



# Public Service Commission

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**DATE:** NOVEMBER 20, 2003

**TO:** DIRECTOR, DIVISION OF THE COMMISSION ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN) DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BULECZA-BANKS) *CRB* *mm* *PAC RR*

**RE:** DOCKET NO. 020507-TL - COMPLAINT OF 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.

**AGENDA:** 12/02/03 - POST HEARING DECISION - DISCUSSION IS LIMITED TO COMMISSIONERS AND STAFF

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\020507.RCM

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**CASE BACKGROUND**

On June 12, 2002, the Florida Competitive Carriers Association (FCCA) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) and a Request for Expedited Relief seeking relief from BellSouth's practice of refusing to provide its FastAccess service to customers who receive voice service from an Alternative Local Exchange Carrier (ALEC).

On July 3, 2002, BellSouth filed a Motion to Dismiss FCCA's Complaint and an Opposition to Request for Expedited Relief. On July 9, 2002, FCCA filed its Response in Opposition to BellSouth's Motion to Dismiss and filed a Motion for Summary Final Order. By Order No. PSC-02-0935-PCO-TL, issued July 12, 2002, the request for expedited relief was denied. By Order No. PSC-02-1464-FOF-TL, issued October 23, 2002, this Commission denied BellSouth's Motion to Dismiss and FCCA's Motion for Summary Final Order without prejudice.

By Order No. PSC-02-1537-PCO-TL, issued November 12, 2002, the Prehearing Officer issued the Order Establishing Procedure which excluded BellSouth's proposed Issue 7 from this proceeding. As proposed by BellSouth, Issue 7 was worded as follows: Should any decisions made in this proceeding apply to all ALECs and ILECs? On November 22, 2002, the Prehearing Officer provided clarification regarding the reasons for excluding BellSouth's proposed Issue 7 and reaffirmed the decision to exclude proposed Issue 7, in Order No. PSC-02-1618-PCO-TL (Clarification Order).

On December 2, 2002, BellSouth filed its Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission, or in the Alternative, Motion to Convert to a Generic Proceeding. On December 9, 2002, FCCA and ITC^DeltaCom Communications, Inc. (DeltaCom) filed their Joint Response to BellSouth's Motion. DeltaCom was granted intervention by Order No. PSC-02-1515-PCO-TL, issued November 5, 2002. By Order No. PSC-03-0016-FOF-TL, issued January 3, 2003, BellSouth's Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission, or in the Alternative, Motion to Convert to a Generic Proceeding was denied. On January 6, 2003, the Prehearing Conference was held and Order No. PSC-03-0152-PHO-TL, the Prehearing Order, was issued January 29, 2003.

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On January 22, 2003, BellSouth filed a Motion for Continuance. On January 23, 2003, FCCA filed its Response to BellSouth's Motion for Continuance. By Order No. PSC-03-0129-PCO-TL, issued January 23, 2003, the hearing was continued. By Order No. PSC-03-0177-PCO-TL, issued February 5, 2003, the hearing was rescheduled to April 16, 2003. By Order No. PSC-03-0201-PCO-TL, issued February 11, 2003, the hearing was again rescheduled to April 22, 2003.

On April 2, 2003, FCCA and BellSouth filed a Joint Motion for Approval of Settlement Agreement and a Joint Motion for Continuance. The Motion for Continuance was addressed by Order No. PSC-03-0476-PCO-TL, issued April 9, 2003, whereby the hearing in this matter was rescheduled to August 6, 2003, along with the rescheduling of other key activities dates.

On April 29, 2003, BellSouth filed its Motion for Continuance and/or Rescheduling of the August 6, 2003, hearing date. On May 6, 2003, FCCA filed its response.

By Commission Order No. PSC-03-0611-AS-TL, issued May 19, 2003, approving the April 2, 2003, settlement, the Commission acknowledged the substitution of AT&T Communications of the Southern States, LLC (AT&T), MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLP (collectively WorldCom), and AIN, for the FCCA as the Petitioners in this docket. ITC DeltaCom remained in the docket as a separate party. On May 20, 2003, FCCA provided notice of its withdrawal from this docket.

On May 23, 2003, the Fourth Order Granting Continuance was issued, approving BellSouth's April 29, 2003, Motion for Continuance and/or Rescheduling. As a result, the hearing was rescheduled for a fourth time to July 21 and 22, 2003.<sup>1</sup>

On June 16, 2003, AT&T, WorldCom, AIN, and ITC^DeltaCom filed their Joint Motion to Strike Portions of the Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner. On June 19, 2003, BellSouth filed its Response to the Motion to Strike. A recommendation was filed on the Motion to Strike and the response on July 2, 2003, which was scheduled to be heard at the July 15,

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<sup>1</sup>Amendatory Order No. PSC-03-0636A-PCO-TL, issued May 29, 2003.

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2003, Agenda Conference. However, on July 10, 2003, AT&T, WorldCom, AIN, and ITC^DeltaCom withdrew their Motion to Strike.

On July 10, 2003, AT&T, MCI, and AIN, filed a voluntary dismissal of the portion of the complaint which dealt with BellSouth's refusal to provide, or continue to provide FastAccess service to end-users who are served by CLECs via UNE loops (UNE-L). They did request dismissal of the complaint regarding service via the UNE platform (UNE-P). On July 10, 2003, AT&T, MCI, AIN, ITC^DeltaCom filed a Motion in Limine to preclude references by BellSouth in its opening statement or witness summaries to matters relating to the provision of FastAccess to end-users who are served by CLECs via UNE-L. On July 15, 2003, BellSouth filed its Response in Opposition to Motion in Limine. At the hearing, the Commission voted to reject the notice of partial dismissal of the complaint and deny the motion in limine.

On July 15, 2003, BellSouth filed an Emergency Motion to Compel AT&T to fully and completely respond to BellSouth's Second Set of Interrogatories. On July 17, 2003, Order No. PSC-03-08432-PCO-TL was issued, granted BellSouth's Motion to Compel.

On July 21 and 22, 2003, an administrative hearing was held in this matter. On August 18, 2003, AT&T, MCI, AIN, and ITC^DeltaCom filed their joint Post Hearing Brief. In addition, BellSouth filed its Post Hearing Brief on August 18, 2003. This recommendation addresses those issues set forth in the Prehearing Order and addressed in hearing.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Does the Commission have jurisdiction to grant the relief requested in the Complaint?

**RECOMMENDATION:** Yes. (CHRISTENSEN)

**POSITION OF THE PARTIES**

**AT&T, MCI, ITC^DELTACOM, ACCESS:** Yes. The Commission has found on no less than four occasions that it has jurisdiction to remedy the anti-competitive behavior which is the subject of this docket.

**BELLSOUTH:** No.

**STAFF ANALYSIS:**

This issue addresses whether the Commission has jurisdiction to grant the relief requested in the Complaint.

I. Petitioner's Argument

In their Brief, the Petitioners contend that the Commission has state law authority to address their Complaint. Petitioners assert that state law requires the Commission to encourage the development of a competitive market for local telecommunications services. Petitioners assert that this policy is expressly set out in the state statutes:

The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, 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 telecommunication infrastructure.

Section 364.01(3), Florida Statutes. The Petitioners contend that to carry out this legislative mandate, this Commission is to exercise its jurisdiction to ensure that the ILECs "shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers." (BR 4)

Petitioners cite to Section 364.01(4), Florida Statutes, arguing this provision confers exclusive jurisdiction on this Commission to remedy anticompetitive behavior. They assert that this 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.<sup>2</sup>

Promote competition by encouraging new entrants into telecommunications markets. . . .<sup>3</sup>

Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior.<sup>4</sup>

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

Petitioners assert that 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. They further claim that in every case in which the Commission has considered the jurisdictional question, it has ruled that it does have jurisdiction. (BR 5)

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<sup>2</sup>Section 364.01(4)(b), Florida Statutes.

<sup>3</sup>Section 364.01(4)(d), Florida Statutes.

<sup>4</sup>Section 364.01(4)(g), Florida Statutes.

A. FDN Case

Petitioners assert that in BellSouth's arbitration with FDN, BellSouth argued that the Commission had no jurisdiction over FastAccess because it is an enhanced, nonregulated service. They contend that this Commission rejected this argument. They assert that this 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 Service when they switched to FDN voice service,"<sup>5</sup> that its action was "an exercise of our jurisdiction to promote competition in the local voice market,"<sup>6</sup> and that BellSouth's practice unfairly penalized customers who wanted a competitive voice provider and BellSouth FastAccess in contravention of Section 364.10.<sup>7</sup> The Petitioners cite to the Commission's order in which 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*

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<sup>5</sup>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 Order No. PSC-02-0765-FOF-TP, issued June 5, 2002, in Docket No. 010098-TP, (FDN Order) at p. 8.

<sup>6</sup>Id. at 11.

<sup>7</sup>Id.



services." Thus, the Legislative's mandate to this Commission is clear.<sup>8</sup> (Emphasis added)

The Petitioners contend that this Commission concluded that BellSouth's practice regarding FastAccess has a "direct, harmful impact on the competitive provision of telecommunications service" thus vesting the Commission with jurisdiction.<sup>9</sup>

The Petitioners assert that BellSouth sought reconsideration of the FDN Order and again alleged that the Commission lacked jurisdiction. They contend that the Commission rejected this argument. They state that the Commission found that it had independent state law authority (aside from its authority to decide an arbitration under the Telecommunications Act of 1996) to remedy BellSouth's anticompetitive actions.<sup>10</sup> (BR 6) Petitioners assert that the Commission reiterated its charge to promote competition to ensure the widest availability of consumer options.<sup>11</sup>

#### B. Supra Case

Petitioners contend that the Commission exercised jurisdiction over the FastAccess issue on its own motion in the arbitration between BellSouth and Supra Telecommunications.<sup>12</sup> Petitioners assert that BellSouth was ordered to cease its practice of disconnecting FastAccess customers who migrated to Supra for voice

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<sup>8</sup>FDN Order at 8-9 (emphasis in Brief).

<sup>9</sup>Id. at 10.

<sup>10</sup>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, Order No. PSC-02-1453-FOF-TP, issued October 21, 2002, in Docket No. 010098-TP. (FDN Reconsideration Order)

<sup>11</sup>Id.

