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August 19, 2003

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

Re: Docket No. 020507-TL (FCCA Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Post-Hearing Brief [PUBLIC] in the above referenced 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,

Meredith Mays MMS

Meredith Mays

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

CERTIFICATE OF SERVICE
DOCKET NO. 020507-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, *Hand Delivery and/or FedEx this 19th day of August 2003 to the following:

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(+) Signed Protective Agreement
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PUBLIC VERSION

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the Florida	)	
Competitive Carriers Association	)	Docket No. 020507-TL
Against BellSouth Telecommunications, Inc.	)	
And Request for Expedited Relief	)	Filed: August 19, 2003

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Post-Hearing Brief in this case, which involves the efforts of certain competitive local exchange telecommunications companies ("CLECs")[1] to expand prior panel decisions and force BellSouth to provide its retail wireline broadband service, BellSouth FastAccess® DSL ("FastAccess®"), to any voice customers served by the CLECs. The CLECs have also rejected the method by which BellSouth is currently complying with prior arbitration rulings pending the appeals of such orders, which is a standalone offering. Instead, the CLECs seek to force BellSouth to change the processes and procedures that are in place and working today by compelling BellSouth to provide FastAccess® over UNE loops or UNE-P loops, which would require new processes and procedures.

Without belaboring BellSouth's fundamental jurisdictional disagreement with prior decisions concerning FastAccess®, no one can deny the rationale for the first of these orders centered on "*possible* barriers to competition in the local telecommunications voice market that *could* result from BellSouth's practice . . ." Order No. PSC-02-0765-FOF-TP, p. 8 ("FDN

[1] The CLEC parties in this case are Access Integrated Networks, Inc. ("AIN"); AT&T Communications of the Southern States, Inc. ("AT&T); ITC^DeltaCom Communications, Inc. ("DeltaCom"); MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLC (both entities referred to as "MCI") (all companies collectively referred to as "CLECs" or "the CLEC parties").

Order") (emphasis supplied). *See also* Complaint, ¶ 3. In the second decision, the Commission panel extended its initial ruling beyond the parties to the FDN arbitration when it reiterated "BellSouth's policy of disconnecting FastAccess service when a customer switche[s] voice service to an ALEC using UNE-P impede[s] competition in the local exchange market." Order No. PSC-02-0878-FOF-TP, p. 50 ("Supra Order"). Consequently, for the CLECs to justify the relief sought in this case – indeed, for this Commission to justify its prior rulings – the record evidence must show demonstrable competitive impact resulting from BellSouth's policy. The record evidence, however, flatly contradicts any negative competitive impact as CLECs in Florida have been growing and continue to grow at the same time that BellSouth's market share continues to decline. Each of the CLEC parties in this case has enjoyed the line growth experienced by the larger CLEC community, which illustrates that the relief requested in this case is without merit.

In considering the relief the CLEC parties are requesting here, it is useful to put the complaint into proper context. In context, although the CLECs clamor loudly of alleged competitive harm and significant impacts, the subset of affected FastAccess® lines is small. The CLECs have not and are not contending that BellSouth's FastAccess policy impacts customers that are not receiving that service. Because the percentage of FastAccess customers represents less than 6% of BellSouth's total access lines in Florida, *the CLECs are not contending that there is any negative impact on their ability to compete for over 94% of BellSouth customers.*

In addition, the Commission must consider the affected constituency. The CLECs have framed the issue as one of consumer choice by alleging that BellSouth's FastAccess policy "delay[s] the time when meaningful local competition will become a reality for Florida consumers", creates consumer reluctance to change voice carriers, and "prevents consumers

from taking service from the carrier they prefer." Complaint, ¶¶ 7, 14. At the hearing, however, the consumers were conspicuously absent. No consumer came forward to testify as a public witness. No consumer presented written comments as an interested party at the hearing. No CLEC sponsored actual customer testimony, either formally, in affidavit form, or even in anecdotal form. No consumer claimed that he or she was actually reluctant to change providers or was prevented from obtaining voice service from the carrier of his or her choice. The Commission should not a be swayed into believing that it is acting in furtherance of consumer choice or welfare when the reality is that the CLEC parties are in business to advance their own agendas and not those of the general Florida populace.

The record evidence indicates that competition is thriving in Florida. 149 operational CLECs currently serve 1.3 million access lines, which is 20.0% of the total lines in Florida. (Exh. 7). This Commission has documented CLEC increases in market share, as well as the heavy CLEC presence in BellSouth territory in its 2002 Annual Report on Competition. (*See* Annual Report on Competition, published by the Florida Public Service Commission's Office of Market Monitoring and Strategic Analysis, December 2002). Such market share increases have continued over time, unaffected whatsoever by BellSouth's FastAccess® policy.

Not only is competition alive and well in Florida, the CLEC parties in this case have experienced extraordinary growth. For example, AIN has grown its lines from 4,368 in 2001 to 11,894 in 2002 to 12,147 lines in mid 2003. (Exh. 1). AIN failed to provide this Commission with any evidence of customers that refused to migrate voice service because of BellSouth's FastAccess policy. (*Id.*) Similarly, AT&T has grown its total lines from _____ in 1999, to _____ in 2000, to _____ in 2001 to _____ in 2002. (Exh. 1). AT&T also failed to provide

any evidence of customers that refused to migrate voice service to it because of BellSouth's FastAccess policy. (*Id.*).

Likewise, DeltaCom has grown its lines from _____in 2001 to _____lines in 2003. (Exh. 1). DeltaCom provided an unsupported estimate of alleged lost sales due to BellSouth's policy; however, DeltaCom did not support any witness testimony in this proceeding. Without evidence of the methodology underlying DeltaCom's estimate, or the ability to cross-examine a witness about the validity of the estimate, DeltaCom's claims cannot withstand scrutiny. Thus, DeltaCom also failed to provide actual evidence of customers that refused to migrate voice service to DeltaCom because of BellSouth's FastAccess policy.

Finally, CLEC MCI has also experienced line growth. (Exh. 1). Initially, MCI's analog line numbers were up and down, however, most recently MCI has grown exponentially. MCI's line data reveals it went from _____ lines in 1999 to _____in 2000, to _____in 2001. (*Id.*) Thereafter, MCI reached _____lines in 2002, and subsequently achieved _____lines by mid-2003. (*Id.*) MCI also failed to provide evidence establishing the number of customers that actually refused to establish voice service with MCI due to BellSouth's FastAccess policy.[2]

The line growth experienced by the CLEC parties illustrates why the relief requested in this proceeding is - at best - unjustified, and more accurately - completely frivolous. The CLEC parties have grown lines during the time BellSouth's alleged anticompetitive policy has been in place. Despite this proceeding having been initiated over a year ago, the CLEC parties are

[2] MCI's reliance on rejected local service requests as a surrogate proves nothing. BellSouth reviewed a sample of MCI's account records, and found that one in five customers decided to migrate to a voice provider other than BellSouth, which indicates that customers are not "reluctant" to change voice carriers as the CLEC witnesses claim. (Exh. 7). Moreover, MCI's conclusions concerning the rejected LSRs are misleading. MCI initially testified that 260 customers established voice service with MCI after an initial reject was received; at hearing Ms. Lictenberg conceded the number was 317. (Tr. at 180).

requesting extraordinary relief that requires BellSouth alone to incur costs, change its processes, and change its business plans when none of the CLECs has even taken a stroke tally or tracked calls from customers that allegedly opted not to establish voice service because of BellSouth's FastAccess® policy. The context of the CLECs' requested relief is clear – accepting the CLECs' claims means that (1) competition is foreclosed for a subset of less than 6% of BellSouth's Florida access lines (which is not the case); (2) the CLECs' alleged inability to compete for less than 6% of BellSouth's Florida access lines has delayed the development of "meaningful" local competition despite this Commission's and the FCC's conclusions otherwise; (3) some unspecified number of and unidentified consumers are "reluctant" to change carriers; and (4) the same unspecified number of and unidentified consumers are prevented from exercising choice. These claims should be viewed with the level of skepticism typically reserved for reports of alien encounters or sightings of Elvis. Instead, the Commission should reject the CLECs' attempt to ignore reality and send a message that only true innovation and investment will be rewarded in Florida.

