

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. Regarding BellSouth's Practice of Refusing to Provide FastAccess Internet Service to Customers who Receive Voice Service from a Competitive Voice Provider, and Request for Expedited Relief

Docket No. 020507-TP

Filed: August 19, 2003

**JOINT POST-HEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS
OF
AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC,
MCI WORLDCOM COMMUNICATIONS, INC. AND
MCIMETRO ACCESS TRANSMISSION SERVICE, LLP,
ITC^DELTACOM COMMUNICATIONS, INC.,
AND
ACCESS INTEGRATED NETWORKS, INC.**

Virginia Tate
Vicki Gordon Kaufman

**Attorneys for the AT&T Communications
of the Southern States, LLC**

Nanette Edwards
Floyd Self

**Attorneys for ITC^Deltacom
Communications, Inc.**

Donna Canzano McNulty
Dulaney O'Roark, III
Richard D. Meison

**Attorneys for MCI WorldCom Communications,
Inc. and MCImetro Access Transmission
Services, LLP**

Joseph A. McGlothlin

**Attorney for the ACCESS Integrated
Networks, Inc.**

DOCUMENT NUMBER: DATE
07680 AUG 19 03
COMMUNICATIONS CLERK

PRELIMINARY STATEMENT¹

Pursuant to Rule 28-106.307, Florida Administrative Code, the CLECs² file their Joint Post-Hearing Brief and Statement of Issues and Positions.

INTRODUCTION

This case is straightforward. The Commission has already determined that BellSouth's practice of disconnecting the FastAccess service of those BellSouth FastAccess customers that have changed voice service providers is anticompetitive and discriminatory and, as such, is unlawful under Florida Law. BellSouth has offered nothing in this proceeding to change that conclusion. BellSouth's own testimony confirms that its practice is not tied to any legitimate business purpose, but instead retards competition in the voice market because BellSouth refuses service to customers that do not agree to retain (or return to) the BellSouth voice monopoly.

Moreover, this proceeding demonstrates that BellSouth intends to flaunt prior Commission orders by using any ambiguity – real or imagined – in past Commission decisions to reinstitute, *as a practical matter*, its goal to use FastAccess as a club to punish any customer seeking voice service from an alternative provider. This proceeding has demonstrated that it is not enough for the Commission to establish a *policy* against BellSouth impeding voice competition through its FastAccess practices, it must remain engaged to ensure that its policy is *implemented in practice* so that it has the desired effect.

¹The following abbreviations are used in this brief: The Florida Public Service Commission is referred to as the Commission. BellSouth Telecommunications, Inc. is called BellSouth. The Federal Communications Commission is referred to as the FCC. The transcript is referred to as (Tr.) followed by the page number and exhibits are referred to as Exh. No.

²CLECs include AT&T Communications of the Southern States, LLC (AT&T), MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLC (MCI), ACCESS Integrated Networks, Inc. (AIN) and ITC^DeltaCom Communications, Inc. (ITC^DeltaCom)

Specifically, through its decision in this Complaint, the CLECs ask:

- That the Commission's prior policy decision be expanded to all CLECs, not relitigated in perpetuity through individual arbitrations;
- That the Commission implement its directive that the transition be seamless for the customer *in actual practice* by prohibiting BellSouth from reassigning the customer's service to a separate facility;³
- That the Commission not permit BellSouth to discriminate against customers desiring FastAccess for the same reasons that the Commission has prohibited BellSouth from discriminating against customers that have chosen the service already.

The relief CLECs seek is equally straightforward. BellSouth has offered (and is working to implement) a simple 2-page contract amendment to satisfy the requirements of the Louisiana Public Service Commission. It should be required to do the same in Florida. CLECs submit that these modest extensions of the Commission's previous rulings will ensure that those rulings apply uniformly to CLECs in BellSouth's Florida service territory, that they apply to migrating as well as existing CLEC voice customers, and that they achieve their intended policy objective.

CLECs are requesting that BellSouth be required to do what would come naturally to most businesses – keep customers it has won already and expand the number of customers to whom it makes its product available. CLECs are not asking to resell FastAccess, nor are they asking for any compensation for making FastAccess available to their local customers. Indeed, CLECs have agreed to permit BellSouth to use the loops

³ FastAccess is a consumer product that is designed for use by smaller customers. For their part, the CLECs have slimmed their Complaint to UNE-P, because that is the configuration used to serve the relevant market - residential and small business customers. As explained below, BellSouth has attempted to foreclose competition in this very same market, imposing requirements that are patently unsuitable to mass-market competition - most notable is the "second line" requirement. While this may be permissible for larger businesses, in the relevant market addressed here, it has the *same effect* as denial of the CLECs' request - numerous, unnecessary steps that people will not live with, or which increase the cost to the point that competition is foreclosed.

that they lease for *free*, even though CLECs will pay the full cost of those loops. In short, BellSouth can use the loop for free and collect all FastAccess revenue. And if the remedy CLECs request in the case is granted, BellSouth still will be able to offer FastAccess as part of a package of services to its customers. CLECs simply want their local residential and small business customers to be able to receive BellSouth's FastAccess service if their customers wish to do so.

BellSouth has used its built-in advantages of a ubiquitous network and a monopoly base of voice customers to garner 99% of the DSL customers in its Florida service territory. BellSouth seeks to leverage its position in the DSL market so it can win and retain voice customers, particularly premium Complete Choice customers who subscribe to a feature-rich service package. BellSouth attempts to shield its heavy-handed tactics from Commission scrutiny by claiming that the Commission lacks jurisdiction; that BellSouth will provide FastAccess to CLEC resale customers; that CLECs should be required to roll out their own DSL networks if they want their customers to receive DSL service, and that the cost of enabling FastAccess customers to receive UNE-P service is too high. None of these excuses has merit and the Louisiana Public Service Commission has rejected these arguments. Moreover, BellSouth already has implemented an interim method by which it provides FastAccess to UNE-P customers in Louisiana, and will have a fully automated system in place there by early next year. BellSouth should be required to undertake the same measures in Florida.

BellSouth seeks to drive a wedge between the Commission's goals of promoting local competition and customer choice on the one hand, and encouraging the expansion of DSL service on the other. BellSouth's purported justification for its refusal to permit its FastAccess customers to choose their local voice provider is that BellSouth has invested heavily in DSL (which BellSouth was uniquely positioned to do) and should be able to reap the rewards for having done so. BellSouth misses the point. Because CLECs will not charge BellSouth to use their UNE-P lines to provide FastAccess, BellSouth will

continue to receive the profits associated with its DSL business when its DSL customers are allowed to migrate to CLECs for voice service. What BellSouth's DSL investment does not entitle it to do is lock in monopoly profits from its local voice business at the expense of Florida consumers. BellSouth's anticompetitive business strategy undermines both the goals of promoting local competition and expanding DSL service, but both goals can and should be advanced, and will be if CLECs prevail in this case.

ARGUMENT

ISSUE 1

DOES THE COMMISSION HAVE JURISDICTION TO GRANT THE RELIEF REQUESTED IN THE COMPLAINT?

CLECs' Position: * Yes. The Commission has found on no less than four occasions that it has jurisdiction to remedy the anticompetitive behavior which is the subject of this docket.*

Statutory Authority

State law requires the Commission to encourage the development of a competitive market for local telecommunications services. This policy is expressly set out in state statute:

The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.⁴

To carry out this legislative mandate, the Commission is to exercise its jurisdiction to ensure that the incumbent local exchange companies "shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers."⁵

⁴ § 364.01(3).

⁵ § 364.051(5)(a)2.

Section 364.01(4) confers exclusive jurisdiction on the Commission to remedy anticompetitive behavior. The Commission's jurisdiction includes the authority to:

Encourage competition ... in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.⁶

Promote competition by encouraging new entrants into telecommunications markets....⁷

Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior...⁸

In addition, Section 364.3381 provides that the Commission shall have continuing jurisdiction over "...anticompetitive behavior and may investigate, upon complaint or its own motion, allegations of such practices." Section 364.10(1) provides that a telecommunications company may not give an undue or unreasonable preference or engage in undue or unreasonable prejudice in any respect.