<sup>12</sup>In re: Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc., Order No. PSC-02-0878-FOF-TP, issued July 1, 2002, in Docket No. 001305-TP (Supra Reconsideration Order).

service via UNE-P. They cite to the finding in the Supra Reconsideration Order in referencing the FDN Order, in which 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.*<sup>13</sup> (emphasis added)

C. 271 Docket

The Petitioners assert that 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.<sup>14</sup> They state that 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 impeded competition in the local exchange market. Therefore, we ordered BellSouth to discontinue this practice.<sup>15</sup>

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<sup>13</sup>Supra Reconsideration Order at p. 50.

<sup>14</sup>In re: Consideration of BellSouth Telecommunications, Inc.'s Entry into interLATA Services Pursuant To Section 271 of the Federal Telecommunications Act of 1996, Order No. PSC-02-1304-FOF-TL, issued September 25, 2002, in Docket No. 960786A-TL.

<sup>15</sup>Id. at 117

D. This Case

The Petitioners assert that when the Complaint was filed in the current docket, BellSouth filed a motion to dismiss. They contend that BellSouth in its motion, claimed that the Commission lacked subject matter jurisdiction and that Complaints had failed to state a claim for which relief could be granted. Petitioners assert that the Commission denied BellSouth's Motion. (BR 8) Petitioners contend that the Commission in citing to the FDN Order and Supra Reconsideration Order, has already determined that:

we have authority to remedy anti-competitive behavior that is detrimental to the development of a competitive telecommunications market.<sup>16</sup>

Petitioners contend that this Commission has decided in numerous decisions that it has ample state law authority to remedy anticompetitive behavior. The Petitioners conclude that this Commission has jurisdiction in this matter. (BR 8)

II. BellSouth's Argument

In its Post Hearing Brief, BellSouth asserts that one of the fundamental disagreements between the parties concerns the authority of this Commission to exercise jurisdiction over BellSouth's unregulated service offering. BellSouth contends that it has outlined key orders in its Post Hearing Statement, in witness testimony, in discovery responses, in prior proceedings, and in prior pleadings. BellSouth indicates in a footnote that it incorporates each and every jurisdictional argument previously raised in its previous Motion to Dismiss, wherein it addresses the statutory authority cited in the Complaint and explained that this Commission's authority is limited to telecommunications services. BellSouth argues that this body of regulatory law and policy preempts this Commission from granting the relief requested in this docket. (BR 13)

BellSouth asserts that in addition, on June 2, 2003, the United States Supreme Court issued its decision in Entergy Louisiana, Inc. v. Louisiana Public Service Com'n, 123 S. Ct. 2050; 156 L. Ed. 2d 34; 2003 U.S. LEXIS 4278; 71 U.S.L.W. 4420.

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<sup>16</sup>Order No. PSC-02-1464-FOF-TL at p. 5.

BellSouth contends that in *Entergy*, the Supreme Court confirmed that the terms of a federal tariff are binding on state agencies and that contrary state rules are preempted. BellSouth claims that while the CLEC parties may suggest BellSouth may modify its FCC tariff, this suggestion disregards the fact that BellSouth has not opted to change its tariff and that a state commission has no authority to require BellSouth to do so. (EXH 7 & BR 13-14) BellSouth, in a footnote, states that 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. BellSouth contends that any such suggestion would be misplaced. BellSouth asserts that it is not in BellSouth's best interests to modify the tariff as a result of an incorrect order that is currently on appeal. BellSouth asserts that the CLEC parties rely upon the FDN Order, the Supra Order, and order from other state jurisdictions to support their theory. BellSouth states that in all likelihood, any order issued in this proceeding may ultimately be appealed. (BR 14)

BellSouth contends that 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 at p. 8; TR 88) BellSouth asserts that because this Commission agrees that FastAccess is a nonregulated service, it defies logic for this Commission to dictate the terms and conditions that apply to such an offering, which is precisely what the CLEC parties desire. BellSouth contends that 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. BellSouth maintains that the end result is that in Florida, an unregulated service is actually subject to regulation. (BR 14)

BellSouth asserts that the CLEC parties also conveniently ignore the broader ramifications resulting from a regulatory foray into unregulated territory. BellSouth states that 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. BellSouth contends that 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. BellSouth contends that the CLECs prefer to brush aside these policy ramifications. BellSouth contends that as an 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. (BR 14; TR 92) BellSouth asserts that this Commission has no such luxury. If this Commission fails to consider to consider the potential negative impact of its actions on "unregulated offerings," then companies may ultimately postpone investment in the future. (BR 14)

BellSouth contends that in addition, the CLEC parties fundamentally confused the scope of this Commission's authority. BellSouth asserts that MCI and AIN, for example, assert this Commission has jurisdiction over cable modem service notwithstanding the FCC's conclusion to the contrary.<sup>17</sup> BellSouth asserts that in discovery, it 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) BellSouth contends that AIN contended this Commission has jurisdiction if such service violate laws regarding telecommunications services. (Id.) BellSouth asserts that both answers conflict with the FCC's Internet Over Cable Declaratory Ruling at Paragraph 7: "we conclude that cable modem service, as it is currently offered, is properly classified as an interstate information service . . . ." (BR 15) BellSouth asserts that witness Gillan asserts the Commission has "ancillary" jurisdiction over unregulated services to protect markets over which the Commission has regulatory authority. (BR 15; TR 88-89) BellSouth argues that these assertions have no basis in reality. BellSouth contends that as witness 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 BR 15; TR 300-302, citing Sections 364.01, 364.10, 364.051, and 364.3381, Florida Statutes). BellSouth argues that while witness Gillan's purposes may be served by finding

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<sup>17</sup>Exhibit 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).

ancillary jurisdiction where none exists, the Florida Commission is a statutory entity and cannot create new authority that was expressly granted to it by the Legislature. (Exhibit A outlining the applicable Florida statutes, which statutes provide authority only over telecommunications services). (BR 15)

BellSouth contends that 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. BellSouth asserts that when the FDN panel denied its Motion to Dismiss this Complaint, the panel stated it has "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 at p. 5. BellSouth contends that consequently, to exercise any authority this Commission must identify: 1) specific anti-competitive behavior; and 2) behavior that is actually detrimental to a competitive telecommunications market. BellSouth asserts that because such facts do not exist, as more fully set forth herein, there is nothing to remedy in this proceeding.

### Analysis

This Commission has determined several times before that it has authority to address this Complaint. Specifically, in rendering its decision regarding BellSouth's Motion to Dismiss filed in this docket, this Commission again found it has jurisdiction to address this complaint. Specifically, this Commission found that:

BellSouth attacks the statutory references provided by FCCA and argues that those statutes only give us authority over telecommunications services. BellSouth notes that its FastAccess service is a nonregulated enhanced information service.

We, however, have determined that we have the authority to remedy anti-competitive behavior that is detrimental to the development of a competitive telecommunications market. See FDN Order, at 11; Supra Order, at 51. In Dockets Nos. 010098-TP and 001305-TP, we required that BellSouth not discontinue its FastAccess service to a customer when that customer chooses to switch from BellSouth's voice service to FDN's voice service. In

this case, FCCA is requesting that we require BellSouth to "cease and desist from its practice of refusing to provide its FastAccess service to customers who select another provider for voice service." While the remedy requested herein is broader than that previously approved, as long as the complaint states a cause of action upon which relief can be granted, the complaint should not be dismissed. See Wilson v. News-Press Publishing Co., 738 So.2d 1000, 1001 (Fla. 4th DCA 1999)(stating that "a court should not dismiss a complaint with prejudice if it is actionable on any ground."). Consequently, we find it appropriate to deny BellSouth's Motion to Dismiss. [Footnotes Omitted]

Id. at 5-6. Thus, this Commission has found that it does have the authority to address this complaint.<sup>18</sup>

However, the Commission has carefully noted in its previous decisions, that the Commission derives its authority to address this Complaint based on its authority over basic telecommunications services and ensuring fair competition in the local telecommunications markets. See Section 364.01(4), Florida Statutes. In addition to the Commission's authority under Section 364.01(4), the Commission also has jurisdiction over anticompetitive behavior and to investigate such behavior pursuant to Section 364.3381, Florida Statutes. Further, the Commission has authority to remedy acts of "undue or unreasonable preference" or "undue and unreasonable prejudice" related to a telecommunications services, such as the local telecommunications services. Staff notes consistent with the Commission's previous decisions in FDN and Supra Orders, that to the extent a nonregulated service impacts a regulated telecommunication service, this Commission has jurisdiction to correct the anticompetitive impacts from the nonregulated service on the regulated telecommunication services to ensure fair competition in local telecommunications services.

Staff notes that BellSouth argues that under the Entergy case, this Commission is precluded from addressing this Complaint because the state commission has no authority to require it to change its federal tariff or cause its federal tariff to require change.

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<sup>18</sup>Staff notes that in the FDN and Supra cases this issue is currently on appeal.

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Staff believes that this is an overly broad interpretation of the the impact of the Enterger case. The Enterger case involved the effect of a tariff approved by the Federal Energy Regulatory Commission (FERC) on intrastate rates in a rate-making proceeding before the Louisiana Public Service Commission. In the Enterger case, the U.S. Supreme Court found that the "filed-rate doctrine" applied, thereby preempting the Louisiana Commission. 123 S. Ct. 2050 at 2056-57. Specifically, the U.S. Supreme Court found that the "filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.'" Id. However, this case does not involve rate-making. Staff notes that BellSouth has filed a tariff at the FCC regarding its wholesale DSL service. While the Commission's decision in this case may impact that tariff (i.e. who may be able to buy under that tariff), no testimony indicates that the FCC did anything other than direct that the company file a tariff at the federal level regarding ADSL services. Further, this decision is not a matter of rate-base regulation since BellSouth elected price-cap regulation. Thus, this case would not implicate the "filed-rate doctrine" and BellSouth's reading of the Enterger case's impact is overly broad and inapplicable.

Based on the foregoing, staff recommends that the Commission find it has jurisdiction to grant the relief requested in the complaint.