II. BACKGROUND

A. Factual Background

1. BellSouth's DSL Offerings

The telecommunications industry originally developed digital subscriber line technology ("DSL") in the late 1980's. (Exh. 7). DSL-based services provide high-speed connections between customers and packet switched networks over ordinary copper telephone loops. (*Id.*). Originally, the industry sought to transmit video signals over the copper facilities. (*Id.*). During technical evaluation of DSL technology the industry deemed the overlay approach of asymmetric digital subscriber line ("ADSL") protocols preferable to other protocols that required a

standalone or separate facility. (Exh. 7). In practical terms, an end user can talk on the telephone and download information from the Internet at the same time, and the same copper loops carries both data and voice traffic. *See In re: Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, ¶¶ 65-66 (Jan. 19, 2001) ("*Line Sharing Reconsideration Order*"). BellSouth filed its initial FCC tariff and began offering FastAccess® service in Florida in 1998, two years after the federal Telecommunications Act of 1996 ("1996 Act") became effective and three years after Senate Bill 1554 was passed in Florida. (Exh. 7).

BellSouth has two DSL offerings – a federally tariffed and federally regulated wholesale DSL transport service, which is not at issue in this proceeding, and a non-regulated retail DSL-based internet access service, which is BellSouth's FastAccess® service, and is at issue in this docket. (R. at 450, 463, 521-522). BellSouth's federally tariffed wholesale DSL transport is offered through BellSouth's Special Access FCC Tariff No. 1, and is a transport service designed to be a component for Internet Service Providers ("ISPs") to package as part of an enhanced service offering. (Tr. at 386). For example, AOL can purchase wholesale DSL circuits from BellSouth and package such circuits with its internet service. BellSouth uses the tariffed wholesale service as a component of its retail FastAccess® offering. (Tr. at 387).

Prior to offering FastAccess® in Florida, BellSouth formulated its marketing strategy and plans and began deploying its DSL infrastructure. (Tr. at 522) BellSouth had no DSL-related equipment in the field at that time and was in exactly the same position as every other local exchange company desiring to enter the broadband marketplace. (Id.) BellSouth sought to capitalize on growing interest in the Internet; to respond to requests from its dial-up customers

for higher speed Internet access; and to compete with the high-speed cable modem products that were already available in the marketplace. (Id.) Consequently, BellSouth began investing the resources necessary to support its DSL product offerings. (Id.)

To date, BellSouth has invested more than $393 million in Florida to support its DSL offerings. (Tr. at 523). That investment includes the cost of upgrading BellSouth's backhaul network and deploying DSL capability in 191 BellSouth central offices and 3,945 BellSouth remote terminals. (Tr. at 530). In deploying DSL, BellSouth took a careful approach. Demand for high-speed Internet access was analyzed at the neighborhood level. Through this process of targeted deployment, BellSouth selected what it believed were the best locations to place central office and remote terminal Digital Subscriber Line Access Multiplexers ("DSLAMs"). (Id.) This efficient use of capital has been critical to the competitive nature of BellSouth's DSL service and has allowed BellSouth to deploy DSL service throughout Florida. (Id.) This is significant because BellSouth's strategy involved only investing in areas where BellSouth believed it could successfully market DSL service as a complement to its existing voice service and thereby realize a favorable return on its investment. (Tr. at 524). BellSouth would not have made as substantial an investment in broadband technology if it knew that it would be required to offer its services to CLEC end users. (Tr. at 533).

Since 1998, BellSouth has grown its FastAccess® customer base in Florida. As of June 30, 2003, BellSouth had _____ FastAccess® customers. Over time BellSouth has also experienced customer disconnections and churn relating to FastAccess®. For example, 235,022 Florida customers have disconnected FastAccess® service while retaining BellSouth voice service since August 1999. (Exh. 7). Such disconnections reflect customer churn; in the broadband market average customer churn rates range from three to five percent per month. (Tr.

at 560). Consequently, on an annual basis approximately forty-eight percent of customers are likely to terminate FastAccess® service with BellSouth.

2. The CLEC Parties

The CLEC parties in this case – AIN, AT&T, DeltaCom, and MCI – either have not invested in a DSL network in Florida at all, or have deployed limited networks, which are primarily focused on large business customers. For example, AIN is exclusively an UNE-P provider and does not provide broadband service in Florida. (Exh. 1). AIN does not have a facilities-based telecommunications network nor a broadband network in Florida. (*Id.*). AIN has no firm dates to deploy either type of network in Florida; however, AIN has resold voice lines in Florida since 2001 and has resold voice lines over which the end user receives FastAccess® service from BellSouth. (*Id.*).

AT&T has been providing voice service in Florida using unbundled loops and its own facilities since 1999, and using UNE-P loops since 2001. (Exh. 1). AT&T has no plans to install its own DSL network in Florida because installment and deployment of a DSL network is not part of AT&T's business plan. (*Id.*). AT&T provides DSL services in Florida through partnerships with Covad, MegaPath and NewEdge. (*Id.*).

DeltaCom has been providing voice service in Florida since 2001, using resold lines, UNE-P loops and its own facilities. (Exh. 1). DeltaCom has no plans to install its own DSL equipment nor deploy a DSL network in BellSouth central offices and remote terminals. (*Id.*). DeltaCom is not willing to take the business risks to do so. (*Id.*). DeltaCom has utilized resold voice lines over which its end users receive FastAccess® service from BellSouth. (*Id.*). DeltaCom also provides internet service via T-1 lines. (*Id.*).

The last CLEC party, MCI has been providing service over resold voice lines since 1999 and continues to do so today. (Exh. 1). MCI currently provides service to end user customers using resold BellSouth voice lines, which customers receive FastAccess® service from BellSouth. (Tr. at 186-187). MCI has been providing service over unbundled loops and UNE-P loops in Florida since 2001. In 2000, before MCI began providing service over UNE-P loops, it provided business customers with DSL service. (*Id.*). Over the same approximate time period that MCI began offering UNE-P service in Florida, MCI also acquired certain assets from Rhythms, which assets allow MCI to provide DSL service. (Tr. at 192-193). Despite the fact that MCI had acquired a DSL footprint in Florida in 2001, and despite the fact that MCI had been providing business customers with DSL since 2000, MCI did not begin offering DSL service to UNE-P customers until May 2003. (Tr. at 194). MCI currently provides DSL service to 39 of its UNE-P customers. (*Id.*). Although MCI has a current DSL network over which it can serve some UNE-P customers, MCI's position is that BellSouth should still be required to provide FastAccess® service, even to MCI's customers located in areas that MCI can serve over its own network. (Tr. at 196-197).

B. Regulatory Background

1. Federal Regulatory Background

Over the same time period that BellSouth has carefully grown its DSL product, federal regulators have made consistent regulatory findings that (1) DSL services are interstate in nature; and (2) that incumbent carriers, such as BellSouth, are not required to provide DSL service over UNE loops. More recently, the FCC has initiated a series of proceedings that will examine the appropriate regulations for incumbent LEC provision of domestic broadband telecommunications services. *See In re: Appropriate Framework for Broadband Access to the*

Internet over Wireline Facilities; CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019 (2002). The FCC has announced, although it has not yet released, the much anticipated *Triennial Review Order;* preliminary indications suggest that regulatory obligations relating to broadband service offerings will be relaxed, and not expanded as the CLEC parties wish to expand prior rulings in this case. *See* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231344A1.pdf, FCC Press Release "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers."

Significantly, in October 1998, just months after BellSouth began offering FastAccess® in Florida, the FCC issued an order finding that GTE's DSL Solutions-ADSL service offering was "an interstate service that is properly tariffed at the federal level." Memorandum Opinion and Order, *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 F.C.C. Rcd 22,466 at ¶1 (October 30, 1998) (*"GTE Tariff Decision"*). The *GTE Tariff Decision* demonstrates the FCC has exclusive jurisdiction over BellSouth's wholesale DSL service. While the CLEC parties have conceded this proceeding is limited to BellSouth's retail offering, to the extent that CLECs are requesting relief that requires BellSouth to violate the terms of its federal tariff, such relief is outside this Commission's jurisdiction.