Despite the Commission's clear statutory authority, in *every* case in which BellSouth's provision of FastAccess has been at issue, BellSouth has claimed that the Commission has no jurisdiction to decide the dispute. And in *every* case in which the Commission has considered the jurisdictional question, it has ruled that it does have jurisdiction.

FDN

In its arbitration with FDN, BellSouth argued that the Commission had no jurisdiction over FastAccess because it is an enhanced, nonregulated service. The Commission rejected this argument. The Commission found that it had regulatory authority over "barriers to competition in the local telecommunications voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet

⁶ § 364.01(4)(b).

⁷ § 364.01(4)(d).

⁸ § 364.01(4)(g). Section 364.051(5)(b) similarly gives the Commission jurisdiction to ensure that all providers are treated fairly in the market.

Service when they switch to FDN voice service"⁹, that its action was "an exercise of our jurisdiction to promote competition in the local voice market,"¹⁰ and that BellSouth's practice unfairly penalized customers who wanted a competitive voice provider and BellSouth FastAccess in contravention of Section 364.10.¹¹

The Commission held:

...[O]ur state statutes provide that we must encourage competition in the local exchange market and remove barriers to entry. As set forth in Section 364.01(4)(g), Florida Statutes, which provides, in part, that the Commission shall, "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior....," we are authorized to address behaviors and practices that erect barriers to competition in the local exchange market. Section 364.01(4)(d), Florida Statutes, also provides, in part, that we are to promote competition. We also note that under Section 364.01(4)(b), Florida Statutes, our purpose in promoting competition is to "ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Thus, the Legislature's mandate to this Commission is clear.¹²

The Commission concluded that BellSouth's practice regarding FastAccess has a "direct, harmful impact on the competitive provision of telecommunications service"¹³ thus vesting it with jurisdiction.

BellSouth sought reconsideration of the *FDN Order* and again alleged that the Commission lacked jurisdiction. Again, the Commission rejected this argument. It found it had independent state law authority (aside from its authority to decide arbitrations under the Telecommunications Act of 1996) to remedy BellSouth's anticompetitive actions.¹⁴ The Commission reiterated its charge to promote competition

⁹ *In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (June 5, 2002) (hereinafter, *FDN Order*) at 8.

¹⁰ *FDN Order* at 10

¹¹ *Id.*

¹² *FDN Order* at 8-9, emphasis added.

¹³ *FDN Order* at 9.

¹⁴ *In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP, Order No. PSC-02-1453-FOF-TP (October 21, 2002) (hereinafter, *FDN Reconsideration Order*) at 5.

to ensure the widest availability of consumer options.¹⁵

Supra

The Commission exercised jurisdiction over the FastAccess issue *on its own motion* in the arbitration between BellSouth and Supra Telecommunications.¹⁶ BellSouth was ordered to cease its practice of disconnecting FastAccess customers who migrated to Supra for voice service via UNE-P. In referencing the *FDN Order*, the Commission held:

...the decision regarding BellSouth's policy on FastAccess went to the legality of that policy under Florida law and *our jurisdiction to address it*.

...

We make a consistent finding in this proceeding that the practice of disconnecting FastAccess Internet Service when the customer switches voice providers creates a barrier to competition in the local exchange telecommunications market. *We fashion an appropriate remedy for the situation pursuant to our authority under Section 364.01(4)(g).... We are also authorized to act to remedy this barrier to competition by Sections 364.01(b) and (d), Florida Statutes.*¹⁷

271 Docket

The Commission also addressed its jurisdictional authority to remedy the discriminatory effects of BellSouth's FastAccess practice in its consideration of BellSouth's request for 271 relief.¹⁸ The Commission noted that after the record was closed in the 271 case:

...we concluded, *based on state law authority*, in the FDN/BellSouth arbitration that BellSouth's policy of disconnecting its FastAccess service when a customer switched its voice service to an ALEC using UNE-P

¹⁵ *Id.*

¹⁶ *In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.*, Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP (July 1, 2002) (hereinafter, *Supra Reconsideration Order*).

¹⁷ *Supra Reconsideration Order* at 40, emphasis added. In a subsequent docket regarding Supra's complaint that BellSouth has failed to properly implement the Commission's order, Docket No. 021249-TP, BellSouth again filed a motion to dismiss on jurisdictional grounds.

¹⁸ *In re: Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996 (Hearing)*, Docket No. 960786A-TL, Order No. PSC-02-1304-FOF-TL (Sept. 25, 2002).

impeded competition in the local exchange market. Therefore, we ordered BellSouth to discontinue this practice.¹⁹

This Case

When the Complaint was filed in the current docket, BellSouth filed a motion to dismiss. In its Motion, BellSouth claimed that the Commission lacked subject matter jurisdiction and that Complainants had failed to state a claim for which relief could be granted.²⁰ The Commission denied BellSouth's Motion.²¹ Citing the *FDN Order* and the *Supra Reconsideration Order*, the Commission stated that it had already determined that:

we have authority to remedy anti-competitive behavior that is detrimental to the development of a competitive telecommunications market.²²

The Commission has decided in numerous decisions that it has ample state law authority to remedy anticompetitive behavior.²³ It has jurisdiction in this matter.

ISSUE 2

WHAT ARE BELL SOUTH'S PRACTICES REGARDING THE PROVISIONING OF ITS FASTACCESS INTERNET SERVICE TO:

- A. A FASTACCESS CUSTOMER WHO MIGRATES FROM BELL SOUTH TO A COMPETITIVE VOICE SERVICE PROVIDER; AND**
- B. TO ALL OTHER ALEC CUSTOMERS.**

CLECs' Position: *BellSouth prohibits FastAccess customers from receiving UNE-P voice service, regardless of whether the customer already has FastAccess and is migrating to a CLEC for voice service or the customer has CLEC voice service and is requesting BellSouth to install FastAccess on the high frequency portion of the in-service voice line.*

¹⁹ *Id.* at 112, emphasis added.

²⁰ BellSouth Motion to Dismiss, filed July 2, 2002, at 1.

²¹ Order No. PSC-02-1464-FOF-TL.

²² *Id.* at 5.

²³ In concluding that it has jurisdiction to resolve these issues, this Commission reached the same conclusion as the Louisiana Public Service Commission did under its similar state statutes requiring it to open its markets to local competition. See, *In re: BellSouth's provision of ADSL Service to end-users over CLEC loops pursuant to the Commission's directive in Order U-22252-E, Order R-26173-A* (Apr. 3, 2003) (hereinafter, *Louisiana Clarification Order*).

This issue is not in dispute. For the year and a half prior to June 2001, BellSouth provisioned its FastAccess service over UNE-P lines, regardless of whether the customer was migrating voice service from BellSouth to a CLEC or already had CLEC voice service and was requesting BellSouth to install FastAccess. (Tr. 411-12). BellSouth, acting unilaterally and without Commission authority, then changed its practice. BellSouth acknowledges that since June 2001, it has prohibited its FastAccess customers from receiving UNE-P voice service. (Tr. 412-13). Specifically, if a BellSouth voice customer with FastAccess on the high frequency portion of the voice line migrates service to a UNE-P CLEC, BellSouth disconnects that customer's FastAccess service. (Tr. 303). Likewise, if a CLEC UNE-P voice customer calls BellSouth and requests it to install FastAccess service on a UNE-P line, BellSouth refuses to provision FastAccess unless the customer first migrates voice service to BellSouth. *Id.* BellSouth's practice is anticompetitive, discriminatory and unlawful, and the Commission should put a stop to it.

ISSUE 3

DO ANY OF THE PRACTICES IDENTIFIED IN ISSUE 2 VIOLATE STATE OR FEDERAL LAW?