**ISSUE 2:** What are BellSouth's practices regarding the provisioning of its FastAccess Internet service to:

- a. A FastAccess customer who migrates from BellSouth to a competitive voice service provider; and
- b. To all other ALEC customers?

**RECOMMENDATIONS:**

a. BellSouth's current FastAccess policy related to customer migration is as follows: if a customer obtains both local voice service and FastAccess from BellSouth and migrates to a CLEC that provisions local service via UNE-P or UNE-L, the customer's FastAccess service will be disconnected. If the CLEC provides local voice service via BellSouth resale, the customer can retain BellSouth FastAccess service. Further, BellSouth will provide FastAccess service in compliance with prior Commission orders provided the parties have agreed upon contract language. **(BULECZA-BANKS)**

b. BellSouth's current FastAccess policy related to customers currently served by a CLEC is as follows: if a customer is obtaining local voice service from a CLEC that provides local service via UNE-P or UNE-L, the customer will not be eligible for FastAccess service. If the CLEC provides local voice service via BellSouth resale, or if the customer migrates to BellSouth for local voice service, the customer would be eligible for FastAccess service. Further, BellSouth will provide FastAccess service in compliance with prior Commission orders provided the parties have agreed upon contract language. **(BULECZA-BANKS)**

**POSITION OF THE PARTIES**

**AT&T, MCI, ITC^DELTACOM, ACCESS:**

Response to a. and b.

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.

**BELLSOUTH:**

a. When a customer migrates voice service, BellSouth continues to provide FastAccess 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 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 order.

b. If a customer 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.

**STAFF ANALYSIS:** This issue is a factual issue relating to BellSouth's FastAccess practices. It is BellSouth's current practice to discontinue FastAccess service to those customers who migrate their local voice service from BellSouth to a CLEC where the CLEC provides local voice service via UNE-P or UNE-L. If the CLEC changes its method of provisioning the customer's local voice service from UNE-P or UNE-L to resale, BellSouth will continue to provide FastAccess to the customer. (TR 303)

With respect to the situation where a current CLEC customer wishes to obtain FastAccess, BellSouth will not provide FastAccess if the CLEC provides local service via UNE-P or UNE-L. If the CLEC changes its method of provisioning the customer's local service from UNE-P or UNE-L to BellSouth resale, BellSouth will provide the customer FastAccess service. Further, if the customer migrates to BellSouth for local voice service, BellSouth will provide FastAccess service. (TR 303)

BellSouth will also provide FastAccess in agreement with Commission Order PSC-03-0690-FOF-TP, issued June 9, 2003, in Docket No. 010098-TP, related to an interconnection agreement between Florida Digital Network (FDN) and BellSouth. Under the terms of the agreement, BellSouth will continue to provide FastAccess to an end-user who obtains voice service from FDN over UNE loops. (TR 303)

In compliance with Commission Order PSC-02-0878-FOF-TP, dated July 1, 2002, in Docket No. 001305-TP, related to an interconnection agreement between Supra Telecommunications and

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Information Systems, Inc. and BellSouth, BellSouth states that it will continue to provide FastAccess even when BellSouth is no longer the voice provider.

While the Petitioners and BellSouth disagree as to the appropriateness of BellSouth's practices, the parties agree to what BellSouth's FastAccess practices are.

**ISSUE 3:** Do any of the practices identified in Issue 2 violate state or federal law?

**RECOMMENDATION:** Staff is presenting three options relating to whether BellSouth's disconnection practices identified in Issue 2 violate state or federal law. Staff recommends that either Option 1 or Option 2, presented below, be selected as those options are more fully supported by the evidence presented in this case.  
**(CHRISTENSEN, BULECZA-BANKS)**

Option 1: BellSouth's disconnection practice is anticompetitive because it prevents the CLECs from being treated fairly by erecting barriers to competition and because it impedes competition by limiting the range of consumer choice.

Option 2: BellSouth's disconnection practice is anticompetitive because it prevents the CLECs from being treated fairly by erecting barriers to competition and because it impedes competition by limiting the range of consumer choice. However, when applied to a new customer seeking service, BellSouth's practices do not limit customer choice since the customer can take into account whether he finds a DSL service or a competitive voice service more important.

Option 3: BellSouth's disconnection practice is not anticompetitive because it does not prevent the CLECs from being treated fairly and does not impede competition by limiting consumer choice.

**POSITION OF THE PARTIES**

**AT&T, MCI, ITC^DELTACOM, ACCESS:** 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:** No.

**STAFF ANALYSIS:**

This issue addresses whether any of the practices discussed in the previous issue violates state or federal law.

I. Petitioners' Argument

Petitioners argue that 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 the previous issue, violates Section 364.01(4)(b), (d), (g), Section 364.051(5)(a)(2) and (b), Section 364.3381, Florida Statutes. Petitioners note the Commission has also found that BellSouth's practice violates Section 706 of the Federal Telecommunications Act, which requires state commissions to encourage competition and the deployment of advanced services, as well as Section 202(a), which prohibits discrimination in the provision of services.<sup>19</sup> Petitioners contend that these statutory sections require the Commission to encourage local competition, to ensure that all telecommunications providers are treated fairly, and to prohibit discrimination among similarly situated customers. They contend that BellSouth's practice of refusing 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 requirements which this Commission must implement. (BR 10; TR 52) Petitioners cite that the Louisiana Commission, which has statutory mandates similar to this Commission's, found that "[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."<sup>20</sup> (BR 9-10)

The Petitioners argue that BellSouth has the majority of DSL lines in its service territory - over 99% - and it is adding FastAccess subscribers every day. (BR 10; TR 53) They state that

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<sup>19</sup>See, FDN Order at 8-9; Supra Reconsideration Order at 40.

<sup>20</sup>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 (April 3, 2003) (Louisiana Clarification Order) at p. 6.

of BellSouth's 198 central offices, 190 are FastAccess capable. (TR 530) The Petitioner contends that said another way, 86% of the BellSouth households in Florida are capable of receiving FastAccess service. (EXH 7; BellSouth's response to Staff's Interrogatory No. 12) They assert that as local competition began, BellSouth had the vast majority of voice customers in its territory and 100% of the last mile of loop to each customer's home. (TR 360, 496, 499) Petitioners contend that BellSouth's FastAccess position today is a direct result of its inherited monopoly voice network; no CLEC is in this position. (TR 70) They contend 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)

The Petitioners contend that BellSouth has labeled its FastAccess service an "overlay" to its voice service. (TR 335) However, they argue this is merely another way of saying that FastAccess is leveraged off of BellSouth's incumbent voice monopoly. They contend that BellSouth cannot have it both ways - either FastAccess supports itself or BellSouth's voice service (which BellSouth consistently contends is below cost) subsidizes it. (BR 10; TR 149) Petitioners cite to BellSouth's witness Smith where he admits:

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.

(TR 524; See also BR 10) Petitioners argue that in questioning BellSouth witness Smith, it was properly concluded that BellSouth's practice appeared to be for the purpose of leveraging its FastAccess service to ensure that customers remain on its network for voice service. (BR 10-11; TR 551)

The Petitioners assert that while BellSouth touts cable as an alternative to DSL, its actions make it clear that DSL is the relevant market. They contend that 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) Petitioners assert that if BellSouth really thought cable modem service was a competitive threat, BellSouth would encourage all customers to purchase FastAccess

rather than discouraging willing buyers and disconnecting paying customers. (BR 11)

Petitioners argue that BellSouth's practice effectively eliminates choice of local service providers for its FastAccess customers. They contend that 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. Petitioners contend one reason BellSouth's practice is so effective is that it is not easy for customers to change their FastAccess to another internet provider. They assert that 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) They contend that in addition, over 95% of BellSouth FastAccess customers "self-install" FastAccess. (TR 55) Petitioners state that 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. (BR 11)

Petitioners contend that 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, violates the law. They claim that 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) Petitioners state that as witness 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. (BR 12, TR 54) Petitioners contend that this is illustrated by the fact MCI alone received rejects from BellSouth for more than 5,000 customers because those customers have FastAccess. (TR 175, 179) Petitioners contend that 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. They note that 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. (BR 12; TR 207) Petitioners contend that 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. (BR 11-12; TR 167)

Petitioners note that Commission 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?" Petitioners state that amazingly, BellSouth answered: "*Whether a customer is paying for FastAccess is not the issue.*" (BR 12; EXH 7, BellSouth's response to Staff Interrogatory No. 60, emphasis added). They cite that in response to Staff's Interrogatory No. 28, BellSouth states there is no profit margin at which it would offer FastAccess and that it would rather lose the customer than provide FastAccess. (EXH 7) Petitioners assert that BellSouth notes that its policy may drive some customers away. (TR 504) Petitioners contend that this "business strategy" fails the straight face test. Petitioners also assert that 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. Again, Petitioners assert that 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) Petitioners contend that the customer remains BellSouth's for the purpose of providing FastAccess service and receiving revenue for FastAccess. (BR 12)

Petitioners assert that a Commissioner illustrated the ludicrousness of BellSouth's arguments in questions to BellSouth witness Smith. Petitioners contend that in analogizing BellSouth's practice of losing the entire revenue stream (voice and FastAccess) to a car dealer who refuses to sell a car without a stereo, the "illogic" in BellSouth's position became obvious. (BR 12- 13) Like the Commissioner, the Petitioners inquire as to why BellSouth would not sell more "units" (FastAccess) by allowing another entity to provide the stereo (voice). (TR 549) Petitioners state that BellSouth's answer to the Commissioner's hypothetical was that his approach was not financially viable. (BR 13; TR 549) Petitioners



assert that BellSouth witness Smith, Chief Product Development and Technology Officer for BellSouth, had however, only done 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. Petitioners note the Commissioner's comment that he would have expected more than "back of the envelope" calculations as to an issue so important to BellSouth. (BR 13; TR 550)

Petitioners assert that 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. Petitioners contend 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 7; BellSouth Response to Staff Interrogatory No. 24) Petitioners assert that this indicates that BellSouth's practice is highly effective and adversely affects competition. (BR 13; TR 124)

Petitioners contend that 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) Petitioners assert that however, what has actually occurred is that the FCC has deferred substantive consideration of the discrimination issue to the states. Petitioners claim that the FCC found, that in the context of the 271 Checklist compliance, pursuant to the FCC's rules, BellSouth has no obligation to offer DSL service to customers served by UNEs. (BR 13- 14; TR 67)<sup>21</sup> Petitioners assert that 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. Petitioners contend that 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 . . ." (BR

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<sup>21</sup>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)

14; EXH 7, BellSouth Response to Staff Interrogatory No. 17, emphasis in original; TR 342-343).