Slightly a year after the *GTE Tariff Decision*, in December 1999, the FCC issued its *Line Sharing Order,* which required incumbent carriers to unbundle the high-frequency portion of the local loop. Notably, the FCC reiterated that its rules provided a CLEC with "exclusive use" of the entire unbundled loop facility. Order No. FCC 99-355, CC Docket Nos. 98-147, 96-98 (rel. 12/9/99), ¶ 19, *citing* 47 C.F.R. §§ 51.307(d), 51.309(c).[3] In the *Line Sharing Order,* the FCC found as a "prerequisite condition that an incumbent LEC be providing voiceband service on that

[3] *Vacated by U.S.T.A. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

loop for a competitive LEC to obtain access to the high frequency portion." (*Line Sharing Order,* ¶ 72). The FCC also noted "incumbent carriers are not required to provide line sharing to requesting carriers that are purchasing a combination of network elements known as the platform. In that circumstance, the incumbent no longer is the voice provider to the customer." (*Id.*, ¶ 72).

In June 2000, the FCC clarified its rules relating to DSL services. This clarification occurred in Order No. 00-238, *SWBT Texas 271 Order,* CC Docket No. 00-65 (rel. 6/30/00). The circumstances complained of were strikingly similar to complaints of the CLEC parties here; specifically, a SWBT customer who had been using SWBT's local voice service and xDSL service combined on a single loop was notified that the xDSL service would be disconnected when the customer migrated service to AT&T. In addressing AT&T's complaint, the FCC found "the incumbent LEC has no obligation to provide xDSL service over this UNE-P carrier loop." *SWBT Texas 271 Order,* ¶ 330.

Approximately six months later, the FCC again addressed DSL. The FCC issued order No. FCC 01-26, *Line Sharing Reconsideration Order,* CC Docket Nos. 98-147, 96-98 (rel. 1/19/01), and acknowledged that "[]although the *Line Sharing Order* obligates incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide voice service, *it does not require that they provide xDSL service when they are no longer the voice provider." Line Sharing Reconsideration Order,* ¶ 26.

The FCC's pronouncements have been consistent thereafter. Not once, not twice, but three times various CLECs have complained of BellSouth's policies concerning DSL. Not once, not twice, but three times the FCC has rejected the CLEC complaints in each of BellSouth's applications for long distance relief. *See* Order No. 02-147, *BellSouth Georgia/Louisiana 271*

Order, CC Docket No. 02-35 (rel. 5/15/02); Order No. 02-260, *BellSouth Multistate 271 Order,* CC Docket No. 02-150 (rel. 9/18/02); Order No. 02-331, *BellSouth Florida/Tennessee 271 Order,* CC Docket No. 02-307 (rel. 12/19/02). Not only has the FCC rejected CLEC complaints, the FCC directly addressed *discrimination,* finding that BellSouth's policy was not discriminatory. *See GA/LA 271 Order,* ¶ 157.

2. Florida Regulatory Background

Notwithstanding the FCC's pronouncements, in both the FDN Order and the Supra Order three-person panels of this Commission have imposed upon BellSouth an obligation to provide its retail FastAccess® service (but not its wholesale product) in circumstances when BellSouth is no longer the voice provider. In the FDN Order, the panel required BellSouth to continue to provide FastAccess® service to voice customers migrating to a UNE loop provider. In the Supra Order, the panel required BellSouth to continue to provide FastAccess® to voice customers migrating to a UNE-P provider. Both orders are currently on appeal, and pending the outcome of the appeals, BellSouth is offering a standalone FastAccess® offering to migrating voice customers in compliance with the orders. This offering is only available to migrating FastAccess® customers and is not available to customers that initially establish service with a CLEC and later request FastAccess® service from BellSouth.

The complaint in this case was filed June 12, 2002, just one week after the issuance of the FDN Order on June 5, 2002.[4] Originally filed by the Florida Competitive Carriers Association ("FCCA"), the CLEC parties subsequently adopted the complaint as part of a resolution of

[4] The CLEC parties' race to the Commission belies any suggestion that broader regulatory implications and general principles have no bearing on the outcome of this proceeding. As soon as the Commission took the first step into an unregulated environment, the CLECs demanded further and greater regulation. The CLEC parties were not content with an order addressing only migrating customers, which suggests that despite that their protestations otherwise the next time BellSouth develops a successful unregulated offering the CLECs will return claiming "ancillary jurisdiction" provides this body with the authority to compel BellSouth to make that product available to CLEC voice customers also.

various discovery disputes. The complaint, and the relief the CLEC parties desire, seeks to expand the FDN Order to require greater regulatory oversight over the manner in which BellSouth provides its unregulated service by seeking to impose upon BellSouth an affirmative obligation to provide its FastAccess® service to any requesting customer, regardless of whether that customer previously obtained wireline broadband service from BellSouth. The CLEC parties are also demanding that BellSouth provide FastAccess® on UNE loops or UNE-P loops and have rejected BellSouth's standalone solution.

III. ISSUES AND POSITIONS

Issue 1: Does the Commission have jurisdiction to grant the relief requested in the complaint?

SUMMARY OF BELLSOUTH'S POSITION

*** No. ***

DISCUSSION

One of the fundamental disagreements between the parties concerns the authority of this Commission to exercise jurisdiction over BellSouth's unregulated service offering. BellSouth has outlined key orders in its pre-hearing statement, in witness testimony, in discovery responses, in prior proceedings, and in prior pleadings.[5] This body of regulatory law and policy preempts this Commission from granting the relief requested in this docket. In addition, on June 2, 2003, the United States Supreme Court issued its decision in *Entergy Louisiana, Inc. v. Louisiana Public Service Com'n,* No. 02-229. In *Entergy,* the Court confirmed that the terms of a federal tariff are binding on state agencies and that contrary state rules are preempted. While the CLEC parties may suggest BellSouth can modify its FCC tariff, this suggestion disregards the fact that

[5] BellSouth incorporates by reference, as if fully stated herein, each and every jurisdictional argument previously raised in its Motion to Dismiss (which is attached hereto as Exhibit A), wherein BellSouth addressed the statutory authority cited in the Complaint and explained that this Commission's authority is limited to telecommunications services.

BellSouth has not opted to change its tariff and that a state commission has no authority to require BellSouth to do so. (Exh. 7).[6] The CLEC parties rely upon the FDN Order, the Supra Order, and orders from other state jurisdictions to support their theory. In all likelihood, any order issued in this proceeding may ultimately be appealed.

The heart of the jurisdictional disagreement concerns the nature of the service at issue – a service this Commission and Witness Gillan acknowledge is an enhanced, nonregulated, nontelecommunications Internet access service. (FDN Order, p. 8; Tr. at 88). Because this Commission agrees that FastAccess® is a nonregulated service, it defies logic for the Commission to dictate the terms and conditions that apply to such an offering, which is precisely what the CLEC parties desire.[7] The CLEC parties also conveniently ignore the broader ramifications resulting from a regulatory foray into unregulated territory. For example, although the CLEC parties stress this case involves only FastAccess®, granting the relief requested in this proceeding would have negative consequences extending beyond this docket. If adopted, the Commission must recognize that the CLECs' theories could readily be extended to require BellSouth to make available any unregulated service to competing voice providers, regardless of whether they are competing via UNE-P, unbundled loops, or even resale.[8]

In addition, the CLEC parties fundamentally confuse the scope of this Commission's authority. MCI and AIN, for example, assert this Commission has jurisdiction over cable

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[6] The CLECs may also suggest that because BellSouth has refrained from modifying its FCC tariff as a result of a decision from the Louisiana Public Service Commission that BellSouth's concerns about the tariff are overblown. Any such suggestion would be misplaced. It is not in BellSouth's best interests to modify the tariff as a result of an incorrect order that is currently on appeal.