CLECs' Position: *Yes. BellSouth's practices regarding FastAccess as to migrating and new customers violate §§ 364.01(4)(b), (d), (g), 364.051 and 364.3381, Florida Statutes, because they create a barrier to local voice competition. BellSouth's practices are also inconsistent with §§ 202 and 706 of the federal Telecommunications Act.*

BellSouth's refusal to provide FastAccess service to retail end users, whether new or migrating customers, who select a CLEC for voice service (as described in Issue 2) violates Sections 364.01(4)(b), (d), (g), 364.051(5)(a)(2) and (b), and 364.3381, Florida Statutes.²⁴ These statutory sections require the Commission to encourage local competition, to ensure that all telecommunications providers are treated fairly, and to

²⁴ The Commission has also found that BellSouth's practice violates § 706 of the Federal Telecommunications Act, which requires state commissions to encourage competition and the deployment of advanced services, as well as § 202(a), which prohibits discrimination in the provision of services. *See, FDN Order* at 8-9; *Supra Reconsideration Order* at 40.

prohibit discrimination among similarly situated customers. BellSouth's practice to *refuse* service to those retail customers who want it is the very antithesis of these statutory goals and is directly contrary to the important policy mandates found in the legal requirements²⁵ which this Commission must implement. (Tr. 52).

BellSouth has the majority of DSL lines in its service territory - over 99% - and it is adding FastAccess subscribers every day. (Tr. 53). Of BellSouth's 198 central offices, 190 are FastAccess capable (Tr. 530). Said another way, 86% of the BellSouth households in Florida are capable of receiving FastAccess service. (Exh. No. 7, BST resp. to Staff Int. 12). Further, as local competition began, BellSouth had the vast majority of the voice customers in its territory and *100%* of the last mile of loop to each customer's home. (Tr. 360, 496, 499). BellSouth's FastAccess position today is a *direct result* of its inherited monopoly voice network and its ability to leverage its FastAccess service onto its inherited monopoly network; no CLEC is in this position. (Tr. 70). Even BellSouth admits that it "may" enjoy an advantage in the *voice* market due to its ability to package FastAccess with voice service. (Tr. 503, 524).

BellSouth has labeled its FastAccess service an "overlay" to its voice service (Tr. 335); this is merely another way of saying that FastAccess is leveraged off of BellSouth's incumbent voice monopoly.²⁶ BellSouth's witness Smith admits this:

By only investing in areas where BellSouth believed that it could successfully market DSL service as a *complement to its existing voice service* and thereby realize a favorable return on its investment, BellSouth was able to increase deployment and investment in later years as its DSL offerings became more popular.

²⁵ The Louisiana Commission, which has statutory mandates similar to this Commission's, found: "[T]he [Louisiana] Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive affects [sic] of BellSouth's policy are at odds with the Commission's, and thus should be prohibited." *Louisiana Clarification Order* at 6.

²⁶ BellSouth cannot have it both ways - either FastAccess supports itself or BellSouth's voice service (which BellSouth consistently contends is below cost) subsidizes it. (Tr. 149).

(Tr. 524, emphasis added). In questions of BellSouth witness Smith, Commissioner Deason correctly concluded that BellSouth's practice appears to be for the purpose of leveraging its FastAccess service to ensure that customers remain on its network for voice service. (Tr. 551).

While BellSouth touts cable as an alternative to DSL, its actions make it clear that DSL is the relevant market. BellSouth affirmatively refuses FastAccess service to customers who want to purchase it, and, according to BellSouth, sends its customers into the arms of its largest competitor. (Tr. 355) If BellSouth really thought cable modem service was a threat, BellSouth would encourage all customers to purchase FastAccess rather than discouraging willing buyers and disconnecting paying customers.

BellSouth's practice effectively eliminates choice of local service providers for its FastAccess customers. Essentially, BellSouth's practice denies a consumer a service that the consumer wants, and for which the consumer is qualified, in an attempt either (i) to retain the consumer's voice service, or (ii) to prevent the consumer from choosing an alternative voice provider. One reason BellSouth's practice is so effective is that it is not easy for customers to change their FastAccess to another internet provider. To do so, the customer would have to return equipment to BellSouth, reconnect with a new provider, and obtain a new e-mail address, notifying places of business and friends of the new address. (Tr. 167, 175-176). In addition, over 95% of BellSouth FastAccess customers "self-install" FastAccess. (Tr. 55) Once the customer has the service up and running, the customer may be reluctant to disconnect it and start over again with a new provider.

The simple fact that BellSouth engages in the practice of refusing FastAccess service to customers who want it demonstrates that it is anticompetitive, and, therefore, violative of law. BellSouth "plays chicken" with the customer because it knows the customer will not leave it for CLEC voice service if doing so would jeopardize FastAccess service. (Tr. 85, 152-153). As Mr. Gillan testified, the *only* reason for BellSouth to forgo \$600 per year per customer in revenue from customers who want to

purchase a BellSouth service is because BellSouth knows the customers will not leave (or will not select a competitive provider) when they discover they will not be able to get FastAccess; thus, BellSouth will retain the customers' voice revenue *and* FastAccess revenue. (Tr. 54). That this is the case is illustrated by the fact that MCI alone received rejects from BellSouth for more than 5,000 customers because those customers had FastAccess. (Tr. 175, 179). Each reject means that a customer who had made the decision to move voice service to MCI had that transfer rejected because the transfer would cause the loss of FastAccess service.²⁷ This reject figure understates the magnitude of the problem - it does not capture those customers who MCI told at the beginning of the ordering process would lose their FastAccess if they migrated to MCI, and therefore chose not to move their service in the first place. (Tr. 167).

Staff, apparently puzzled by BellSouth's willingness to forgo revenue, asked: "If BellSouth's policy is not designed to keep voice customers from switching to another provider, why does BellSouth refuse to provide paying customers with FastAccess?" Amazingly, BellSouth answered: "*Whether a customer is paying for FastAccess is not the issue.*" (Exh. No. 7, BST resp. to Staff Int. 60, emphasis added).²⁸ If increased revenue is *not* the issue for BellSouth, it has failed to provide any appropriate rationale for its practice other than its desire to preclude customer choice in the voice market.²⁹

Commissioner Deason illustrated the ludicrousness of BellSouth's claim that its FastAccess practice is not done for anticompetitive reasons in questions to BellSouth witness Smith. In analogizing BellSouth's practice of losing the entire revenue stream

²⁷ BellSouth subsequently changed its practice of rejecting such orders. Instead, such orders now flow through and the customer's FastAccess service is automatically disconnected with no prior notice from BellSouth. (Tr. 207).

²⁸ See also, Exh. No. 7, BST resp. to Staff Int. 28, in which BellSouth says there is *no* profit margin at which it would offer FastAccess. BellSouth also says it would rather *lose* the customer than provide FastAccess. (Exh. No. 7, BST resp. to Staff Int. 62). It notes that its policy may drive some customers away. (Tr. 504). This "business strategy" fails the straight face test.

²⁹ BellSouth insists that it does not want to "share" its investment with CLECs; however, BellSouth admitted that none of the revenue it receives for FastAccess service goes to the CLECs. (Tr. 500). The customer remains BellSouth's for the purpose of providing FastAccess service and receiving revenue for FastAccess.

(voice and FastAccess) to a car dealer who refuses to sell a car without a stereo, the “illogic” in Bellsouth’s position became obvious. Why not sell more “units” (FastAccess) by allowing another entity to provide the stereo (voice)? (Tr. 549).

BellSouth’s “answer” to Commissioner Deason's hypothetical was that his approach was not financially viable. (Tr. 549). However, BellSouth witness Smith, Chief Product Development and Technology Officer for BellSouth, had done only a “back of the envelope” analysis of this proposition (which was not proffered) to back up his claim that BellSouth would be worse off selling FastAccess to a customer who did not take BellSouth voice service. As Commissioner Deason commented, he would have expected more than "back of the envelope" calculations as to an issue so important to BellSouth. (Tr. 550).