A. Migrating Customers

Petitioners contend that as to migrating customers, this Commission has already ruled twice that BellSouth's practice violates state and federal law. Petitioners cite to the FDN Order, in which 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.*<sup>22</sup>

(BR 14)

Petitioners assert that 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

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<sup>22</sup>FDN Order at 10, emphasis added; see also FDN Reconsideration Order.

. . . require BellSouth to continue providing FastAccess even when BellSouth is no longer the voice provider.<sup>23</sup>

(BR 14)

Petitioners contend that 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. (BR 15)

B. New Customers

Petitioners contend that as noted above, the Commission has determined that it is anticompetitive for BellSouth to refuse to provide its FastAccess service to migrating customers. Petitioners contend that the same reasoning and policy imperatives apply to a customer who has made a competitive choice and who desires FastAccess. Petitioners argue that there is simply no distinction - legally, technically or otherwise - between these two customer groups. (TR 58) Petitioners state that 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)." (BR 15; TR 58, emphasis in original)

Petitioners contend that making a distinction between migrating and new customers would create a large and illogical gap in the Commission's policy that a consumer should not be punished for a competitive choice. (TR 58) Petitioners assert that it is the customer's ability to make a competitive choice, not the timing of the choice, that should drive the Commission's analysis. Petitioners state that 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) Petitioners contend that to do otherwise would foreclose voice competition for those customers who desire FastAccess (TR 57), and violate state and federal law. (BR 15)

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<sup>23</sup>Supra Reconsideration Order at 40.

## II. BellSouth's Argument

BellSouth contends that 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. BellSouth asserts that 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. BellSouth argues that 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. (BR 18-19)

### A. Federal Law

BellSouth asserts that federal regulatory policy can be traced through a series of decisions, which have been addressed in part in its Brief. BellSouth provides an outline form of what it believes are the relevant decisions:

1) 1998 - The FCC's GTE Tariff Order<sup>24</sup> provides that ADSL services are properly tariffed at the federal level.

2) 1999 - The FCC's Line Sharing Order<sup>25</sup> 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 requirements.

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<sup>24</sup> GTE Tariff Order - Memorandum Opinion and Order, *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 F.C.C. Rcd 22, 466 (October 30, 1998) (GTE Tariff Order)

<sup>25</sup> Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, CC Docket Nos. 98-147, 96-98, *In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order No. FCC 99-355 (released December 9, 1999) (Line Sharing Order)

3) 2000 - The FCC's SWBT Texas 271 Order<sup>26</sup> stated incumbent LECs have no obligation to provide xDSL over UNE-P loops.

4) 2001 - The FCC's Line Sharing Reconsideration Order<sup>27</sup> 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 commentators (§ 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."<sup>28</sup>

5) 2002 - The FCC issued a series of BellSouth 271 Orders<sup>29</sup> 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

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<sup>26</sup> Memorandum Opinion and Order, CC Docket 00-65, *In the Matter of Application by SBC Communications Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Order No. FCC 00-238 (released June 30, 2000) (SWBT Texas 271 Order)

<sup>27</sup> Third Report and Order on Reconsideration in CC Docket No. 98-147; Fourth Report and Order on Reconsideration in CC Docket No. 96-98; Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, 96-98, *In the Matter of Deployment of Wireline Service Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order No. FCC 01-26 (released January 19, 2001) (Line Sharing Reconsideration Order)

<sup>28</sup> Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC No. 01-337, 16 F.C.C.R. 22, 745 (2001).

<sup>29</sup> See Order No. 02-147, *BellSouth Georgia/Louisiana 271 Order*, CC Docket No. 02-35 (released May 15, 2003); Order No. 02-260, *BellSouth Multistate 271 Order*, CC Docket No. 02-150 (released September 18, 2002); Order No. 02-331, *BellSouth Florida/Tennessee 271 Order*, CC Docket No. 02-137 (released December 19, 2002).

Internet provided over wireline facilities in which it tentatively concluded that such services are information services not telecommunications services. The FCC issued a Declaratory Ruling classifying cable modem service as an interstate information service.<sup>30</sup> (BR 19)

6) 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.<sup>31</sup>

7) 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 a substantial unbundling relief for loops utilizing fiber facilities and that line-sharing will no longer be available as an unbundled element.<sup>32</sup> (BR 20)

BellSouth argues that because it 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 its FastAccess practices were not created as part of some nefarious plot to undermine voice competition. BellSouth contends that instead, the principles of federal regulatory policy outlined above support its view. BellSouth asserts that as such, merely because the CLECs (or even Commissioners) may question its 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. BellSouth contends that it is also clear that the federal trend is to relax or decrease, rather than increase the amount of regulation over broadband facilities. BellSouth states

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<sup>30</sup>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); 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)

<sup>31</sup>USTA et al. v. FCC, 290 F.3d 415 (D.C. Cir. 2002)

<sup>32</sup>See [http://hraunfoss.gov/edocs\\_public/attachmatch/DOC-231344A1.pdf](http://hraunfoss.gov/edocs_public/attachmatch/DOC-231344A1.pdf).

that 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.<sup>33</sup>(BR 20)

BellSouth contends that CLEC witness Gillan suggests that federal law allows state commissions flexibility to impose additional regulation upon BellSouth because its FastAccess policy is discriminatory. BellSouth asserts that witness Gillan disregards the trend of federal regulatory policy. (BR 20) BellSouth contends that 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 its DSL policy*. (BR 21, emphasis in original). BellSouth asserts that the FCC expressly found that *"we cannot agree with commentators that BellSouth's policy is discriminatory."*<sup>34</sup> (BR 21, emphasis in original). BellSouth states that 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*. (BR 21, emphasis in original). BellSouth asserts that instead, the FCC answered this question head on and witness Gillan's attempts to circumvent this FCC order should be rejected. (BR 21)

BellSouth contends that 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 witness Gillan rely upon as support for imposing unnecessary obligation upon BellSouth. BellSouth asserts that the FCC, in relevant part, 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

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<sup>33</sup>Cable Modem Order, ¶4.

<sup>34</sup>BellSouth GA/LA 271 Order, ¶157.

*"preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."*<sup>35</sup>

BellSouth asserts that contrary to witness 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. BellSouth contends that it is against this backdrop that this Commission has previously acted. (BR 21)

B. State Law

BellSouth asserts that in attempting to create a legal or regulatory violation where none exists, the CLEC parties primarily rely upon the FDN Order and Supra Order. BellSouth contends that these orders held that its FastAccess practice violated the discrimination provisions in Section 364.01, Florida Statutes, and Section 202 of the 1996 Act. BellSouth states that as set forth above, the Commission's finding concerning Section 202 of the 1996 Act contradicts the FCC's BellSouth GA/LA 271 Order. BellSouth argues that 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)). BellSouth asserts that the FCC has repeatedly held that its policy regarding the provision of DSL services is neither discriminatory nor anticompetitive; a contrary ruling by this Commission is therefore preempted. (BR 22)

BellSouth contends that the Petitioners may also attempt to bolster their claims by citing to decisions from other states. BellSouth claims that such decisions are distinguishable and, in any event, do not tell the entire story. BellSouth states that 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.<sup>36</sup> BellSouth asserts that the Louisiana Commission

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<sup>35</sup>(Citations omitted, emphasis added in Brief, Cable Modem Order, ¶4)

<sup>36</sup>Clarification Order R-26173-A, In re: BellSouth's Provision of ADSL Service to End-Users Over CLEC Loops, Docket 26173 (April



reached its decision without ever holding an evidentiary hearing and without giving BellSouth the opportunity to engage in discovery. BellSouth argues that 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 stated commission addressing DSL related issues has done so based on its authority to promote voice competition and address anti-competitive behavior." *Id.* at 7. BellSouth asserts that in support of this conclusion, the Louisiana Commission cited to an order of the Michigan Public Service Commission date June 6, 2002. BellSouth asserts that this decision, however, 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.<sup>37</sup> (BR 22-23)

BellSouth asserts that in addition to the Michigan Commission's decision, there are orders from other state commissions that are inconsistent with Petitioners' position in this case. BellSouth cites to the Illinois Commerce Commission as an example in which the Illinois 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

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4, 2003) (Louisiana Order).

<sup>37</sup>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. . .").

that would lead to the Commission to find [Ameritech] deficient on this checklist item.

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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 the matter) to participate in a line splitting arrangement to be within the data CLEC's rights.<sup>38</sup>

(BR 23)

BellSouth asserts that 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. (BR 23) BellSouth states that the South Carolina Commission reached this result in an arbitration proceeding with IDS Telecom<sup>39</sup>. BellSouth also cites to the North Carolina Utilities Commission refusal to require BellSouth to provide its FastAccess service over loops leased to CLECs in its recent Section 271 proceeding.<sup>40</sup> (BR 24)

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<sup>38</sup>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 Telecommunication Act of 1996, ¶¶917 & 919.

<sup>39</sup>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.")

<sup>40</sup>See Order and Advisory Opinion Regarding Section 271 Requirements, North Carolina Utilities Commission, Docket No. P-55, SUB 1022, at 204 (July 9, 2002) (finding 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").