[7] To be clear, this Pandora's Box was opened by the issuance of the FDN Order with its contradictory language that FastAccess® is an unregulated service yet BellSouth must provide that service in certain circumstances. The end result is that in Florida, an unregulated service is actually subject to regulation.

[8] The CLECs prefer to brush aside these policy ramifications. For example, at the hearing (and during his deposition which preceded the hearing by approximately 7 months) Witness Gillan "[h]ad not put thought into" the broader policy issues. (Tr. at 92). This Commission has no such luxury. If this Commission fails to consider the potential negative impact of its actions on "unregulated offerings," then companies may ultimately postpone investment in the future.

modem service notwithstanding the FCC's conclusion to the contrary. (*See* Exh. 1 *and* Declaratory Ruling and Notice of Proposed Rulemaking, *Internet Over Cable Declaratory Ruling,* GN Docket No. 00-185, CS Docket No. 02-52 (rel. 3/15/02).[9] Witness Gillan asserts the Commission has "ancillary" jurisdiction over unregulated services to protect markets over which the Commission has regulatory authority. (Tr. at 88-89). These assertions have no basis in reality. As Mr. Ruscilli explained, the policy set forth in the Florida statutes relates solely to jurisdiction over telephone companies and it does not provide authority over broadband services. (Tr. at 300-302; *citing* Florida Statutes §§ 364.01 364.10, 364.051, and 364.3381). While Mr. Gillan's purposes may be served by finding ancillary jurisdiction where none exists, the Florida Commission is a statutory entity and cannot create new authority that was not expressly granted to it by the legislature. *See e.g.,* Exh. A. (outlining the applicable Florida statutes, which statues provide authority only over telecommunications services).

To the extent that this Commission implicitly agrees that it has ancillary jurisdiction to grant the relief requested by the CLEC parties (with which BellSouth respectfully disagrees), such authority is limited. When the FDN panel denied BellSouth's Motion to Dismiss this complaint, the panel stated it had "the authority to remedy anti-competitive behavior that is detrimental to the development of a competitive telecommunications market." *See* Order No. PSC-02-1464-FOF-TL, p. 5. Consequently, to exercise any authority this Commission must identify: (1) specific anti-competitive behavior *and* (2) behavior that is actually detrimental to a

[9] In discovery, BellSouth asked whether the CLEC parties contended the Florida Commission had jurisdiction over cable modem service, to which MCI indicated this Commission has jurisdiction over cable modem service notwithstanding the FCC's finding otherwise. (Exh. 1). AIN contended this Commission has jurisdiction if such service violate laws regarding telecommunications services. (*Id.*). Both answers conflict with the FCC's *Internet Over Cable Declaratory Ruling* (at ¶ 7): "we conclude that cable modem service, as it is currently offered, is properly classified as an interstate information service . . . ."

competitive telecommunications market. Because such facts do not exist, as more fully set forth herein, there is nothing to remedy in this proceeding.

Issue No. 2: What are BellSouth's practices regarding the provisioning of its FastAccess Internet service to:

1) a FastAccess customer who migrates from BellSouth to a competitive voice provider; and
2) to all other ALEC customers.

SUMMARY OF BELLSOUTH'S POSITION

*** 1) When a customer migrates voice service, BellSouth continues to provide FastAccess service to existing customers when the end user's voice service is provided over a resold BellSouth line. Also, BellSouth continues to provide FastAccess consistent with prior Commission orders so as long as such rulings (which are currently on appeal to federal district court) are effective and so long as the parties' have agreed upon contractual language that incorporates such orders.

2) If a customer that has never previously had BellSouth FastAccess service, BellSouth will provide this service to an end user that receives voice service on a BellSouth line or via a resold BellSouth voice line. ***

DISCUSSION

BellSouth's practices concerning FastAccess® result from the interplay between BellSouth's two DSL offerings. These offerings -- the federally tariffed, federally regulated wholesale DSL transport service (that is not at issue in this proceeding) and FastAccess®, BellSouth's enhanced non-regulated high-speed Internet access service – coexist. BellSouth has previously compared the two services as the pipe through which water flows. Using this analogy, BellSouth's regulated wholesale DSL transport service is the pipe and BellSouth's retail FastAccess® is the water flowing through the pipe. (Tr. at 304). Any ISP provider can purchase transport (or the pipe) from BellSouth consistent with the terms of BellSouth's FCC tariff, and then supply its Internet access service (or flavored water of choice) using that transport.

BellSouth's practices result also from the overlay nature of BellSouth's DSL service. From the time BellSouth began offering DSL service, both the wholesale DSL service and FastAccess were designed as overlay services to BellSouth's voice service, and the operational support systems used to support DSL were developed based upon this assumption. This assumption also is reflected in BellSouth's FCC Tariff No 1, which establishes the wholesale DSL service as an overlay to BellSouth's voice service by requiring the existence of an "in-service, Telephone Company [i.e., BellSouth] provided exchange line facility." (FCC Tariff No. 1, § 7.2.17(A); Tr. at 305).

Consistent with the FCC Tariff, BellSouth's practice is to provide FastAccess® over a line that is being resold by a CLEC, since a resold line is a "Telephone Company [i.e., BellSouth] provided exchange line facility" within the meaning of BellSouth's FCC Tariff No. 1. CLECs AIN, DeltaCom, and MCI are all purchasing resold voice lines from BellSouth today with FastAccess® being provided over the same line. (Exh. 1). BellSouth will provide FastAccess® to any CLEC customers (migrating customers or otherwise) receiving voice service over a resold line.

In addition, and also consistent with its FCC tariff, when a BellSouth voice customer migrates to a CLEC for voice service via an unbundled loop or via UNE-P, BellSouth will not continue to provide DSL service to that customer with certain exceptions outlined below. To do so would be inconsistent with the manner in which BellSouth designed its DSL service. (Tr. at 527). It also would violate BellSouth's FCC Tariff No. 1, since an unbundled loop leased to a CLEC, either a loop or a loop that is part of a UNE-P arrangement is not an "in-service, Telephone Company [i.e., BellSouth] provided exchange line facility." (Tr. at 305). Furthermore, BellSouth has no legal right to continue providing DSL service on the high

frequency spectrum of an unbundled loop, since, under the FCC's rules, a CLEC leasing an unbundled loop is entitled to make use of "all features, functions, and capabilities" of that loop. *See* 47 C.F.R. § 51.319(a)(1) (2002).

There is an exception to BellSouth's standard practice in Florida, which exception resulted from the FDN and Supra Orders. Thus, when a BellSouth voice customer migrates to a CLEC for voice service via an unbundled loop or via UNE-P and that CLEC and BellSouth have negotiated the appropriate language in their interconnection agreement, then BellSouth will continue to provide FastAccess® service subject to the outcome of pending appeals of the FDN and Supra Orders. BellSouth has complied with these orders by utilizing a standalone loop offering to provide FastAccess® to such migrating voice customers. (Tr. at 514). By using a standalone loop BellSouth has not violated the terms of its FCC tariff, because FastAccess® is being provided over an in-service, BellSouth provided line. (Exh. 7).

The CLECs contend BellSouth will not provide FastAccess® to a customer that is receiving voice service from a provider other than BellSouth. (Tr. at 51). This contention is wrong. BellSouth provides FastAccess® to CLECs' voice customers – including voice customers of AIN, DeltaCom, and MCI – today over resold voice lines. (Exh. 1; *and* Tr. at 187). BellSouth also provides FastAccess® today over standalone loops to CLECs' voice customers served via unbundled loops consistent with the FDN and Supra orders, and subject to the outcome of the pending appeals of those orders. (Tr. at 514).

Issue No. 3: Do any of the practices identified in Issue 2 violate state or federal law?

SUMMARY OF BELLSOUTH'S POSITION

*** No. ***

DISCUSSION

In considering the possible existence of a legal violation, the juxtaposition between federal and state regulatory policy in Florida has reached a collision course, caused by the issuance of the FDN and Supra orders. This collision results from the Florida specific requirement that BellSouth must continue to provide its unregulated service in certain instances based upon the belief that such a requirement will facilitate voice competition. The problem with this decision, with the CLEC parties' request, and with any consideration of extending this decision, is that it conflicts with federal regulatory policy.