Additional evidence that BellSouth's anticompetitive strategy is working is that BellSouth retains over 80% of all FastAccess customers that attempt to select a CLEC for local voice service. In a sample of MCI customers that had chosen MCI for voice service but were then informed they would lose their FastAccess service if they changed voice providers, only 18% switched voice providers, indicating that 82% of customers remained with BellSouth. (Tr. 131-132; Exh. No. 7, BST resp. to Staff Int. 24). This indicates that BellSouth’s practice is highly effective and adversely affects competition (Tr. 124).

In an attempt to justify its practice, BellSouth claimed that the FCC has approved it, and thus, the Florida Commission is preempted. (Tr. 299-300). However, what has actually occurred is that the FCC has deferred substantive consideration of the discrimination issue to the states. The FCC found, that in the context of 271 Checklist compliance, *pursuant to the FCC's rules*, BellSouth had no obligation to offer DSL

service to customers served by UNEs. (Tr. 67).³⁰ This finding has *no effect* on the Florida Commission's ability to act pursuant to its state authority (see Issue 1) to remedy discriminatory conduct and such action is not inconsistent with any FCC requirements. BellSouth admits that it is "not aware of any FCC rules that *prohibit* an ILEC from providing DSL service over an ALEC's leased facilities...." (Exh. No. 7, BST resp. to Staff Int. 17, emphasis in original; Tr. 342-343).

Migrating Customers

As to migrating customers, this Commission has already *ruled twice* that BellSouth's practice violates state and federal law. In the *FDN Order*, the Commission held:

...we find that this practice [of disconnecting migrating customers] unreasonably penalizes customers who desire to have access to voice service from FDN and DSL service from BellSouth. Thus, *this practice is in contravention of Section 364.10, Florida Statutes, and Section 202 of the Act*. Furthermore, because we find that this practice creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another ALEC as their voice service provider, *this practice is also in violation of Section 364.01(4), Florida Statutes.*³¹

The Commission made the same finding in the *Supra Reconsideration Order*:

...the practice of disconnecting FastAccess Internet Service when the customer switches voice providers creates a barrier to competition in the local telecommunications exchange market. We fashion an appropriate remedy for the situation pursuant to our authority under Section 364.01(4)(g).... We are also authorized to act to remedy this barrier to competition by Sections 364.01(b) and (d)... Therefore, in the interest of promoting competition in accordance with the state statutes and the federal Telecommunications Act we .. require BellSouth to continue providing FastAccess even when BellSouth is no longer the voice provider.³²

³⁰ *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, CC Docket 02-150, Memorandum Order and Opinion (Sept. 18, 2002) at ¶ 164.

³¹ *FDN Order* at 10, emphasis added; *see also, FDN Reconsideration Order*.

³² *Supra Reconsideration Order* at 40.

Just as the Commission found BellSouth's practice of affirmatively disconnecting migrating customers violative of state and federal law in the *Supra* and *FDN* cases, the same result as to the exact same behavior must be reached in this case.

New Customers

As noted above, the Commission has determined that it is anticompetitive for BellSouth to refuse to provide its FastAccess service to migrating customers. The same reasoning and policy imperatives apply to a customer who has made a competitive choice and who desires FastAccess. There is simply no distinction - legally, technically or otherwise - between these two customer groups. (Tr. 58). As Mr. Gillan testified: "It is just as discriminatory and anticompetitive for BellSouth to refuse service to customers that have *chosen* an alternative voice provider as it is to refuse service to customers that are *choosing* an alternative (but which already have FastAccess installed)." (Tr. 58, emphasis in original).

Making a distinction between migrating and new customers would create a large and illogical gap in the Commission's policy that a consumer may not be punished for a competitive choice. (Tr. 58). It is the customer's ability to make a competitive choice, not the timing of the choice, that should drive the Commission's analysis. BellSouth should not be permitted to refuse service to a customer, whether the customer has already purchased FastAccess or would like to purchase it. (Tr. 59). To do otherwise would foreclose voice competition for those customers who desire FastAccess, (Tr. 57), and violate state and federal law.

ISSUE 4

SHOULD THE COMMISSION ORDER THAT BELLSOUTH MAY NOT DISCONNECT THE FASTACCESS INTERNET SERVICE OF AN END USER WHO MIGRATES HIS VOICE SERVICE TO AN ALTERNATIVE VOICE PROVIDER?

CLECs' Position: *Yes. The Commission has ruled in two prior cases that BellSouth may not disconnect the FastAccess service of an end user who migrates to a competitive voice provider because such behavior is anticompetitive. It should now ensure that its decision is implemented through a seamless transition as it previously ordered.*

BellSouth's practice creates a barrier to local competition, forecloses customer choice, and punishes the end user for selecting the carrier it prefers.

The Commission has already ruled twice (in the *FDN* and *Supra* cases) that BellSouth may not disconnect the FastAccess service of a customer who chooses to migrate from BellSouth to a CLEC for voice service because this practice is anticompetitive and contrary to law.³³ Issue 3 discusses in detail the anticompetitive nature of BellSouth's practices, including its dominance of the DSL market, the effectiveness of its practice to hold local voice customers hostage, and the lack of a sound or reasonable business rationale for its practice. This discussion is incorporated herein by reference.

The Commission further ruled in the *FDN Reconsideration Order* that the migration of existing customers must be "seamless" and in a "manner so that the customer's service would not be altered."³⁴ As discussed below, provisioning FastAccess via the installation of a second unnecessary line cannot accomplish this directive and is the antithesis of it. Allowing BellSouth to use a second loop to provision FastAccess has the *practical effect* of allowing BellSouth to continue its anticompetitive behavior; that is, it will have the *same effect* in the real world as permitting BellSouth to continue its discriminatory policy. The Commission should ensure that its decision requiring a

³³ See discussion of the *FDN* and *Supra* cases in Issue 3, *supra*, at pgs 14 - 15.

³⁴ *FDN Reconsideration Order* at 6-7.

seamless transition is implemented in this docket by requiring FastAccess to be provided over the in-service voice line.

Seamless provision of FastAccess is essential for meaningful implementation of the Commission's policy of removing BellSouth's competitive barriers to entry. BellSouth's provisioning of FastAccess via a second line is duplicative, unnecessary, and inconvenient to customers and will continue to prohibit customer choice.

In the *FDN Reconsideration Order*, the Commission held that BellSouth's migration of customers must be seamless. The Commission specifically ordered that:

BellSouth's migration of its FastAccess Internet Service to an FDN customer shall be a *seamless* transition for a customer changing voice service from BellSouth to FDN in a manner that *does not create an additional barrier to entry* in the local voice market.³⁵

The Commission clearly stated that FastAccess should be provided "in a manner so that the customer's service would not be altered" and that it should be provided at no additional charge to the customer.³⁶

In keeping with its *FDN* decision, the Commission should not permit BellSouth to make *any* changes to the customer's network serving arrangement nor assess any additional charges to a migrating customer. The same UNE-P loop/port combination that served the customer originally should continue to be used to provide voice service to the customer. The only action BellSouth must take is to establish a new billing arrangement via credit card for the FastAccess service. This is the same action it takes today for FastAccess customers who obtain their voice service from CLECs that provide service by resale. BellSouth should not be permitted to install new loop facilities, change the service to a different loop arrangement, or make any network change to the underlying service. (Tr. 60). If any such changes are permitted, a new and additional barrier to

³⁵ *FDN Reconsideration Order* at 7, emphasis added

³⁶ *Id.*

competition will be created, thwarting the intent of the Commission's original decision.³⁷ Permitting provisioning of FastAccess over a second line effectively prohibits CLEC voice customers from obtaining FastAccess. Thus, BellSouth will be able to avoid the mandate of this Commission's policy decision by engaging in a *real world practice* that eviscerates the policy's implementation.

Simply put, the Commission should not permit BellSouth to disrupt, rearrange, or tear down customer service, or put the service on a different facility. (Tr. 84). The whole reason UNE-P works is that the customer is not inconvenienced nor is the customer's service disrupted. (Tr. 144). Provisioning of FastAccess over a second, unnecessary line has just the opposite effect.