BellSouth asserts that of course, regardless of decisions of other state commissions, this Commission must look to the evidence in this case. BellSouth contends that here, simply because BellSouth does not offer FastAccess to any requesting consumer does not mean that such a practice constitutes illegal discrimination. BellSouth asserts that 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, at p. 3. BellSouth contends that 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. BellSouth asserts that 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. BellSouth contends that 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 stand-alone basis. BellSouth asserts that its desire to offer unique bundles is no different than typical industry practice, and should be supported rather than discouraged. (BR 25)

BellSouth states that 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. BellSouth contends that 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 Advance Services. BellSouth in a footnote states that this 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). BellSouth argues that the FDN Reconsideration Order, however, fails to follow the "best practices" articulated in the Broadband Report. BellSouth further argues that this Commission should heed its own analysis in rendering a decision in this docket. (BR 26)

BellSouth contends that 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." BellSouth asserts that 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 at p. 54) BellSouth contends that moreover, the Broadband Report recognizes that "[t]he most effective solutions have been market driven." (BR 26)

BellSouth asserts that 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 at 23) BellSouth contends that this finding is consistent with the evidence in this docket; here, 98% of BellSouth's lines overlap with cable networks. (BR 26; TR 508; and EXH 24) BellSouth contends that the FCC has also documented the level of activity in the broadband market. (EXH 17) BellSouth states that most recently, the FCC reported on data through December 2002 which illustrates that DSL continues to trail behind cable in the Florida broadband market.

BellSouth argues that when considering the entire broadband market, the relief requested by the CLEC parties should be summarily rejected. BellSouth contends that the CLECs' requested relief would require BellSouth to incur cost estimated to exceed millions of dollars (BR 27; TR 468; and EXH 25), yet would also require BellSouth to provide its retail offering at the same price. (TR at 61) BellSouth asserts that 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 203) BellSouth argues that requiring it - 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. (BR 27; TR 283)

BellSouth contends that the relief requested by the CLECs is equally unjustified even if this Commission limits its inquiry to the voice market. BellSouth asserts that the record evidence shows a Florida voice market that is flourishing. (BR 27; TR 330) BellSouth argues that 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. (BR 28)

BellSouth asserts that the CLECs' other allegations of legal violations are also without merit. BellSouth contends that the CLECs' "tying" claim conflicts with the economic definition of tying. (TR 280) BellSouth argues that moreover, its FastAccess decision is the opposite of monopoly leveraging or tying. (TR 281) BellSouth contends that tying occurs when a company forces customers of its less competitive service to buy its more competitive service. (TR 281) BellSouth claims that its practice is neither tying nor anticompetitive because any FastAccess customer that prefers not to buy BellSouth's voice service can find another broadband supplier. (BR 28; TR 281)

BellSouth argues that likewise the CLEC parties cannot show any anticompetitive act by BellSouth. BellSouth contends that its 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. (BR 28; TR 524) BellSouth asserts that the CLECs have no evidence that disproves such facts, and even witness Gillan agrees that in a situation in which anticompetitive acts may exist, that anticompetitive behavior must be proven with facts. (BR 28; TR 93) BellSouth argues that thus, the CLECs' subjective claim and speculation are not sufficient, and the facts of record demonstrate a competitive voice market unimpeded by BellSouth's policy. BellSouth concludes that this 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.

### III. Analysis

As noted in Issue 1, staff believes that this Commission has jurisdiction under state law to grant the relief requested. BellSouth argues that even if this Commission has authority under state law, the FCC, through several decisions rendered in its 271 proceedings, has determined that this practice is not discriminatory, therefore this Commission is preempted from making any decision that is contrary to the FCC's finding in those dockets.

A. Federal law

Contrary to BellSouth's assertion that the Commission is preempted by the FCC's findings in the 271 dockets, staff believes that Commission still has authority to review BellSouth alleged "anti-competitive" practices in relation to the local voice service market. Staff does not dispute that the FCC's GTE Tariff Order required ADSL services to be tariffed at the federal level, nor that FCC's Line Sharing Order required the ILECs to unbundle the high frequency portion of the loop in a line sharing arrangement which is now under review in the FCC's Triennial Review Order.

However, staff disagrees that the FCC in the Line Sharing Reconsideration Order, intend to foreclose the type of anti-competitive inquiry that the Petitioners seek here. The FCC clarified that:

As described above, we deny AT&T's request for clarification that under the *Line Sharing Order*, incumbent LECs are not permitted to deny their xDSL services to customers who obtain voice service from a competing carrier where the competing carrier agrees to the use of its loop for that purpose. 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 not [sic] longer the voice provider. **We do not, however, consider in this Order whether, as AT&T alleges, this situation is a violation of sections 201 and/or 202 of the Act. To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, we encourage AT&T to pursue enforcement action.**

Id. at ¶26. Section 201 of the Act refers to the carriers general obligations related to the provision of telecommunications service and Section 202 refers to the carriers obligations regarding discrimination and preferences. Specifically, Section 202(a) states that:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges,

practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

While the FCC clarified in the Line Sharing Reconsideration Order, that under the Line Sharing Order a ILEC, like BellSouth, was not required to provide its xDSL service when it was no longer the voice provider, the FCC clearly left open the door for the type of anticompetitive, discriminatory, prejudicial inquiry that is the subject of this Complaint.

BellSouth cites to the numerous 271 proceedings before the FCC in which, BellSouth asserts, the FCC rejected the claim that its FastAccess practice was discriminatory. BellSouth cites specifically to the FCC's finding in Paragraph 157 of the Georgia/Louisiana 271 proceeding, which states that:

BellSouth states that its policy "not to offer its wholesale DSL service to an ISP or other network service provider [] on a line that is provided by a competitor via the UNE-P" is not discriminatory nor contrary to the Commission's rules. Commenters allege that BellSouth will not offer its DSL service over a competitive LEC's UNE-P voice service on the same line. We reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities. Furthermore, a UNE-P carrier can compete with BellSouth's combined voice and data offering on the same loop by providing the customer with line splitting voice and data service over the UNE-P loop in the same manner. Accordingly, we cannot agree with commenters that BellSouth's policy is discriminatory. Further, we note that BellSouth is taking adequate steps to remedy any confusion that may arise when customers order DSL.

(FCC Order No. 02-147) However, this determination was made in the context of whether BellSouth's practice regarding its wholesale service was discriminatory within the meaning of the 271 checklist.

It is clear that the FCC did not make any finding that this practice or the practice complained of in this case does not violate Sections 201 or 202 of the Act. Even though the FCC made determinations that BellSouth's wholesale DSL policy was not discriminatory in the context of the 271 proceedings, the FCC did not withdraw its earlier invitation for a complaint to be filed pursuant to 201 and 202 of the Act. Thus, a complaint filed at the state level based on state statutory authority similar to Sections 201 and 202 of the Act would not be foreclosed by the FCC's findings in the 271 proceedings, since it appears clear that those determinations were limited to the 271 context.

B. State Law

As noted in Issue 1, this Commission has state statutory authority under Section 364.01(4)(a), (b), (d), (g), Section 364.051(5)(a)(2) and (b), Section 364.10, and Section 364.3381, Florida Statutes. Section 364.01(4)(a), (b), (d), and (g) states that the Commission shall exercise its exclusive jurisdiction in order to:

(a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices;

(b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunication services;

(d) Promote competition by encouraging new entrants into telecommunications markets and by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies; and

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.



Considering the scope of the Legislature's mandate to the Commission in Section 364.01(4), Florida Statutes, staff believes that in order to determine whether the nature of the behavior is anticompetitive, the Commission should consider the following factors: 1) whether the behavior prevents telecommunications companies from being treated fairly by erecting barriers to competition in the local exchange market; and 2) whether the behavior impedes competition by limiting the range of consumer choice. BellSouth put forth a slightly different factor it believes the Commission should use in evaluating whether the behavior is anticompetitive. BellSouth believes that the only factor that should be considered is whether the specific anticompetitive behavior is actually detrimental to a competitive telecommunications market. However, staff believes that the factors as elucidated by staff better implement the Commission's statutory mandate under Chapter 364 and, thus, should be used in evaluating whether the behavior is anticompetitive. In addition, staff notes that the statute emphasizes the exercise of regulatory restraint, to the extent possible, to ensure fair and competitive markets. Therefore, any analysis should also include options regarding the least restrictive regulation required to correct the impacts of any anticompetitive behavior in accordance with the Section 364.01(4)(b) and (g), Florida Statutes.

Section 364.051(5)(a)(2) permits the ILECs to meet competitors offers regarding non-basic services so long as the ILECs do not engage in any anticompetitive acts or practices, nor unreasonable discriminate among similarly situated customers. Section 364.051(5)(b) provides the Commission with continuing oversight authority of nonbasic services for the purpose of ensuring that all telecommunications carriers are treated fairly. Similarly, Section 364.3381(3), Florida Statutes, also provides the Commission continuing "oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices." Finally, Section 364.10, Florida Statutes, prohibits the ILECs from making or giving any undue or unreasonable preference or advantage to a person or locality or subjecting a person or locality to undue or unreasonable prejudice or disadvantage in any respect whatsoever. As noted previously, these particular requirements are similar to Section 202 of the Act.

1) Whether the behavior prevents telecommunications companies from being treated fairly by erecting barriers to competition in the local exchange market

As noted in Issue 2, the parties do not dispute BellSouth's policy/practices regarding its FastAccess Service, but do dispute the appropriateness of said policies/practices. Witness Gillan testified that BellSouth's policy "results in a barrier to competition, making it more difficult for new entrants to compete with BellSouth." (TR 49)

BellSouth's witness Ruscilli countered that it is the CLEC's choice not to offer a DSL solution to their customers in spite of the variety of existing options from which to do so. (TR 328) Witness Milner contends that the CLEC can provide their customers with DSL service using unbundled elements and can collocate in BellSouth's central offices or remote terminals. (TR 396-397)

Although BellSouth claims the CLECs can collocate their DSLAM in its remote terminal, the sheer number of remote terminals in which a CLEC would have to collocate prior to obtaining any customers is enormous. (TR 154-155) Further, a CLEC would have to front the cost of its own DSLAM. Thus, staff agrees that the current remote collocation for DSLAMs is not practical for most CLECs, thus line splitting in practical terms is not available.

Witness Gillan also testified that he believes that if the Commission were to reverse its prior decisions and approve BellSouth's policy that it would be sanctioning BellSouth's erection of yet another barrier to local voice competition. Further, witness Lichtenberg testified that when customers are given the option of migrating to a competitive provider for voice service and losing FastAccess, or staying with BellSouth for voice service and keeping their DSL service, the customers decide to retain FastAccess. (TR 166) The fact that almost 80% of BellSouth's voice customers are retained by its practice is not disputed in the record.