Federal Law

Federal regulatory policy can be traced through a series of decisions, which have been addressed in part in Section II of this brief. In outline form, the relevant decisions provide:

- 1998 – The FCC's *GTE Tariff Order* provides that ADSL services are properly tariffed at the federal level.

- 1999 – The FCC's *Line Sharing Order* requiring incumbent LECs to unbundle the high frequency portion of the local loop has the prerequisite that incumbent LECs must be providing voice service to trigger this requirement.

- 2000 – The FCC's *SWBT Texas 271 Order* stated incumbent LECs have no obligation to provide xDSL over UNE-P loops.

- 2001 – The FCC's *Line Sharing Reconsideration Order* reiterates that incumbent LECs do not have to provide xDSL service when they are not the voice provider; in addition, the FCC released a Notice of Proposed Rulemaking (NPRM) seeking comments on which Title II regulations, if any, should apply to ILEC broadband telecommunications services. The NPRM asked commenters (¶ 19) to "consider not only broadband services provided over local telephone networks, but also broadband services offered over other platforms, such as cable, wireless, and satellite." *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC No. 01-337, 16 F.C.C.R. 22,745 (2001).

- 2002 – The FCC issued a series of BellSouth 271 Orders in which the FCC expressly stated that BellSouth's DSL practice is not discriminatory; the FCC issued a NPRM seeking comment on the appropriate regulatory framework for broadband access to the Internet provided over wireline facilities in which it tentatively concluded that such services are information services not telecommunications services. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities,* CC Nos.

02-33 and 98-10, 17 F.C.C.R. 3,019 (2002); the FCC issued a Declaratory Ruling classifying cable modem service as an interstate information service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN No. 00-185 and CS No. 02-52, 17 F.C.C.R. 4,798 (2002) ("*Cable Modem Order*").

- May 24, 2002 – U.S. Circuit Court of Appeals for the D.C. circuit vacated and remanded the FCC's *Line Sharing Orders* because the FCC failed to consider the presence of intermodal competition from cable and satellite services in requiring incumbent LECs to unbundle the high frequency portion of the loop. The D.C. Circuit extended the time to implement its order until February 20, 2003. *USTA* et al. v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

- February 20, 2003 (the *USTA v. FCC* stay expired) – the FCC released a summary of its *UNE Triennial Review* Order that indicates there will be substantial unbundling relief for loops utilizing fiber facilities and that line-sharing will no longer be available as an unbundled element.
  See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231344A1.pdf.

Because BellSouth is not required to provide its FastAccess® service over unbundled loops and because the FCC has found this practice is not discriminatory, it is apparent that BellSouth's FastAccess® practices were not created as part of some nefarious plot to undermine voice competition; instead, the principles of federal regulatory policy outlined above support BellSouth's view. As such, that CLECs (or even Commissioners) may question BellSouth's decision to forego FastAccess® revenue, does not lead to a conclusion that the decision is anything other than a product developed consistent with such principles. Moreover, it is also clear that the federal trend is to relax or decrease, rather than increase the amount of regulation over broadband facilities. For example, in connection with its *Cable Modem Order,* the FCC cited to language from Section 706 of the 1996 Act that stresses regulatory forbearance as a method of encouraging the deployment of advanced services. *Cable Modem Order,* ¶ 4.

CLEC witness Gillan suggests that federal law allows state commissions flexibility to impose additional regulation upon BellSouth because BellSouth's FastAccess® policy is discriminatory. Witness Gillan, however, disregards the trend of federal regulatory policy.

Significantly, while the FCC initially left unanswered the question of discrimination in its *Line Sharing Reconsideration* Order (¶ 26) in 2001, in 2002, the FCC *addressed the question of discrimination* when it dealt with BellSouth's DSL policy. The FCC expressly found that "*we cannot agree with commenters that BellSouth's policy is discriminatory.*" *BellSouth GA/LA 271 Order,* ¶ 157. The FCC *did not ignore the question of discrimination or direct CLECs to pursue enforcement action*, as it had in the *Line Sharing Reconsideration Order.* Instead, the FCC answered this question head on. Witness Gillan's attempts to circumvent this FCC order should be rejected.

Not only has the FCC addressed discrimination, it has also discussed the correct application of Section 706 of the 1996 Act, which both the FDN panel and Mr. Gillan rely upon as support for imposing unnecessary obligation upon BellSouth. In relevant part, the FCC explained that:

> Section 706 of the Telecommunications Act of 1996 ("1996 Act") charges the Commission with "encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "*regulatory forbearance*, measures that promote competition . . ., or other regulating methods that remove barriers to infrastructure investment." Moreover, consistent with section 230(b)(2) of the Act, *we seek to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.*"

(citations omitted) (emphasis added). *Cable Modem Order,* ¶ 4. Contrary to Mr. Gillan's suggestions (indeed, contrary to the panel's decision in the FDN Order), the federal interpretation of Section 706 suggests that a policy of less, rather than more, regulation is the preferred approach in addressing advanced services. It is against this backdrop that this Commission has previously acted.

State Law

In attempting to create a legal or regulatory violation where none exists, the CLEC parties primarily rely upon the FDN and Supra orders. These orders held that BellSouth's FastAccess® practice violated the discrimination provisions in Section 364.10, Florida statutes and Section 202 of the 1996 Act. As set forth above, the Commission's finding concerning Section 202 of the 1996 Act contradicts the FCC's *BellSouth GA/LA 271 Order*. This finding cannot stand because any obligation imposed under state law that is inconsistent with federal law is preempted. (1996 Act, § 251(d)(3)(b)). The FCC has repeatedly held found that BellSouth's policy regarding the provision of DSL services is neither discriminatory nor anticompetitive, and a contrary ruling by this Commission is therefore preempted.

The CLEC parties may also attempt to bolster their claims by citing to decisions from other states. Such decisions are distinguishable and, in any event, do not tell the entire story. For example, the Louisiana Commission held that BellSouth should be required to provide its DSL service to CLEC voice customers served via the UNE-P. Clarification Order R-26173-A, *In re: BellSouth's Provision of ADSL Service to End-Users Over CLEC Loops,* Docket 26173 (April 4, 2003) ("Louisiana Order"). However, the Louisiana Commission reached its decision without ever holding an evidentiary hearing and without giving BellSouth the opportunity to engage in any discovery. Furthermore, the Louisiana Commission's decision is wrong; the Louisiana Commission concluded that, to its knowledge, the argument that "the provision of DSL is federally regulated and as such cannot be addressed by state commissions ... has never been successful, as each state commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior." *Id.* at 7. In support of this conclusion, the Louisiana Commission cited to an order of the Michigan Public Service Commission dated June 6, 2002. However, this decision was superceded by a

subsequent order entered in October 2002, in which the Michigan Commission refused to require an ILEC-affiliated data LEC to provide DSL service to a CLEC voice customer over the same loop. *See* Opinion and Order, Michigan Public Service Commission, Case No. U-12320, at 18-19 (October 3, 2002) ("[T]he Commission is not persuaded that it may require a DSL provider to continue to provide service after a migration from line sharing to line splitting. No authority has been cited that would permit the Commission to do so ...").

In addition to the Michigan Commission's decision, there are orders from other state commissions that are inconsistent with the CLEC parties' position in this case. For example, the Illinois Commerce Commission recently rejected WorldCom's claims that it was anticompetitive for an incumbent to refuse to provide its DSL service when WorldCom was providing the voice service over the same loop:

> The Commission found in Docket 00-0393 that "[CLECs wanting to line split] must be responsible for all coordination with third party vendors or data services partners." *Order* Docket 00-0393 at 55. Implicit in this statement is an endorsement of the policy that the data CLEC must be a willing participant in this relationship. WorldCom's apparent desire to line split without the consent of the data CLEC is not the type of situation that would lead to the Commission to find [Ameritech] deficient on this checklist item.
>
> * * *
>
> As Ameritech well notes, this same issue has been put before the FCC on several occasion and it has found that the refusal of the incumbent's data affiliate (or any data CLEC for that matter) to participate in a line splitting arrangement to be within the data CLEC's rights.