BellSouth's proposal for provisioning FastAccess via a second line, (Tr. 429-431, 464-465), would be extremely disruptive to UNE-P customers. It would create a marketplace entry barrier which the Commission's policy pronouncement is intended to remove. BellSouth contends that a customer would experience only "minimal changes" if FastAccess is provided over a second line. (Tr. 464). However, the following activities, which would *not* be required if the customer continued to be served on the high frequency portion of the *existing in-service loop*, become necessary under BellSouth's second line scenario:

- BellSouth must install a new facility;
- BellSouth must make an appointment with the customer to enter the house;
- BellSouth must dispatch a truck to the consumer's house to install the new facility.

Installation of a second line to provision FastAccess results in:

- Only one operational jack, so that the customer can only use FastAccess in one location in the house;
- Service disruption for the consumer;
- Unavailability of all FastAccess services, such as on-line fax and dial-up back up;

³⁷ The Commission also held: ... "[W]e believe our decision envisioned that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers. *Id* at 6.

- No FastAccess at all if a second facility is "not available."

(Tr. 138-143; Exh. No. 3, BST Resp. to FCCA Int. 30).

The above activities illustrate that BellSouth's suggestion that it be permitted to provide FastAccess to UNE-P customers over a second line is not seamless by any stretch of the imagination. For example, most consumers know from personal experience that it is disruptive and inconvenient to arrange for a service appointment and to then take time off from work to be home for a service call.³⁸

BellSouth's second line proposal makes only one jack operational, in contrast to BellSouth's other FastAccess customers where every jack that has voice service is capable of connecting to a computer to receive FastAccess. With only one "FastAccess jack," the customer can not move the computer from one room to another but is able to use FastAccess only where the single operational jack is located. (Tr. 138-139, 141, 143).

It is beyond doubt that the installation of a second, unneeded line disrupts the customer's service. BellSouth attempts to define this interruption as a "momentary disruption" of 15 minutes. (Exh. No. 3, BST Resp. to FCCA Int. 31). First, it strains credulity to conclude that a service technician could complete all the work required to install a new facility in a mere 15 minutes. But even if that were the case, 15 minutes is a significant service interruption and does not meet the definition of "momentary," especially when *no* disruption at all occurs if the existing line remains in use.³⁹

Even more astonishing, BellSouth seeks an "escape" clause to relieve itself of *any* obligation to provide FastAccess if it claims that a second facility is "not available." (Tr. 143). The Commission rejected this in the *FDN* case.⁴⁰

³⁸ It does not appear that BellSouth includes customer time spent waiting for a technician in its "momentary" 15 minute disruption.

³⁹ Apparently, Staff believes that 5 minutes might meet the "momentary" standard. However, BellSouth insists that a service disruption of 15 minutes is "seamless and momentary." (BST resp. to Staff Int. 86).

⁴⁰ *Order Resolving Parties' Disputed Language*, Docket No. 010098-TP, Order No. PSC-03-0395-FOF-TP (Mar. 21, 2003) at 13-14.

Considering the impact of all these factors on the customer, BellSouth's position that provisioning FastAccess over a second line only minimally affects the customer is not credible and must be rejected. The Commission should not permit BellSouth to provision FastAccess over a second line because *as a practical matter*, it would eviscerate the Commission's requirement that BellSouth continue to provide the service.⁴¹ Any proposal that necessitates two loops instead of one is inefficient, wasteful of scarce resources, seriously inconveniences retail customers, and provides an inferior product. (Tr. 234-235).⁴² Clearly, this is *not* what the Commission meant when it ordered "seamless" provisioning of FastAccess.

BellSouth's excuses for its anticompetitive practices are without merit.

Despite the fact that this Commission has already ruled twice that BellSouth may *not* disconnect migrating customers, BellSouth has trotted out a list of excuses for its continued anticompetitive behavior. BellSouth presented these same excuses to the Louisiana Public Service Commission, who found them to be without merit. The Louisiana Commission ordered:

BellSouth is to continue to provide its wholesale and retail DSL service to customers who choose to switch voice services to a competitive local exchange carrier utilizing the Unbundled Network Element Platform. As stated in Order R-26173, this requirement likewise applies to CLEC voice customers who subsequently choose to receive BellSouth's wholesale or retail DSL service.⁴³

BellSouth's excuses are similarly without merit here and should be rejected.

1. BellSouth's tariff does not preclude the relief sought here.

BellSouth contends that its FCC Tariff No. 1, Section 7.2.17(A), which it drafted and which it can amend at any time, prohibits it from providing FastAccess if it is not

⁴¹ The Louisiana Commission did not permit BellSouth to provide the service over a second line. *Louisiana Clarification Order* at 16; Tr. 315.

⁴² A visual depiction of the inefficient and wasteful impact of BellSouth's two loop methodology on the network and consumer is provided in Exh. No. 9, Bradbury dep., exh 2. Page 4 of that Exhibit depicts what DSL technology requires to provide FastAccess Service to a UNE-P customer. Page 8 depicts what BellSouth's two loop methodology would needlessly require.

⁴³ *Louisiana Clarification Order* at 17.

also the voice provider to the end user. (Tr. 304-305) Such an argument must be rejected for several reasons.⁴⁴

First, even if BellSouth's interpretation of its tariff were correct (and the CLECs dispute that below)⁴⁵, BellSouth drafted and filed its tariff, and it is totally within BellSouth's discretion to change the tariff. (Tr. 71). The contents of the tariff are the results of a BellSouth business decision, not a regulatory requirement. (Tr. 342, 368-369). As BellSouth admits:

BellSouth could make a business decision to change the provisioning of its service, and modify the FCC tariff accordingly.

(Exh. No. 7, BST resp. to Staff Int. 20). Thus, this "obstacle" is entirely of BellSouth's own device. BellSouth should not be permitted to justify anticompetitive behavior as a result of a tariff that it drafted. (Tr. 71).

Second, BellSouth's interpretation of its tariff is unreasonable. BellSouth claims that its FCC tariff requires it to refuse service to a customer served via a UNE arrangement because the tariff requires service to be provided to an "in-service, Telephone Company provided exchange line facility." (Tr. 305). However, BellSouth neglects to note that the tariff defines an "in-service exchange line facility" as the "serving Central Office line equipment and all the plant facilities up to and including the Telephone Company-provided Network Interface Device." (Tr. 71-72). UNE loops include the Central Office line equipment and all the plant facilities "up to and including" the Network Interface Device. UNE loops satisfy these conditions in the same way a resold line or a BellSouth retail line does. (Tr. 72). BellSouth's interpretation of its tariff must be rejected.

⁴⁴ The Louisiana Commission rejected this argument: "[A]ny perceived conflicts between FCC and LPSC jurisdiction raised by BellSouth should be of no concern to this Commission, as it clearly has the authority to determine BellSouth's practices are contrary to LPSC rules and regulations, without fear of infringing on the FCC's jurisdiction or non-regulated areas." *Louisiana Clarification Order* at 8.

⁴⁵ BellSouth's interpretation of its FCC tariff has not prevented it from executing contract amendments in Louisiana which cause the very same "tariff violation" BellSouth complains of here. (Exh. No.18; Tr. 352-353).

Third, in the *FDN* case, BellSouth made the same argument regarding its FCC tariff. The Commission rejected BellSouth's claim:

BellSouth asserts that for it to provision its FastAccess Internet Service over a UNE loop would be a violation of its FCC tariff. Although we acknowledge BellSouth's FCC tariff, we believe that we are not solely constrained by an FCC tariff.... [U]nder Section 251(d) of the Act, we can impose additional requirements as long as they are not inconsistent with FCC rules, or Orders, or Federal statutes.... BellSouth has failed to make a showing that our decision is contrary to any controlling law.⁴⁶

BellSouth has similarly failed to make any such showing here.