However, BellSouth witness Ruscilli argues that CLECs in Florida have been extremely successful in competing in the voice market, serving more than 595, 000 residential customers in Florida as of April 30, 2003. (TR 300) Witness Ruscilli goes on to point out that as of September 2002, it estimated that CLECs in Florida were serving 1,324,819 access lines. (TR 309) As to the claim

that its policy dissuades customers from switching voice service, witness Ruscilli states that telling prospective customers that they cannot keep their DSL service if they switch to the CLEC for local voice service is a business decision on the part of the CLEC. He continues that the CLEC actually have other options for serving these potential customers, but they have chosen not to pursue them. (TR 311)

2) Whether the behavior impedes competition by limiting the range of consumer choice

As noted above, there is no dispute that under its current policy that BellSouth requires a customer to choose its voice service if the customer wants its FastAccess service. Witness Lichtenberg testified that when customers are given the option of migrating to a competitive provider for voice service and losing FastAccess, or staying with BellSouth for voice service and keeping their DSL service, the customers decide to retain FastAccess. (TR 166)

Witness Gillan testified that BellSouth's policy denies customers the opportunity for basic self-determination as to what combination of providers best meet their needs. (TR 49) Witness Gillan cites an example of how BellSouth practice is inherently discriminatory between customers:

Consider the situation of two customers currently subscribing to FastAccess (which today also means they are part of BellSouth's voice monopoly). One customer decides to subscribe to WorldCom's new residential offering, the "Neighborhood," while the other intends to remain with BellSouth. The same network facilities will be used to serve the customer choosing WorldCom's voice service as are used today (or would be used to serve the customer staying with BellSouth for local service). Thus, there can be no question that the customers are similarly situated - they are each being served over identical facilities. Yet, BellSouth would provide FastAccess to one (the customer that stays with it) while affirmatively disconnecting the other (the customer that chooses a competitive alternative). No clearer example of discrimination can be found.

(TR 56-57) Witness Gillan further claims that BellSouth forces customers to make this choice because it recognizes that customers desiring DSL service are also likely to be the best voice customers and those customer have undertaken the work to make the service operational (i.e. 95% self-install). (TR 55)

BellSouth counters that its policy is not anticompetitive. (BR 28) Witness Ruscilli contends that BellSouth's approach is simply to offer a customer an overlay service to meet that customer's broadband needs. (TR 321) Witness Ruscilli opines that a consumer can choose which arrangements best suite their needs. He contends that for some customers long distance is more important while for others it may be FastAccess. Witness Ruscilli asserts that this is consistent with free market choice, and there is nothing evil in allowing customers to have different choices. (TR 322)

Further, witness Ruscilli points out that a customer can continue to receive its FastAccess service if the CLEC's voice service is provisioned over a resold line. (TR 323) Witness Ruscilli also contends that witness Gillan's arguments completely ignore the entire broadband market, and instead focus on only a subset of that market, which is DSL service. (TR 324) Witness Ruscilli testified that 66.4% of TV households have cable modem service available according to a report found on the web from the National Cable Telecommunications or something like that. (TR 371) Witness Ruscilli argues that BellSouth has spent about four years investing in a technology and nurturing and developing a market for its FastAccess. He continues that he thinks that what BellSouth has done is it has built a very strong competitive offering, both to cable companies and to the CLEC who had the opportunity to the same and now consumers have choices. (TR 356)

### III. CONCLUSION

#### a. Option 1

Based on the record, staff believes that BellSouth's current practices and policies regarding its FastAccess prevent the CLECs from being treated fairly by erecting barriers to competition. Although, BellSouth claims that the CLECs have options for providing their own DSL service, it is clear from the record, that as a practical matter, these are not reasonable, viable options. In fact, the resold line option which BellSouth touts would be

moving facilities-based competition backwards. As noted by witness Gillan, currently, the cost for providing facilities-based remote terminal collocation is prohibitive, which no business case can support. (TR 155) At some point in time when the equipment to provide DSL type services can be collocated in central offices, BellSouth's policy may no longer be anticompetitive in its effect. But in today's current state of technology, BellSouth's policy erects a barrier to competition in the local voice market by requiring a customer to retain/obtain its voice service to obtain its FastAccess service.

Staff also believes that BellSouth's practice of requiring customers have its voice service to obtain its FastAccess impedes competition by limiting the range of consumer choice. Staff is persuaded by the witnesses testimony that this practice effectively keeps customers from switching. Further, staff is equally persuaded that BellSouth adopt its practice to keep customers from switching voice service. Thus, staff believes that this particular practice is especially anticompetitive.

While BellSouth contends that customers have the option of obtaining broadband service from other providers, such as cable modem service. It is unclear that a significant number of customers actually enjoy that option. The record supports the contention that there really are no viable DSL competitors. Therefore, staff believes that BellSouth's policy impedes competition by limiting the range of consumer choice.

Based on the facts in the record, BellSouth's practice of requiring a customer to choose its voice service if that customer wants its FastAccess service is anticompetitive. This practice is anticompetitive because it prevents the CLECs from being treated fairly by erecting barriers to competition and because it impedes competition by limiting the range of consumer choice for the reasons stated in Option 1.

b. Option 2

Based on the record, staff believes that BellSouth's current practices and policies regarding its FastAccess in disconnecting customers who seek to change voice providers prevent the CLECs from being treated fairly by erecting barriers to competition. As a practical matter, CLECs currently are unable to compete with BellSouth's DSL service, without resorting to reselling lines.

Thus, it is difficult for a CLEC to entice a customer away from BellSouth once that customer has FastAccess. Therefore, BellSouth's policy of disconnecting its FastAccess from customers who choose a competing voice provider, erects barriers to competition. However, for new customers that have never had FastAccess, such a barrier does not exist.

In addition, BellSouth's practice of disconnecting its FastAccess service when a customer chooses a competing voice provider impedes competition by limiting the range of consumer choice for those customers who have already expended significant investment in BellSouth's FastAccess service. Due to those expenses, a customer would be dissuaded from switching voice providers thereby impeding competition. However, when applied to a new customer seeking service, BellSouth's practice does not limit the customer's choice, since that customer can take into account whether he finds a DSL service or a competitive voice service more important.

Based on the facts in the record, BellSouth's practice of disconnecting its FastAccess service when a customer chooses a competing voice provider is anticompetitive. This practice is anticompetitive because it prevents the CLECs from being treated fairly by erecting barriers to competition and because it impedes competition by limiting the range of consumer choice for the reasons stated herein. However, when applied to a new customer seeking service, BellSouth practice does not limit customer choice, since that customer can take into account whether he finds a DSL service or a competitive voice service more important.

c. Option 3

Based on the record, it appears that the CLECs have alternative options for providing DSL type services to their potential customers. Whether or not the CLEC chooses to offer potential customers a DSL-type service through resold lines, investment in facilities, or through line-splitting arrangement is a business decision, which should be left to the company. As such, the Commission should find that BellSouth's policy does not treat telecommunications companies unfairly by erecting barriers to competition. In this instance, having an effective business policy does not equate to a barrier to competition.

BellSouth's practices regarding its FastAccess service do not impede competition by limiting the range of consumer choice. As BellSouth noted there are alternative ways of provisioning broadband services, chiefly cable modem service. Currently, about 66.4% of household with cable TV service have access to cable modem service. Moreover, witness Ruscilli testified that currently cable modem service leads BellSouth about two-to-one in access to broadband customers. (TR 355) Therefore, it appears that at least some customers have a choice regarding providers for broadband services. Staff believes that if there is a choice of broadband providers, there is no anticompetitive effect on the customer's ability to choose a competing voice provider.

BellSouth's FastAccess practice requiring a customer to choose its voice service if that customer wants its FastAccess service is not anticompetitive. This practice is not anticompetitive because it does not prevent the CLECs from being treated fairly by erecting barriers to competition and because it does not impede competition by limiting the range of consumer choice for the reasons stated herein.

d. Staff Opinion

Of the three options presented, Staff believes that at a minimum, Option 1 should be chosen, because disconnecting FastAccess from existing BellSouth customers is clearly anticompetitive in nature. With respect to Option 2, BellSouth's refusal to provide FastAccess service to current CLEC customers is not as egregious as when an existing BellSouth customer migrates to a CLEC and has his FastAccess disconnected. However, the refusal to provide FastAccess to current local voice CLEC customers that are similarly-situated to existing BellSouth local voice customers, also has anticompetitive aspects.

**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?

**RECOMMENDATION:** Of the three viable options presented by staff, staff recommends that either Options 1 or 2 be selected, as they set forth the most appropriate course of action. **(BULECZA-BANKS)**

Option 1: In the interest of promoting competition in accordance with Section 364.01(4)(d) and (g), Florida Statutes, and the federal Telecommunications Act, BellSouth should be prohibited from disconnecting FastAccess service to an end user who migrates his voice service to a CLEC. However, the requirement to continue to provide FastAccess should be re-evaluated by December 31, 2006, to determine whether this provision continues to be necessary to promote local voice competition. Further, the requirement would be subject to the terms set forth in Issue 6A. If during the Commission's on-going market monitoring process staff determines that the competitive conditions have changed in either the local voice market or the broadband market, staff would inform the Commission and seek guidance as to whether the re-evaluation process should be undertaken sooner.

Option 2: In the interest of promoting competition in accordance with Chapter 364.01(4)(d) and (g), Florida Statutes, and the federal Telecommunications Act, BellSouth should be prohibited from disconnecting FastAccess service to an end user who migrates his voice service to a CLEC. However, the requirement to continue to provide FastAccess should terminate after three years from the date of the final order. Further, during the three year period, the provision of FastAccess service would be subject to the terms set forth in Issue 6A.

Option 3: BellSouth's disconnection practices are neither anti-competitive or discriminatory. BellSouth should be allowed to continue its practice of disconnecting its FastAccess customers that migrate to a CLEC.



**POSITION OF THE PARTIES**

**AT&T, MCI, ITC^DELTACOM, ACCESS:** Yes. The Commission has ruled in two prior cases that BellSouth may not disconnect FastAccess service of an end user who migrates to a competitive voice provider because such behavior is anti-competitive. It should now ensure that its decision is implemented through a seamless transition as it previously ordered.