Commission Findings on the Phase I Investigation, Illinois Commerce Commission, Docket 01-0662, Investigation concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996, ¶¶ 917 & 919.

Likewise, other state commissions in the BellSouth region have rejected arguments that BellSouth should be required to provide its FastAccess service over an unbundled loop. The

South Carolina Commission reached this result in an arbitration proceeding with IDS Telcom, LLC. *See Order on Arbitration*, Public Service Commission of South Carolina, Docket No. 2001-19-C-Order No. 2001-286, at 28-29 (April 3, 2001) ("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's 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."). In addition, the North Carolina Utilities Commission refused to require BellSouth to provide its FastAccess service over loops leased to CLECs in its recent Section 271 proceeding. *See Order and Advisory Opinion Regarding Section 271 Requirements*, North Carolina Utilities Commission, Docket No. P-55, SUB 1022, at 204 (July 9, 2002) (find that "[n]either AT&T nor WorldCom offers this Commission sufficient reason to jettison the FCC's prior rulings on [the xDSL] matter in a similar proceeding").

Of course, regardless of decisions of other state commissions, this Commission must look to the evidence in this case. Here, simply because BellSouth does not offer FastAccess® to any requesting consumer does not mean that such a practice constitutes illegal discrimination. Florida law does not require that all end users must be treated exactly the same; rather the law requires "similar treatment in similar circumstances." *See* Order No. PSC-95-1153-FOF-TL, p. 3. CLEC voice customers served over unbundled loops as compared to BellSouth end users and CLEC voice customers served over resale loops are not similarly situated. In the case of BellSouth end users and CLEC resale customers, BellSouth and not the CLEC, has the absolute right to the high frequency portion of the local loop and BellSouth has no obligation to enter in negotiations or establish new processes and procedures to order, provision, maintain and repair

its FastAccess® service over such loops, all of which would be required to provide FastAccess® service over unbundled loops. In addition, establishing unique bundles of service in the competitive telecommunications market is commonplace – the CLEC parties have chosen to offer certain services as bundled offerings and other services on a standalone basis. For example, the chart below summarizes certain responses to discovery questions, (which responses are included in Exh. 1):

	CAN A MIGRATING VOICE CUSTOMER CONTINUE TO RECEIVE VOICEMAIL?	CAN A MIGRATING VOICE CUSTOMER CONTINUE TO RECEIVE UNLIMITED LONG DISTANCE?
AIN	Objected – No Answer Provided.	
AT&T	No. "AT&T does not provide voicemail as a stand-alone service. There are many third party vendors that provide voice mail, but AT&T has not made the business decision to make such an offering."	Yes.
ITC^DeltaCom	Yes.	No. ". . . the customer cannot continue to receive unlimited long distance because DeltaCom does not have such a stand alone offering."
MCI	No. ". . . if an MCI customer receiving local voice service, long distance service and voice mail service switches to another carrier for local voice service, the customer may not retain MCI's voice mail service because MCI has not developed a voicemail product that is independent of its local service."	No. " . . . if a Neighborhood customer with unlimited long distance service migrates to another carrier for local voice service, the customer will not be able to retain his or her unlimited long distance service, because MCI does not offer such service on a standalone basis."

BellSouth's desire to offer unique bundles is no different than typical industry practice, and should be supported rather than discouraged.

In considering provisions of Florida law, the Commission must also consider the nature of the Florida broadband market, and not just the DSL market, to address the competitive – or alleged anticompetitive - nature of BellSouth's policy. This analysis need not occur in a vacuum; rather, the Commission can begin with its October 2002 analysis, *Broadband Services in the United States: An Analysis of Availability and Demand* ("Broadband Report"), prepared by the Commission's Office of Market Monitoring and Strategic Analysis on Behalf of the Federal-State Joint Conference on Advanced Services.[10]

The Broadband Report outlines the "most important role" state governments can play in fostering demand for advanced services; including to "avoid regulations that would determine market outcomes" as well as to "provide regulatory certainty through a consistent regulatory scheme." The Broadband Report cautions regulators to "not hasten to judgment and impose 'remedies' for increasing deployment and demand that would interfere with the dynamic and growing broadband market." (Broadband Report, pp. 6, 54). Moreover, the Broadband Report recognizes that "[t]he most effective solutions have been market driven."

In considering market trends, the Broadband Report recognizes that "because cable and DSL networks overlap to a large degree, most broadband communities now have the benefit of a choice of providers." (Broadband Report, p. 23). This finding is consistent with the evidence in this docket; here, 98% of BellSouth's lines overlap with cable networks. (Tr. at 508; *and* Exh. 24). The FCC has also documented the level of activity in the broadband market. (Exh. 17). Most recently, the FCC reported on data through December 2002; the following table, extracted

[10] The Commission's *Broadband Report* is dated October 2002, which is the same month during which the Commission issued Order No. PSC-02-1453-FOF-TP ("FDN Reconsideration Order"). The FDN Reconsideration Order, however, fails to follow the "best practices" articulated in the *Broadband Report.* BellSouth urges the Commission to heed its own analysis in rendering a decision in this docket; the *Broadband Report* is accessible on the Commission's website at the following URL:
http://www.floridapsc.com/general/publications/reports/TakeRateStudyFinal.PDF.

from that report (which is included in composite Exh.17) illustrates that DSL continues to trail behind cable in the Florida broadband market:

Florida High Speed Lines

	ADSL		Coaxial Cable		Other		Total Lines
	No. lines	% of total	No. Lines	% of total	No. Lines	% of Total	
June 2002	391,188	35%	595,806	53%	132,699	12%	1,119,693
December 2002	521,623	37%	741,426	53%	142,927	10%	1,405,976
Growth: June to Dec. 2002	130,435	46%	145,620	51%	10,228	3%	286,283

When considering the entire broadband market, the relief requested by the CLEC parties should be summarily rejected. The CLECs' requested relief would require BellSouth to incur costs estimated to exceed millions of dollars (Tr. at 468 *and* Exh. 25), yet would also require BellSouth to provide its retail offering a the same price. (Tr. at 61). Even if the total number of FastAccess® customers grew, the end result is that BellSouth alone would incur costs that the CLECs have refused to pay for. (Tr. at 203). Requiring BellSouth – but no other provider in the highly competitive broadband market – to supply services regardless of cost and profitability would distort regulation and incentives to compete and invest in such markets. (Tr. at 283).

The relief requested by the CLECs is equally unjustified even if this Commission limits its inquiry to the voice market. The record evidence shows a Florida voice market that is flourishing. (Tr. at 330). In light of the remarkable line growth experienced by the CLEC

parties and the overall market trends, any conclusion that BellSouth's FastAccess® policy has a negative impact on competition or raises barriers to entry cannot withstand scrutiny.

The CLECs' other alleged legal violations also also without merit. The CLECs' "tying" claim conflicts with the economic definition of tying. (Tr. at 280). Moreover, BellSouth's FastAccess® decision is the opposite of monopoly leveraging or tying. (Tr. at 281). Tying occurs when a company forces customers of its less competitive service to buy its more competitive service. (*Id.*). BellSouth's practice is neither tying nor anticompetitive because any FastAcess® customer that prefers not to buy BellSouth's voice service can find another broadband supplier. (*Id.*).

Likewise, the CLEC parties cannot show any anticompetitive act by BellSouth. BellSouth's FastAccess® policy is not a result of some conspiracy to prevent competition; rather, BellSouth has developed a means to differentiate itself in a highly competitive market, invested heavily in Florida and in its broadband network, and developed a product over which it desires to exercise full control. (Tr. at 524). The CLECs have no evidence that disproves such facts, and even Mr. Gillan agrees that in a situation in which anticompetitive acts may exist, that anticompetitive behavior must be proven with facts. (Tr. at 93). Thus, the CLECs' subjective claim and speculation is not sufficient, and the facts of record demonstrate a competitive voice market unimpeded by BellSouth's policy. The Commission should reject the CLEC parties' invitation to find a legal violation where none exists and should reconsider and reverse the FDN and Supra Orders.

