one year before FDN could start to provide service, and perhaps much longer." (See Gallagher Direct at 24-25). As noted above, however, FDN is not required to construct or obtain lit fiber to the central office because BellSouth offers UNE subloops between the remote terminal and the central office. Moreover, the only evidence FDN's witness presented in support of this contention was the statement that "it is my understanding that in one of the few instances where an ALEC attempted to collocate a DSLAM at an ILEC remote terminal, cross-connection and construction issues remained unresolved more than one year after the initial collocation request was made." (Gallagher Direct at 25.)

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

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

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

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

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

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

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

In contrast, if BellSouth's position is adopted, FDN and other ALECs may decide to get a jump on BellSouth by collocating DSLAMs in a remote terminal in which BellSouth has not yet deployed a DSLAM. (Tr. at 352). After all, FDN's witness acknowledged that "there's a huge market [for DSL] in some of the most rural areas" in the state of Florida. (See Tr. at 108). In that event, customers who cannot get voice and data over a single line from any telecommunications service provider¹⁷ could then get voice and data over the same line from FDN or other ALECs. Tr. at 154-55.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

could . . . contact Earthlink or another ISP that advertises that they offer some sort of DSL or high-speed access type service [and] place an order with them. And then that particular carrier would . . . check and see if it was available in that particular customer's community and then at that address, and see if facilities were available and provide service that way.

Comm'r Deason: So then it would be incumbent upon the alternative ISP then to actually make arrangements with BellSouth to install the DSL capability for that particular location?

Mr. Ruscilli: That's correct. That's what they are buying out of [BellSouth's] FCC tariff.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted this 26th day of September, 2001.

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Attachment A

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

ATTENDEES: Al Tousek Diann Hammond Debbie Timmons Darryl Millard Larry Thomas

Via Bridge: Richard McDaniel Dan Peer Craig Uptagrafft Michael Holt Margaret Largent
Theresa Hall Melissa Mathews Beth Gunn Erick Gamble Tommy Williams
Colette Davis Mark Myslinski

FROM: Al Tousek – PMSI • Project Mentors

Notes:

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

1. Remote Site HFS Line Sharing

Larry Thomas, collocation project manager, joined the meeting for the issues/action items discussion.

- **Issues/Action Items Review**

The following collocation issues were addressed in detail:

0809-01 – What is the collocation process when an RT targeted by a DLEC has no space available?

The collocation process for remote sites where there is no space available is basically the same as the process followed in the CO. Physical, virtual and adjacent collocation options are all available at remote sites.

Adjacent collocation is restricted as in some cases where the BellSouth lease restricts the use of the land to BellSouth only. In these instances BellSouth would attempt to negotiate a modification to the lease to allow the presence of a third party cabinet.

Construction of additional BellSouth cabinets is an option where space is available.

0816-02 - Collaborative requested that the item requesting BST to provide information documenting the number of customers served from an RT

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

0816-03 - What documentation can BST provide to cross reference the RT CLLI codes back to the serving COs?

This item was also addressed in the Georgia xDSL Settlement, which ruled that information regarding the RTs subtended, by a particular CO has to be provided. This information is also available via the ad hoc information request as discussed above in 0816-02.

Refer to the attached updated issues/action items log

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

2. Line Sharing

- **Test Set Discussion**

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

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

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

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

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

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

Covad indicated they currently have no test set equipment.

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

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

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

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

- **% DLC Report**

The %DLC report was presented, reviewed and accepted.

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

This report will be posted on the Collaborative web site.

BST - Line Splitting/Line Sharing Collaborative Meeting

Meeting Notes – August 23, 2001

Refer to the attached %DLC report

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

This document will be posted on the collaborative web site.

Refer to the attached Manual DLEC Notification Process CLEC Information Package

- **Issues/Action Items Update**
Issues/action items were reviewed and updated.
Refer to the attached updated issues/action items log

3. Line Splitting

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

The line splitting option of taking a UNE-P to line splitting with BellSouth owning the splitter has not been previously discussed and has to be included in the prioritization. Since ATT was not present a call for reprioritization will be made at the next collaborative.

Refer to the attached updated Product Matrix

- **Collaborative ETET Status Update**
The LSOD has been submitted to CRSG and is in process.

4. Next Meeting Agenda Inputs

Line splitting prioritization

Test set discussion follow-up

Remote Site Order Document (RSOD)

RS Provisioning process review

Next meeting will be planned as a conference call.

Attached Items:

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

Next Scheduled Meeting:

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

This document is for a CLEC line splitting collaborative and does not necessarily
represent the official position of any participant of the collaborative

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