Finally, in a last ditch effort to revive its tariff argument, BellSouth proffers *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 123 S.Ct. 2050, 156 L.Ed.2d 34 (2003). BellSouth contends that this case stands for the proposition that its FCC tariff is binding on the Florida Commission and preempts it from granting the relief sought. However, the *Entergy* case is inapposite.

Entergy involved a state commission's disallowance of costs resulting from their allocation under a multi-state operating agreement the Federal Energy Regulatory Commission (FERC) approved. The Louisiana Public Service Commission (LPSC) participated in the case at the FERC regarding the allocation, which was made pursuant to a FERC tariff. The LPSC argued that a refund was due to retail customers but did not prevail at the FERC. In a later state proceeding setting retail rates, the LPSC disallowed the same costs that the FERC had found appropriate. Thus in *Entergy*, unlike the case here, the very same costs which FERC had previously ruled upon were at issue, and the LPSC's decision directly conflicted with FERC's decision.

Finally, this case is about BellSouth's *retail* FastAccess service and BellSouth's attempt to use that service to squelch retail voice competition. It has nothing to do with BellSouth's *wholesale* DSL tariff filed at the FCC.

⁴⁶ *FDN Reconsideration Order* at 7.

2. BellSouth's operational "problems" are self-imposed and exaggerated.

BellSouth's contention that operational and technical issues justify its FastAccess practice is without merit. As a preliminary matter, BellSouth admits that its systems were designed to accommodate its practice of providing FastAccess *only* to BellSouth voice customers. The only reason BellSouth personnel do not have access to the systems BellSouth claims they need is because BellSouth has restricted their availability. (Tr. 253, 414, 455-456; Exh. No. 7, BST resp. to Staff Int. 19). Thus, to the extent that any system changes are required to provide FastAccess to retail customers who chose a CLEC for voice service, this is a "problem" entirely of BellSouth's own making which it has responsibility to remedy.

Further, the evidence demonstrates that the "problems" BellSouth alleges are highly exaggerated and that systems and procedures are already in place to allow BellSouth to provide FastAccess to customers who choose a competitor for voice service. (Tr. 221, 234). The most telling piece of evidence as to "operational" problems belies BellSouth's claims. For approximately 18 months, BellSouth provided FastAccess to customers who chose a CLEC for voice without incident or operational difficulties. FastAccess was provided to hundreds of customers who had FastAccess and migrated to a CLEC, as well as to customers who added FastAccess after selecting a CLEC for voice service. (Conf. Exh. No. 21; Tr. 172). This direct customer experience plainly contradicts BellSouth's claim that FastAccess is difficult or costly to provide to non-BellSouth voice customers. (Tr. 78). Only after BellSouth "discovered" that it had "mistakenly" provided FastAccess to these customers, did it intentionally add edits to its systems to block migrating and new customers from receiving FastAccess. (Exh. No. 13, JPG-2; Tr. 413).

In addition, BellSouth provides the ability to obtain FastAccess via resale. (Tr. 307). The network arrangement used to provide FastAccess for resale (or at retail for that

matter) is *identical* to that used to provide FastAccess to customers served by UNE-P for voice, both of which BellSouth does routinely. (Tr. 236; Exh. No. 9, Bradbury dep., exh. 2).

After hearing essentially the same evidence as to operational issues which BellSouth provided in this case, the Louisiana Commission held:

Simply put, there is no technical reason set forth by BellSouth or the CLECs as to why BellSouth's DSL service cannot be provisioned over CLEC loops. As mentioned throughout this recommendation, BellSouth's current practice is based on an internal policy decision.

Staff was not convinced that any of the operational issues provided by BellSouth were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers. If anything, they suggested to Staff that BellSouth is leveraging [its] position as the dominant voice provider with control of the network, to give itself another advantage over CLEC DSL providers.⁴⁷

BellSouth has completed the first phase of its compliance with the *Louisiana Clarification Order* and implemented its requirements on June 1, 2003. (Tr. 417; Exh. No. 20). BellSouth estimated that it will have its systems mechanized to process FastAccess orders for new and migrating customers by February 2004. (Tr. 416, 418, 479). BellSouth already has executed a simple two-page contract amendment to implement the *Louisiana Clarification Order*. (Exh. No. 18). Thus, BellSouth's operational and technical arguments are simply moot, because CLECs would be satisfied to have the same relief in Florida that was ordered in Louisiana and which BellSouth is already providing. (Tr. 119, 144).

Confidential Exh. No. 25 purports to illustrate the additional costs that BellSouth will incur to provision FastAccess as the CLECs request in Florida. As discussed above, to the extent such costs have any basis in reality, they will be incurred, or have already been incurred, to comply with the *Louisiana Clarification Order*. BellSouth's systems

⁴⁷ *Louisiana Clarification Order* at 9-10.

are region-wide, it is already required to make any needed changes, and it has committed to such changes as a result of the *Louisiana Clarification Order*. (Tr. 262, 418-419, 476). BellSouth is *currently* accepting FastAccess orders in Louisiana for new and migrating customers served over UNE-P for voice. (Tr. 478). Any changes that may be required for Florida will require little additional effort.

To the extent there are any operational problems, BellSouth has brought them on itself and it is therefore entirely reasonable to expect BellSouth to pay to remedy them. Moreover, the costs BellSouth claims it will sustain are overblown. For example, BellSouth has listed a ridiculous dollar amount to draft a contract amendment to implement the Commission's decision in this case. (Conf. Exh. No. 25). However, as discussed above, an amendment has already been executed by some CLECs in Louisiana, including MCI. (Exh. No. 18). Thus, the amount listed for this task appears extreme at best⁴⁸ BellSouth has projected that about one-third of the total system cost modifications are necessary to accommodate FastAccess billing. (Conf. Exh. No. 25). However, BellSouth has admitted that if credit card billing is used, a billing method with which the CLECs agree, any billing issues would be resolved. (Tr. 482). BellSouth also lists an amount to perform a cost study; however, no such study was performed in Louisiana. (Tr. 484). No justification was offered for the necessity to perform one in Florida.

Finally, while BellSouth claims it will incur enormous expense in changing its systems, it has done *no analysis* of projected order volume. (Tr. 494). As Commissioner Deason's questions of BellSouth witness Fogle highlighted, it makes no economic sense for BellSouth to incur the enormous amounts it has projected, if it does not have sufficient order volume to justify the expenditure. (Tr. 493-494).⁴⁹ BellSouth admitted

⁴⁸ Essentially, BellSouth would need to change "Louisiana" to "Florida."

⁴⁹ BellSouth admits it is uncertain whether sufficient volume exists to justify mechanization. Nonetheless, BellSouth still proffers exorbitant costs to mechanize its system.

the costs would not be incurred unless volume increased to the level to make such expenditures cost effective. (Tr. 495).

Despite the overwhelming evidence discussed above that there are no severe operational or technical problems, the CLECs briefly respond to BellSouth's claims of operational impediments. As shown below, these claims are nothing more than red herrings:

Access to the high frequency portion of the loop: CLECs will provide access to the high frequency portion of the loop to BellSouth at *no* charge. (Tr. 90, 94, 102, 117, 139, 169-170, 222, 235). Therefore, the characteristics of FastAccess service from BellSouth's vantage point are the same, regardless of whether the customer stays with or leaves BellSouth for voice service. (Tr. 100.) When pressed by Chairman Jaber, BellSouth witness Ruscilli admitted that the CLECs' willingness to grant BellSouth access for free to the high frequency portion of the loop was not really the issue. Rather, it was BellSouth's business decision to refuse to offer the service. (Tr. 346).

Nor are CLECs suggesting, as BellSouth attempted to imply, that the question of loop access be determined on a customer-by-customer basis. BellSouth would receive access to the high frequency portion of the loop for all customers of a CLEC using UNE-P who wanted BellSouth to provide FastAccess.⁵⁰ (Tr. 120).