**BELLSOUTH:** No.

**STAFF ANALYSIS:**

**I. AT&T, MCI, ITC^DELTACOM, ACCESS**

The Petitioners argue that BellSouth's practice to disconnect a FastAccess customer who migrates his local voice service to a CLEC creates a barrier to local competition, forecloses customer choice, and punishes the end user for selecting the carrier it prefers.

The Petitioners' witness Gillan provides an example of why he believes BellSouth's disconnection practices are anticompetitive:

...if the customer wants FastAccess, your position to that customer is I will not sell you this product unless you agree to buy voice service from me. If you choose to obtain voice service from AT&T or MCI or some other provider, I'm going to refuse to provide you service.  
(TR 94-95)

Witness Gillan considers the above situation to be anticompetitive. (TR 95) He believes that any customer that wants to take its voice service somewhere else for whatever set of reasons, should be permitted to do so without being punished by losing, or being denied, FastAccess service. (TR 146) Similarly, Petitioners' witness Lichtenberg provides another example:

If the customer continues to say to BellSouth "How do I get your FastAccess service?" and BellSouth says, "You can only have that service if you are my voice customer," then that is anticompetitive. (TR 212)

In witness Gillan's direct testimony, he opines that BellSouth's refusal to provide DSL and risk customer disconnection

is because BellSouth expects to retain both the DSL and voice service. (TR 130-131) Witness Gillan asserts that since customers, particularly customers that have gone through the trouble to get FastAccess up and running, are going to be discouraged from choosing a different local voice provider if they have to give up their FastAccess or if they are refused FastAccess as a result of that decision. (TR 133) Similarly, witness Lichtenberg testifies that when customers are given the option of migrating to a competitive provider for voice service and losing FastAccess, or staying with BellSouth for voice service and keeping their DSL service, customers decide to retain FastAccess. (TR 166) Witness Gillan supports witness Lichtenberg's testimony, by identifying information contained in Staff Interrogatory No. 24, (EXH 7), which indicates that if a customer was informed that his DSL service would be disconnected if he switched local providers, in excess of 80 percent of time, the customer would remain with BellSouth. (TR 131)

In witness Gillan's direct testimony, he claims that BellSouth's policy "results in a barrier to competition, making it more difficult for new entrants to compete with BellSouth." (TR 49) While BellSouth witness Ruscilli argues that a CLEC could invest in its own facilities in order to provide a competing DSL service (TR 312), witness Gillan asserts that no provider is capable of creating a DSL-footprint of comparable scale and scope as BellSouth. (TR 57) In support of this statement, he points out that there are no remote terminal collocations in the state of Florida, so there is no entity that has an ability to offer a comparable footprint. (TR 136) In Mr. Gillan's opinion, CLECs are pursuing the voice market, rather than the DSL market, because a provider can pursue the voice market without having it lead to bankruptcy. He surmises that companies that employed a data-only strategy for CLECs without the benefit of a voice monopoly like BellSouth, have been led down an unprofitable path. (TR 136)

Witness Gillan further argues that BellSouth's policy to deny FastAccess to any customer subscribing to an alternative provider of voice service is contrary to both the spirit and letter of Florida law. Witness Gillan asserts that BellSouth's policy explicitly violates Chapter 364, Florida Statutes' prohibition on anti-competitive behavior and discrimination, arguing that BellSouth's policy denies customers the opportunity for basic self-determination as to what combination of providers best meet their needs. (TR 49)

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Another point raised by witness Gillan is that BellSouth's policy frustrates the state and national goal to achieve a greater penetration of advanced services. He believes that BellSouth is using its advanced service offering as a hostage to try and retain local voice service customers. (TR 55-56) However, witness Gillan does state that the purpose of the complaint filed is not to prevent BellSouth from providing bundles of services; the complaint was raised to simply prevent BellSouth from disconnecting the FastAccess customer. (TR 111-112)

Witness Gillan points out that the Commission has already decided the foundational issue in this proceeding, and that the current complaint was filed so that the Commission would have an administratively simple tool to extend or apply the decisions already reached, to other carriers in similar circumstances. Witness Gillan identified three Commission orders that addressed BellSouth's policy to related to its FastAccess service. Commission Orders PSC-02-0765-FOF-TP and PSC-02-1453-FOF-TP related to Docket No. 010098-TP, FDN/BellSouth Arbitration, and PSC-02-0878-FOF-TP, in Docket No. 001305-TP, related to the Supra/BellSouth Arbitration. Witness Gillan states that in these orders, the Commission directed BellSouth to partially cease its anti-competitive and discriminatory behavior. (TR 50-51)

Witness Gillan believes that if the Commission were to reverse its prior decisions and approve BellSouth's policy, it would be sanctioning BellSouth's erection of yet another barrier to local voice competition. He believes that BellSouth's policy effectively forecloses voice competition for those customers desiring FastAccess service. (TR 57) Witness Gillan asserts that forcing customers to choose between FastAccess and local competition is unfair to the customer and it forecloses an important customer segment from local competition. (TR 57)

At the hearing, the parties were asked to brief the issue of whether a time frame should be established that would limit BellSouth's requirement to provide CLEC customers FastAccess service. In the Petitioners' brief, they indicate that there should be no time frame imposed to limit BellSouth's obligation to provide FastAccess service to CLEC customers. They argue that an anti-competitive behavior today, is still an anti-competitive behavior tomorrow. (Petitioners BR 30)

## II. BELLSOUTH

BellSouth argues that this issue revisits in part, an issue that was decided in the FDN Order. BellSouth does not dispute that the Commission's FDN Order imposed upon BellSouth, an obligation to continue to provide FastAccess to migrating voice customers. (TR 303) However, BellSouth asserts that the Commission cannot impose such an obligation upon it, and points out that both the FDN and Supra orders are under appeal. (TR 334)

Witness Ruscilli points out that the Commission agreed that BellSouth's FastAccess service was an 'enhanced, nonregulated, nontelecommunications Internet access service.' (TR 321) Further, BellSouth's tariffed wholesale DSL transport service is a regulated interstate telecommunications service offering that is subject to the exclusive jurisdiction of the FCC. (TR 304)

Witness Ruscilli alleges that BellSouth's policy is not discriminatory. In support of his claim, he states that the FCC has considered and rejected, not once, but three times, the argument that BellSouth's policy is discriminatory. Specifically, he notes in the recent Florida/Tennessee 271 decision, CC Docket No. 02-307, Rel. December 19, 2002, the FCC stated:

"Network Telephone claims that BellSouth is 'tying' its DSL-based high-speed Internet access service to BellSouth local exchange service. As BellSouth points out, the Commission has repeatedly reviewed this same BellSouth policy and determined that it is not a bar to section 271 compliance... . BellSouth is correct that we have previously rejected this argument." (¶ 178) (TR 329)

Witness Ruscilli rebuts witness Gillan's claim that BellSouth threatens its customers, since BellSouth will continue to provide FastAccess service as long as the local voice service is provided over a resold line. He claims that it is the choice of the ALEC not to offer a DSL solution to their customers in spite of the variety of existing options from which to do so. (TR 328) As noted previously, BellSouth witness Milner provides various ways that a CLEC can provide their customers with DSL service using unbundled elements. CLECs can collocate a DSLAM in BellSouth's central offices or in BellSouth's remote terminals. (TR 396-397) Witness Ruscilli claims that BellSouth's approach is to offer a customer an overlay DSL service to meet that customer's broadband needs. (TR

321) According to witness Ruscilli, some consumers find long distance service more important, while to others, FastAccess may be more important. Consumers can choose which arrangement best suits their needs and this is consistent with free market choice. (TR 322)

Witness Ruscilli argues that ALECs in Florida have been extremely successful in competing in the voice market, serving more than 595,000 residential customers in Florida, as of April 30, 2003. (TR 330) He suggests that BellSouth's FastAccess policy has had no demonstrable impact on competition in the voice market, particularly given the significant share of the local market the ALECs have been able to garner in Florida. Witness Ruscilli opines that to the extent ALECs are "foreclosed" from serving a segment of the voice market that demands DSL service, ALECs have only themselves to blame. (TR 330)

With respect to the issue raised at the hearing regarding a time frame to limit BellSouth's obligation to provide FastAccess, BellSouth proposes that a limitation should be imposed so that when a customer migrates to a CLEC, the CLEC has 60 days to fulfill the broadband needs of their customers without relying upon BellSouth for such needs. Further, BellSouth believes that 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. (BellSouth BR 38)

### **III. GENERAL STAFF ANALYSIS**

On July 10, 2003, AT&T, MCI, AIN, and ITC^DeltaCom filed a voluntary dismissal of a portion of the complaint which dealt with BellSouth's refusal to provide or continue to provide FastAccess service to end users who are served by CLECs via UNE-L. The Petitioners also filed a motion in limine to preclude references by BellSouth in its opening statements or witness summaries to matters relating to the provisioning of FastAccess to end users served by CLECs via UNE-L.

At the hearing, the Commission voted to reject the notice of partial dismissal and deny the motion in limine, expressing its desire to make a decision on both UNE-P and UNE-L related issues so that appropriate signals could be provided to the industry. (TR 19)

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By Commission Order No. PSC-02-0765-FOF-TP, in Docket No. 010098-TP, related to an arbitration between Florida Digital Network, Inc. (FDN) and BellSouth Telecommunications, Inc., the Commission concurred with FDN that BellSouth's practice to disconnect its FastAccess service as a result of customer migration, raises a competitive barrier in the voice market for carriers that are unable to provide DSL service. The Order states that BellSouth's practice of disconnecting its FastAccess service unduly prejudices or penalizes those customers who switch their voice service, as well as, their new carrier.

The Commission acknowledged that this was a case of first impression and within the order, cautioned that this decision should not be construed as an attempt to exercise jurisdiction over the regulation of DSL service; instead, the Commission held that it was exercising its jurisdiction to promote competition in the local voice market. As a result, the Commission ordered BellSouth to continue to provide FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops (UNE-L). Both FDN and BellSouth filed Motions for Reconsideration and/or Clarification of the Order. Both parties sought clarification as to whether the FastAccess provision applied to UNE-L, or both UNE-L and UNE-P. The Commission concluded that since FDN represented itself as not being a UNE-P provider, and that since there was no mention in the FDN proceeding of continuing FastAccess in conjunction with UNE-P, should be adopted that references only UNE-L.