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?

SUMMARY OF BELLSOUTH'S POSITION

*** No. ***

DISCUSSION

This issue revisits, in part, an issue that was decided in the FDN Order. That is, no party disputes that the FDN Order imposed upon BellSouth an obligation to continue to provide FastAccess® to migrating voice customers. BellSouth disagrees that this Commission can impose such an obligation upon it, and the FDN and Supra Orders are currently under appeal. This issue varies slightly from prior orders, however, in the sense that it considers actual *disconnection* of BellSouth's service. Issue 4 implies this Commission can actually dictate the specific provisioning method of BellSouth's unregulated service offering. As set forth herein, this Commission has no authority to issue an order that regulates directly the manner in which BellSouth provides its unregulated service offering.

Even assuming (which BellSouth does not) that the Commission can dictate the terms under which it provides unregulated services, it would be entirely inappropriate to prohibit actual disconnection of this offering. The FDN panel refrained from dictating the precise method by which BellSouth had to comply with its directive. On reconsideration, the panel reiterated that it did not impose a specific provisioning method:

> To the extent that BellSouth has requested that our decision be clarified in regards to the provisioning of its FastAccess Internet Service, we observe that the provisioning of BellSouth's FastAccess Internet Service was not specifically addressed by our decision. However, we contemplated that BellSouth would provide its FastAccess Internet Service in a manner so that the customer's service would not be altered. We note however, that there may be momentary disruptions in service when a customer changes to FDN's voice service. While we decline to impose how the FastAccess should be provisioned, we believe that the provision of the FastAccess should not impose an additional charge to the customer.

FDN Reconsideration Order, p. 7. Thereafter, the panel approved language in the interconnection agreement between BellSouth and FDN that allows BellSouth to provide

FastAccess on a BellSouth owned and maintained loop, separate and distinct from the line FDN uses for voice service. Order No. PSC-03-0690-FOF-TP, p. 8, Section 2.10.1.4 ("FDN Interconnection Agreement Order").

The most efficient and practical method to continue to provide FastAccess® service when an end user changes voice providers is through standalone FastAccess® service. (Tr. at 464). Because BellSouth would own the loop over which standalone FastAccess is provided, it still has the telephone number and related information in its system. (Tr. at 465). Moreover, because BellSouth can and does provision UNE loops and UNE-P loops, it does not need to change existing methods and procedures of provisioning such facilities. (Id.). BellSouth would also have a single solution for all types of CLEC serving arrangements – whether CLECs utilized unbundled loops or unbundled UNE-P loops – with a standalone offering. (Id.). BellSouth's cost estimates also indicate that a standalone offering is more cost effective than spending the millions of dollars to provide FastAccess® over UNE loops or UNE-P loops. (Tr. at 468-469).

The CLECs' position – which would preclude disconnection of FastAccess® service – is without basis. The CLECs imply that it would be a minor undertaking for BellSouth to simply change its processes. This testimony is not credible, however, because if it was such a minor undertaking for BellSouth to change its processes, then the CLEC parties should be willing to pay for the related costs. However, Mr. Bradbury saw "no reason" for the CLECs to absorb such costs. (Tr. at 253).[11] The CLECs may also claim that BellSouth's inadvertent provisioning of FastAccess® to approximately 700 customers in the region, supports such a view. Any such view is overstated. The inadvertent provisioning of FastAccess® service was discovered by maintenance personnel during troubleshooting, which caused operational problems. (Exh. 8).

[11] While BellSouth and the CLEC parties disagree about the about the level of operational difficulties associated with the relief the CLECs desire, even Mr. Bradbury concedes that some effort would be required to modify TAG and LENS, and that modifications to EDI would be "more difficult." (Tr. at 253).

This Commission should avoid creating operational problems, when another option exists and allows BellSouth to take advantage of existing procedures.

The CLECs will also claim that because BellSouth is taking steps to comply with the Louisiana Order, that the work necessary to provide the CLECs' requested relief is practically finished. This claim is also without merit. BellSouth's work in Louisiana is far from complete. (Tr. at 475). To comply with the order, BellSouth had to remove edits from its systems that allow all UNE-P lines to qualify. (*Id.*). This means, that even if a CLEC has not provided BellSouth with permission to access the high-frequency portion of the loop, the loop qualifies for service. (*Id.*). Eventually, after a series of manually intensive steps, the order will be rejected. (Tr. at 476). To create a customer expectation that a service will be available, only to learn later that the customer will not receive the service hardly results in the type of consumer friendly environment the CLECs claim to espouse.

Issue 5: Should the Commission order BellSouth to provide its FastAccess Internet service, where feasible, to any ALEC end user that requests it?

SUMMARY OF BELLSOUTH'S POSITION

*** No. ***

DISCUSSION

Throughout this proceeding, the CLEC parties have made abundantly clear their desire that this Commission "extend" the FDN and Supra Orders and require BellSouth to provide FastAccess service to any ALEC end user that requests it. (*See* Tr. at 31). The CLECs mistakenly claim that there is no distinction between a migrating customer and a customer that establishes voice service initially with a CLEC. (Tr. at 58). While BellSouth disagrees with

most aspects of the FDN Order, it is clear that the Commission addressed this issue and held otherwise in the FDN Reconsideration Order, concluding:

> BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Rather, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. We agree.
> * * * *
> We believe that we were clear in our decision requiring BellSouth to continue to provide FastAccess Service to those BellSouth customers who choose to switch their voice provider. The Order clearly demonstrates that we considered the arguments raised by FDN.

FDN Reconsideration Order, p. 4; *also* Tr. at 330-331.

As Mr. Ruscilli explained, there is a distinction between an existing FastAccess® customer and customers that have never had FastAccess®. (Tr. at 331). A customer that has never had FastAccess service and establishes voice service with a CLEC selects that provider with knowledge of the CLEC's available offerings. (*Id.*) If the CLEC does not provide DSL service, the customer accepts service anyway, presumably because the availability of DSL service is not important to that customer. (*Id.*) A customer that has FastAccess® and desires to change providers evidenced an interest in broadband prior to deciding to switch providers. (*Id.*). Both customers have sufficient flexibility to choose from available voice and broadband providers; however, for the Commission to impose on BellSouth to impose a new, rather than continued, obligation upon BellSouth that did not previously exist effectively makes BellSouth the broadband provider of last resort. Having previously recognized this distinction, the Commission should reject the CLEC parties attempt to burden BellSouth alone with newly created obligations that are not shared by any other broadband provider. (Tr. at 332).

Both Mr. Gillan and Ms. Lichtenberg seek to justify the creation of such obligations through generalized statements about consumer choice. While the concept of a consumer

friendly environment is certain laudable, Mr. Gillan and Ms. Lichtenberg's generalized notions cannot stand in light of the evidence in this proceeding. Specifically, MCI continues to publish on its website information concerning its "Neighborhood" offering that directs customers to "cancel" their DSL service and that also states customers must maintain voice service with MCI to obtain MCI's DSL service. (Exh. 1). Such documents hardly further the pie in the sky vision of consumer choice that Mr. Gillan and Ms. Lichtenberg advocate.

These broad statements also disregard that consumers cannot dictate service provider choice. (Tr. at 270). In a competitive market, firm profit is paramount. (*Id.*) If BellSouth provided all services to all consumers, without regard to economic principles of supply, demand, and pricing, then the only consumer choice left at the end of the day would likely be a bankruptcy filing. (*See* Tr. at 270). Moreover, if the Commission imposes unbalanced regulatory obligations upon BellSouth, then the Commission will only negatively impact future investment and innovation. (*Id.*). Any such requirements will do little to further advanced services as a whole because in Florida cable modem service, and not DSL service, dominates the market.