As to BellSouth's claim that it is unable to determine which CLEC has granted it access to the high frequency portion of the loop,⁵¹ BellSouth tracks numerous different interconnection agreement amendments and the amendment related to FastAccess would be no different. (Tr. 222; 486; Exh. No. 23). BellSouth has already entered into amended interconnection agreements in Louisiana, (Tr. 482), and has obviously found a way to track the amendments.

⁵⁰ The Louisiana Commission held: "[when FastAccess is provided], CLECs should be prevented from charging BellSouth for use of the high frequency portion of the loop." *Louisiana Clarification Order* at 14.

⁵¹ Though BellSouth tried to assert it would need to keep track of "hundreds of CLECs", in fact, only 53 CLECs in Florida use UNE-P to provide service. (Tr. 427).

Loop qualification: Today, BellSouth service representatives perform loop qualification using either the customer telephone number or street address. (Tr. 227-229). For UNE-P, the customer telephone number resides in all necessary BellSouth databases. (Tr. 236; Exh. No. 15, JMB-4, JMB-5). Even if the customer does not have telephone number information available, the street address allows the service representative to determine if FastAccess is available at that location. (Tr. 249-250, 253). Today, FastAccess can be ordered by calling either the BellSouth residence center, business center or FastAccess center. (Tr. 249).

Loop testing, maintenance and repair: BellSouth already performs these functions for UNE-P lines and has the systems and procedures in place to do so. BellSouth performs these functions for UNE-P providers *today* pursuant to its interconnection agreements with CLECs. (Tr. 235)

Billing: Billing for FastAccess provided over UNE-P is the same as billing for resold lines. (Tr. 236). Typical credit card billing is appropriate and BellSouth bills by credit card on a routine basis. (Tr. 225; Exh. No. 15, JMB-2 at 17-18). BellSouth testified that if the Commission ordered credit card billing, any billing issues would be resolved. (Tr. 482).

3. BellSouth's "offer" to provide FastAccess over resold lines does not change its anticompetitive behavior.

BellSouth's "offer" to provide FastAccess over resold lines, does not make its failure to provide FastAccess to UNE-P voice customers any less anticompetitive. (Tr. 13-14). First, as even BellSouth admits, the Telecommunications Act is neutral regarding which of the three delineated entry strategies is used. (Tr. 135; Exh. No. 7, BST resp. to Staff Int. 91). Competitors, not BellSouth, choose which strategy to pursue. Thus, the fact the FastAccess may be resold is irrelevant to the question of whether BellSouth's

conduct is anticompetitive.⁵² The issue is not whether BellSouth offers FastAccess for resale but whether BellSouth may refuse to provide service to its own existing or potential FastAccess customers simply because of the method their preferred voice carrier uses to provide service. (Tr. 73).

Second, resale is a failed entry strategy. It does not permit CLECs to offer innovative packages which require that the CLEC be the access provider. But more importantly, resale is simply not financially viable as the statistics concerning resale demonstrate. From December 2001 to June 2003, the number of resold lines declined by over 50%. The number of resale lines peaked in December 2001 and has declined every six-month period thereafter through June 2003. (Tr. 349). Currently, there are fewer than 70,000 resold lines in BellSouth's entire territory, illustrating that of the millions of BellSouth access lines, only a miniscule amount are resold. (Conf. Exh. No. 8, BST resp. to Staff Int. 41; Tr. 134; Tr. conf. 307). In contrast, the UNE-P lines served have tripled from December 2001 to June 2002. (Tr. 75, revised Table 1). These numbers dramatically illustrate that UNE-P is the most viable method for mass market competition for residential and smaller business customers.

Because resale does not present a viable option, BellSouth is willing to offer it; because the marketplace has demonstrated that UNE-P is viable, BellSouth refuses to offer it. The availability of resale does nothing to diminish the anticompetitive and discriminatory nature of BellSouth's FastAccess practices.

4. Duplication of BellSouth's network is impractical and prohibitively expensive.

Last, BellSouth argues that all providers started from the same point when DSL deployment began and that CLECs should have deployed DSL technology on their own and not "relied" upon BellSouth. (Tr. 522). However, as discussed in Issue 3,

⁵² It is relevant, however, to alleged operational difficulties. If BellSouth can provide FastAccess over resold lines, it can provide it over UNE-P lines; operationally and technically the processes are the same. (Tr. 236).

BellSouth's dominance in the DSL market is unparalleled due to its inherited voice monopoly. Moreover, at the time BellSouth claims that CLECs could have started deploying competing DSL networks, BellSouth was seeking, in both federal and state forums, to prevent CLECs from collocating at remote terminals. To claim that CLECs were in the same position as the incumbent monopoly belies belief. As Mr. Gillan testified:

It is clear that no provider is capable of creating a DSL-footprint of comparable scale and scope as BellSouth...Entrants must either attempt to duplicate BellSouth's DSL-footprint (which would be prohibitively expensive if not impossible) or forego competing for customers desiring such [FastAccess] services.

(Tr. 57).

Duplication of BellSouth's DSL footprint is essentially impossible because it is based largely on equipment installed in remote terminals. There are *no* remote terminal collocations in Florida, demonstrating that no provider has the ability to offer a comparable footprint. (Tr. 136, 155). For example, if MCI wanted to provide DSL using its own facilities to establish the same footprint as BellSouth, it would have to collocate in 185 central offices and 3,945 remote terminals. (Tr. 359). No CLEC has the immense resources necessary for such a deployment.

CLECs lack the advantage that BellSouth has due to its inherited voice monopoly. They cannot offer DSL on the same scope and scale as BellSouth. But even if they could, that would not change the analysis in this case - it would not justify *forcing* customers to change DSL service in order to select the *voice* provider they prefer. (Tr. 74).

Chairman Jaber's questions

At hearing, Chairman Jaber raised two questions which she requested that the parties discuss in their briefs. First, as to the CLECs' provision of the high frequency portion of the loop to BellSouth at no cost, Chairman Jaber inquired as to what language

would be required to accomplish this. (Tr. 437). The answer is quite simple. BellSouth has already drafted a contract amendment to address this issue in Louisiana. (Exh. No. 18). The amendment is quoted below and the CLECs are prepared to accept it in Florida.

As to migrating FastAccess customers, the Louisiana amendment provides:

By allowing the ADL++ [the USOC for FastAccess service] to remain on the line, [CLEC] grants BellSouth the right to use the high frequency portion of its loop without charge, for the provision of FastAccess or wholesale ADSL.

(Exh. No. 18). For customers who desire to add FastAccess after they have selected a CLEC for voice service, the amendment provides:

By including this ADL++ on the FastAccess or wholesale Low Speed DSL order, [CLEC] grants BellSouth the right to use the high frequency portion of its loop without charge, for the provision of FastAccess or wholesale DSL.

(Exh. No. 18).

Chairman Jaber's second question was whether there should be a time frame put on the requirement that BellSouth provide FastAccess to those customers who desire it. (Tr. 441). No timeframe should be imposed. If BellSouth's behavior is anticompetitive and violative of law today, it is anticompetitive and violative of law tomorrow and in the future.

Further, imposition of a timeframe would be inconsistent with the intent of the Act that no entry strategy be favored over another. So long as any competitors choose to use UNEs to provide voice service, as opposed to resale or facilities-based, consumers should be able to avail themselves of that option. They should not be penalized due to the method their preferred carrier uses to provide voice service. BellSouth should not be permitted to engage in anticompetitive and discriminatory behavior that in any way diminishes local competition.

ISSUE 5

SHOULD THE COMMISSION ORDER BELLSOUTH TO PROVIDE ITS FASTACCESS INTERNET SERVICE, WHERE FEASIBLE, TO ANY ALEC END USER THAT REQUESTS IT?