Incredibly, while maintaining a "consumer choice" platform as a basis for the relief requested in this case, the CLEC parties completely ignore the impact of their choices on the Florida telecommunications market. For example, MCI has touted rejected local service orders as evidence of the impact of BellSouth's FastAccess® policy on the Florida voice market. (Tr.167-168). MCI however, concedes that during the same time period that these orders were rejected that it offered DSL services to business customers in Florida. (Tr. at 188-189). MCI also served end users over resold voice lines, which end users received FastAccess® service. (Tr. at 186-187). MCI made no effort whatsoever to create a choice for the consumers whose

orders were clarified back to MCI. Instead, MCI went to great lengths to add a third-party verification to its ordering process and ensure that FastAccess® customers were told they could not migrate to MCI rather than take the steps to coordinate service offerings with a "different portion of the company." (Tr. at 184-185).

The CLEC parties, naturally, are unconcerned about BellSouth's ability to compete in the broadband market as a whole. Rather, the CLEC parties, *three of whom readily admit they have no plans whatsoever to deploy DSL networks of their own*, want BellSouth to supply the needs of their broadband customers at BellSouth's expense. (*See* Exh. 1). As Dr. Taylor explained, in the long run consumers would be injured by such a requirement. (Tr. at 286). Neither BellSouth nor CLECs would have any incentive to invest in new facilities and technologies because (1) BellSouth would be forced to share the benefits of its investment and its research and development and (2) by being able to take advantage of BellSouth's investment and new service deployment, entrants would have diluted incentives to develop their own services. (Tr. at 287). This Commission should encourage, not discourage, investment, which would be the result of ordering the relief requested by the CLEC parties.

Issue 6a: **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?**

SUMMARY OF BELLSOUTH'S POSITION

*** The Commission should not enter such an order, which exceeds the Commission's jurisdiction and which seeks to regulate an unregulated service offering. Notwithstanding the foregoing, BellSouth needs the freedom and flexibility to: (1) implement credit card billing; (2) require the CLEC to provide the splitter for an end user served via an UNE-L; (3) require the CLEC to provide BellSouth access to the mechanized loop testing capability on a CLEC switch for an end user served via an UNE-L; (4) deploy a second line to the end user customer's home to provide either FastAccess service and/or to provide the UNE-

L or UNE-P; (5) recover the costs incurred to provision this service; and (6) alter the pricing for its unregulated service offering in its discretion. ***

Issue 6b: **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?**

SUMMARY OF BELLSOUTH'S POSITION

*** BellSouth incorporates by reference its response to Issue 6a. ***

DISCUSSION

As BellSouth has explained above, the Commission should not impose any requirement that effectively sets the terms of an unregulated offering. Nonetheless, in Florida the FDN and Supra orders are currently effective, which orders BellSouth has complied with. While the orders remain effective, there is no need for additional Commission action concerning the rates, terms, and conditions of BellSouth's FastAccess® service, except that the Commission should clearly and definitively state that BellSouth has the freedom to increase the price for its wireline broadband service in its discretion.

As Mr. Fogle testified, the standalone FastAccess offering is BellSouth's preferred method of implementing the FDN and Supra Orders. (Tr. at 464). The cost of offering standalone FastAccess is less than implementing the widespread systems changes necessary to provide FastAccess over unbundled loops or UNE-P loops and BellSouth has absorbed any additional costs associated with the standalone offering. (Exh. 7).

This Commission has also approved the terms and conditions for BellSouth's standalone offering. (*See* FDN Interconnection Agreement Order). BellSouth has completed orders using this standalone offering, which other CLECs, including some of the CLEC parties have adopted. (Tr. at 514-515). To require BellSouth to reverse the last several months of work associated with

the FDN and Supra Orders would be an incredible waste of resources and would effectively penalize the regulatory process, which process has resulted in two existing orders, one applicable to UNE-P providers and one applicable to UNE providers, the terms of which other carriers have already incorporated into their interconnection agreements. Moreover, in connection with approving the FDN Interconnection Agreement, this Commission rejected another of the CLEC parties' requests; namely, the Commission acknowledged that failure to maintain a bundle that includes a discount associated with the services subscribed to can result in a loss of the discount. (FDN Interconnection Agreement Order, p. 8). Mr. Gillan conceded "[t]here are times when FastAccess would be discounted as part of a bundle." (Tr. at 111).

Because bundles of services are priced differently, Mr. Smith explained that implementing typical, market-based standalone market prices for FastAccess® would likely result in a standalone price of approximately $69. (Tr. at 554). Consequently, if this Commission were to require BellSouth to offer FastAccess® at all (which it should not), at a minimum any such order should contain language that recognizes the standalone price for FastAccess® may increase and also recognizes that BellSouth has the flexibility to set the appropriate standalone price in its discretion.

Issue[12] **If the Commission orders BellSouth to provide its FastAccess service to ALEC end users, should the Commission impose a time limitation or sunset on any such requirement?**

SUMMARY OF BELLSOUTH'S POSITION

*** The Commission should not enter such an order, which exceeds the Commission's jurisdiction and which seeks to regulate an unregulated service offering. Notwithstanding the foregoing, if the Commission imposed such an obligation upon BellSouth the duration of such a requirement should not exceed twelve months. ***

DISCUSSION

[12] Chairman Jaber directed the parties to address this hearing issue in post-hearing briefs. (Tr. at 442).

In considering the regulatory impact of Commission action in the broadband market, Chairman Jaber acknowledged a philosophical desire to provide incentives that result in CLECs building independent network options and creating the protocols of their choice. (*See* Tr. at 440. Chairman Jaber requested specifically that the parties address the question of a time period or sunset on any obligation to provide FastAccess® service. (Tr. at 442).

As Mr. Milner explained, any regulatory requirement that imposes on BellSouth alone an obligation to supply its broadband service to CLEC end user customers sends the wrong regulatory signal. (Tr. at 442). Presumably, the CLEC parties have interpreted the FDN and Supra orders as justification for their failure to deploy broadband networks, since three of the CLEC parties have no plans whatsoever to invest in such facilities. (Exh. 1). Nonetheless, CLECs have the ability to deploy broadband networks, to resell BellSouth voice lines, to enter into line splitting arrangements, or to seek out some new innovative offerings of their choice. (Tr. at 500). In fact, using a CLEC business model, Mr. Milner explained that CLECs can deploy their own networks and make a healthy rate of return in doing so. (Tr. at 403-414). Because CLECs have the ability to deploy broadband networks, providing the equivalent of regulatory welfare today so that the CLECs deploy these networks tomorrow is procrastination that will only forestall future innovation. (*See* Tr. at 442).

In Florida the reality is that BellSouth alone has a regulatory burden resulting from the FDN and Supra orders. To the extent this Commission reiterates the language in these orders in this docket and mandates the continued provision of FastAccess to migrating customers (which the Commission should not do), then at a minimum, such an obligation should include clear timeframes after which the CLECs must fulfill the broadband needs of their customers without relying upon BellSouth for such needs. There are two potential timeframes that could apply.

First, the Commission should establish a timeframe that begins after an end user migrates to a CLEC. This timeframe would begin upon migration and would end after sixty (60) days. (*See, e.g.*, 47 C.F.R. § 63.71(c)) (sixty-day timeframe applies to discontinuance of service). Second, the Commission should establish a time period after which BellSouth has no obligation whatsoever to provide FastAccess® -- except in a manner consistent with BellSouth's business plans. This obligation should terminate after twelve months. (*See, e.g.*, §364.057 referring generally to pricing adjustments, which cannot exceed a certain amount within a 12-month period).

CONCLUSION

All the CLEC parties in this proceeding have the ability to supply their end user customers with broadband service without imposing burdensome and uneven regulation upon BellSouth. Instead of imposing additional regulation on BellSouth, the full Commission should send the appropriate regulatory signals to the CLEC community and reject the CLEC parties' position. In addition, BellSouth urges the Commission to *sua sponte* reverse its FDN and Supra Orders based upon unequivocal evidence that BellSouth's FastAccess® policy has no adverse impact on the

local voice market, as the number of consumers in Florida served by CLECs continues to grow by leaps and bounds.

Respectfully submitted this 19th day of August, 2003.

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