CLECs' Position: *Yes. The Commission should require BellSouth to provide FastAccess to any CLEC end user who requests it. It is just as anticompetitive and discriminatory to refuse FastAccess to a customer who already has chosen a voice provider as it is for a customer who migrates to a voice provider.*

The Commission already has determined in the *FDN* and *Supra* decisions that BellSouth's refusal to provide FastAccess to a customer who chooses to migrate to another voice provider has a direct, harmful impact on the competitive provision of local telecommunications service and creates a barrier to competition in the local exchange market.⁵³

The Commission's policy should be the same for customers who first obtain voice service from a CLEC and subsequently decide to order BellSouth FastAccess as it is for customers who migrate to a CLEC. There is no distinction - legally, technically, or otherwise - between these types of customers. (Tr. 58). Creating an artificial distinction between these two groups of customers violates Chapter 364's prohibitions on anticompetitive behavior and discrimination, and thwarts the Commission's established policy objective of preventing or eliminating barriers to competition in the local exchange market. It is just as anticompetitive, discriminatory and unreasonable for BellSouth to refuse service to an otherwise qualified customer who has already chosen a voice provider as it is for BellSouth to disconnect service to a customer who is moving to a voice provider. (Tr. 83). Either practice has the effect of removing such customers from the competitive marketplace.

Everything BellSouth needs to provide FastAccess over UNE facilities is physically present and needs only to be placed into service for it to provide FastAccess to

⁵³ *FDN Order* 11 9-10; *Supra Reconsideration Order* at 47-48.

new customers that it would otherwise serve, has planned to serve, and invested to serve. (Tr. 234). Each of the reasons discussed in detail in Issues 3 and 4 (which are incorporated by reference into this issue) for requiring BellSouth to continue to provide FastAccess to migrating customers is equally applicable to customers obtaining voice service from CLECs using UNE-P who want to subscribe to BellSouth's FastAccess for the first time.

ISSUE 6(a)

IF THE COMMISSION ORDERS THAT BELLSOUTH MAY NOT DISCONNECT ITS FASTACCESS INTERNET SERVICE, WHERE A CUSTOMER MIGRATES HIS VOICE SERVICE TO AN ALEC AND WISHES TO RETAIN HIS BELLSOUTH FASTACCESS SERVICE, WHAT CHANGES TO THE RATES, TERMS, AND CONDITIONS OF HIS SERVICE, IF ANY, MAY BELLSOUTH MAKE?

ISSUE 6(b)

IF THE COMMISSION ORDERS BELLSOUTH TO PROVIDE ITS FASTACCESS SERVICE TO ANY ALEC END USER THAT REQUESTS IT, WHERE FEASIBLE, THEN WHAT RATES, TERMS AND CONDITIONS SHOULD APPLY?

CLECs' Position: *The terms and conditions of the *Louisiana Clarification Order* should apply to BellSouth in Florida. The *Order* encompasses customers who migrate and customers who first obtain voice service from CLECs before purchasing FastAccess. As to price, BellSouth should not be permitted to charge more than the resale price.*

Essentially, the CLECs in this docket seek to have the terms and conditions identified in the *Louisiana Clarification Order* apply in Florida for BellSouth's provision of FastAccess to UNE-P customers. The Commission simply should require BellSouth to offer to CLECs in Florida the two-page contract amendment from Louisiana pertaining to FastAccess. (Tr. 119; Exh. No. 18).

During the hearing, BellSouth suggested that if it is required to provide FastAccess to a CLEC UNE-P customer, it should be permitted to charge that customer more than it charges a BellSouth voice customer, perhaps as much as \$60 to \$69. (Tr.

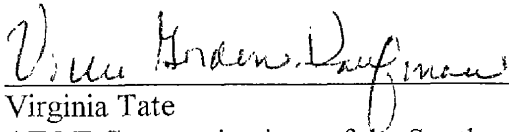
552-554).⁵⁴ However, BellSouth should not be permitted to discriminate among similarly situated customers because this simply creates another barrier to competition.

Regarding price, today, BellSouth provides FastAccess to customers who obtain voice services from CLECs using resale, as discussed in Issue 4. BellSouth should not be permitted to discriminate among similarly situated customers simply because the customers' voice providers use different entry strategies since the facilities used to provide the service are identical. The Commission should require BellSouth to offer FastAccess to customers obtaining voice from a UNE-P provider at no more than the price it offers FastAccess to customers of CLECs who provide service via resale. Any other pricing level would discriminate among customers based solely on their choice of competitive voice provider. (Tr. 61, 111-112).

CONCLUSION

To continue on the path to robust local competition, the Commission should expand the policy it articulated in *FDN* and *Supra* to all CLECS; prohibit the provisioning of FastAccess over a second line to ensure that its policy is translated into reality in the marketplace; require FastAccess to continue to be provided to customers who already have it and to customers who want to purchase it; and require BellSouth to offer FastAccess to customers who obtain voice service from a UNE-P provider at no more than the resale price.

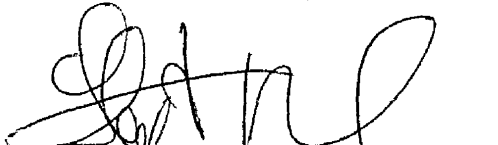
⁵⁴ Apparently, at the conclusion of the hearing, BellSouth reconsidered its earlier position, that there was *no* price at which it would provide FastAccess to UNE-P customers. See fn 28.



Virginia Tate
AT&T Communications of the Southern
States, LLC
Law and Government Affairs
1200 Peachtree Street, NE, Suite 8100
Atlanta, Georgia 30309
(404) 810-4922 Telephone
(404) 810-5901 Telefax

Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

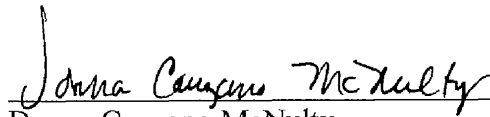
Attorneys for the AT&T Communications
of the Southern States, LLC



Nanette Edwards
ITC DeltaCom
4092 South Memorial Parkway
Huntsville, Alabama 35802
(256) 382-3856 Telephone
(256) 382-3936 Telefax

Floyd Self
Messer, Caparello & Self
Post Office Drawer 1876
215 South Monroe Street
Suite 701
Tallahassee, Florida 32302
(850) 222-0720 Telephone
(850) 224-4359 Telefax

Attorneys for ITC^Deltacom
Communications, Inc.

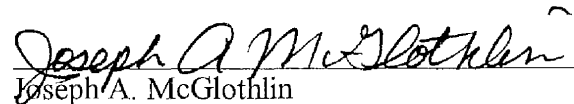


Donna Canzano McNulty
MCI WorldCom
1203 Governors Square Boulevard
Suite 201
Tallahassee, Florida 32301
(850) 219-1008 Telephone
(850) 219-1018 Telefax

Dulaney O'Roark, III
MCI WorldCom
6 Concourse Parkway
Suite 600
Atlanta, Georgia 30328
(770) 284-5498 Telephone
(770) 284-5488 Telefax

Richard D. Melson
Hopping, Green, Sams & Smith, P.A.
Post Office Box 6526
123 South Calhoun Street
Tallahassee, Florida 32314
(850) 425-2313 Telephone
(850) 224-8551 Telefax

Attorneys for MCI WorldCom Communications,
Inc and MCI metro Access Transmission
Services, LLP



Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin, Davidson,
Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

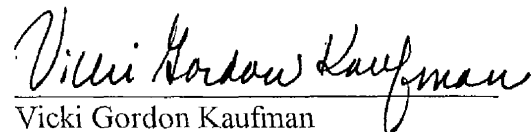
Attorney for the ACCESS Integrated
Networks, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Joint Post-Hearing Brief and Statement of Issues and Positions of AT&T Communications of the Southern States, LLC, MCI WorldCom Communications, Inc. and MCImetro Access Transmission Service, LLP, ITC^Deltacom Communications, Inc. and ACCESS Integrated Networks, Inc. has been furnished by (*) hand delivery or by U.S. Mail this 19th day of August, 2003, to the following:

(*) Patricia Christensen
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Nancy White
Meredith Mays
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556


Vicki Gordon Kaufman