In Order No. PSC-02-0878-FOF-TP, dated July 1, 2002, which addresses an arbitration between Supra Telecommunications and Information Systems, Inc. and BellSouth Telecommunications, Inc., the Commission, consistent with its finding in the FDN/BellSouth arbitration, concluded that the practice of disconnecting FastAccess Internet Service when a customer switches voice providers creates a barrier to competition in the local exchange telecommunications market. While the FDN/BellSouth arbitration addressed FastAccess when local voice service is provided via UNE loop, the Supra/BellSouth addressed FastAccess when local voice service is provided via UNE-P.

In Section 364.01(4)(d), Florida statutes, it sets forth the Commission's responsibility to promote competition by encouraging new entrants into telecommunications markets and by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than incumbent local exchange

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telecommunications companies. Further, in Section 364.01(4)(g), Florida Statutes, the Commission is granted the jurisdiction to ensure all providers of telecommunications services are treated fairly, by preventing anti-competitive behavior.

In Order No. PSC-02-0765-FOF-TP, dated June 5, 2002, the Commission expressed its discontent with BellSouth's policy to disconnect its FastAccess customers. Specifically, the Order states:

We are troubled by FDN's assertions that BellSouth uses its ability to provide its FastAccess Internet Service as leverage to retain voice customers, creating a disincentive for customers to obtain competitive voice service. (Order at p. 8)

BellSouth witness Smith purports that revenue is not what makes a business profitable. He asserts that revenue does not return earning to stockholders; he maintains that margin is the key. Specifically, witness Smith said:

And so if you look at our overall customer relationships, our best customers are the ones that typically want DSL. Those are the ones, as we heard yesterday, that are quite often buying our packages, our CompleteChoice service, our long distance services. So those customers in total, if we lose those customers and all we have is DSL, we are definitely at a, at a worst position. (TR 550-551)

BellSouth's policy to disconnect FastAccess customers that migrate to a CLEC, can discourage customers from switching local voice providers. (TR 166) Those customers who value high speed data service, would presumably wish to continue that service even if they decided to switch their local voice service provider. (TR 167)

BellSouth's practices could discourage those customers receiving FastAccess service from BellSouth from migrating to a CLEC, particularly in the cases where the customer does not have a comparable alternative to BellSouth's FastAccess. In those cases, where the customer chooses a DSL alternative to FastAccess (even if not comparable), the customer must disconnect his FastAccess, obtain a different DSL modem, arrange for connection to the new DSL provider, and likely change his e-mail address. (TR 167) Given

that these steps would be required to maintain high speed data access, one could deduce that the customer would be dissuaded from changing local service providers.

While BellSouth's disconnection policy varies with the provisioning method used by the CLEC to provide local service, the method used by the CLEC is likely unknown by the customer. In fact, the customer should be indifferent as to whether the CLEC uses UNE-P, UNE-L, or BellSouth resale. The customer should not be placed in a position to research and evaluate a CLEC's provisioning method when he makes the decision whether to migrate to a CLEC for local voice service. However, since the customer's FastAccess service will be disconnected unless the CLEC provisions local voice service via BellSouth resale, the customer has been placed in the middle of a provisioning dispute.

BellSouth's disconnection policy applies equally to customers served via UNE-L or UNE-P. Because the customer is disconnected regardless if service is provisioned via UNE-P or UNE-L, staff believes the impact on the customers will be the same. Therefore, the options proposed by staff apply equally to UNE-P or UNE-L.

Before examining the competitive impacts of BellSouth's disconnection policy, the Commission should first examine whether there are any unduly burdensome technical requirements that would result from requiring BellSouth to continue to provide FastAccess service.

BellSouth witness Milner identified the following problems that arise when BellSouth provisions FastAccess service but is not the local voice service provider:

- 1) Requires BellSouth to provide the terminating ATM circuit, a help desk, installation services, access to the Internet, and all necessary customer premises equipment for the ALEC's end-user customers. (TR 387)
- 2) Requires BellSouth to develop an alternate method of billing end users, such a credit card billing. (TR 387)
- 3) BellSouth cannot use the high frequency spectrum of the loop without ALEC permission. (Tr 388)



- 4) BellSouth would need to change its systems requiring a massive amount of expensive and time consuming "re-writes" to all of the systems and related sub-systems, and would require a very large amount of resources. (TR 391)
- 5) BellSouth would be unable to utilize mechanized maintenance and trouble isolation systems on such stand-alone unbundled loops purchased by ALECs. (TR 392)

With respect to Problem Number 1, BellSouth was asked whether it supplies a help desk, installation service, access to the internet, and necessary customer premises equipment when it provides DSL service. In response to Staff Interrogatory No. 37, BellSouth affirmed that it does provide the services when it provides DSL service. (EXH 7) Witness Bradbury notes that these same services are provided by BellSouth when the CLEC is providing local voice service via resale with BellSouth providing the FastAccess service. (TR 225)

Problem 2 relates to the need for an alternative billing mechanism. Witness Milner claims that BellSouth would have to develop an alternative method of billing the end user because BellSouth would no longer have a direct relationship with the end user for that end user's voice service. (TR 387) Witness Bradbury rebuts this claim, stating that BellSouth already has in place the capability to render bills and accept payments using credit cards. (TR 225) Witness Bradbury further notes that BellSouth does have the capability to produce bills for customers that do not have working BellSouth telephone numbers as BellSouth is able to use Miscellaneous Account Numbers (MANs). (TR 226) In response to Staff Interrogatory No. 53, BellSouth does, in fact, employ the use of MANs in billing the following services: Synchronet, Megalink, Private Line, and DIA. (EXH 7)

With respect to Problem Number 3, witness Milner asserts that when a CLEC is providing local voice service via UNE-P or UNE-L, BellSouth does not have the right to access the high frequency portion of the loop (HFPL). He further asserts that BellSouth does not have any means to determine if any one of the hundreds of ALECs in the BellSouth region has granted authorization for BellSouth or another ALEC to access the HFPL. (TR 390) Witness Milner argues that BellSouth would be forced to negotiate prices with the ALECs for access to the HFPL to provide a service that BellSouth does not

wish to provide, absent some provision requiring all ALECs to provide BellSouth with access to the affected spectrum without cost. (TR 390) The Petitioners' witness Gillan recommends that BellSouth only be required to provide FastAccess to customers when the carrier purchasing the loop from BellSouth has agreed to allow BellSouth access to the HFPL free of costs. He believes that by providing BellSouth free access to the HFPL, BellSouth is providing FastAccess on the same economic characteristics as when BellSouth was also providing the customer local voice service. (TR 100) The Petitioners' witness Bradbury also asserts that ALECs currently participating in the case are willing to provide BellSouth the permission necessary for BellSouth to serve its existing FastAccess service customers. (TR 244)

With respect to the difficulty in determining which of the hundreds of ALECs have granted BellSouth authorization to the HFPL, witness Bradbury asserts that this is a very minor undertaking. He argues that BellSouth can readily determine which ALEC is serving a given UNE-P or UNE-L served end user. (TR 246-247) According to BellSouth witness Ruscilli's testimony, as of September 2002, there were 53 facility-based CLECs serving in Florida. (TR 310) During cross examination, BellSouth witness Fogle admitted that BellSouth was manually tracking orders placed in Louisiana, but that BellSouth was in the process of developing an electronic system to link the loop qualification system with the contract database. (TR 491) As the Louisiana Commission has ordered BellSouth to implement an electronic processing system for the provisioning of FastAccess to UNE-P customers, BellSouth is in the process of developing an electronic system to comply with these requirements. BellSouth is attempting to complete the required system changes so that it can implement them by February 2004. (TR 492)

Problem 5 relates to BellSouth's claim that it would need to change its systems requiring a massive amount of expensive and time consuming "re-writes" to all of the systems and related sub-systems, and would require a very large amount of resources. Petitioners' witness Bradbury disputes these claims. Witness Bradbury argues that virtually all of BellSouth's Operations Support Systems and associated databases can be used with equal effectiveness when presented with any one of three key identifiers - the telephone number, a circuit identification number, or the service address. (TR 227) Further, witness Bradbury states that BellSouth has provided FastAccess to UNE-P customers in the past and then modified its systems to prevent the process from working.

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(TR 235) Witness Milner affirmed that BellSouth provided DSL service over UNE-P lines for a period spanning about a year and a half. (TR 412) Witness Milner agreed that BellSouth added edits to its systems that caused customers' FastAccess to be terminated if they migrated to a UNE-P carrier for voice service. (TR 413)

In addressing BellSouth's concern that it would be unable to utilize mechanized maintenance and trouble isolation systems on such stand-alone unbundled loops purchased by ALECs, witness Bradbury asserts that the full capability to use such systems exists. (TR 230) Witness Bradbury points out that full functionality of the test set is still available where the loop is connected to the CLEC switch, it is merely the CLEC that would conduct the test, not BellSouth. A procedure to coordinate the process between BellSouth and the CLEC is all that is needed. (TR 256-257) Witness Bradbury asserts that BellSouth already performs testing and repairs functions for UNE-P arrangements today under its interconnections agreements. (TR 235)

In reviewing the technical problems that BellSouth asserts arise when it provides FastAccess but is not the local voice provider, staff does not believe any alleged problem or combination of problems is sufficient to warrant immediate acceptance of BellSouth's disconnection practices. Staff does not consider Problem 1 significant. BellSouth argues that it is problematic to provide a help desk, installation services, access to the Internet, and all necessary customer premises equipment when BellSouth does not provide the local service. Staff does not view this situation as problematic because BellSouth will still be the provider of its FastAccess service. Since BellSouth provides these services to its FastAccess customers that obtain local service from BellSouth, it should provide these services to those FastAccess customers that obtain local service from a CLEC.

With respect to billing problems, BellSouth already has procedures in place to bill by credit card and MANs. BellSouth's concern that it does not have access to the HFPL can be dismissed with respect to the Petitioners in this case, because the Petitioners agree to provide BellSouth access to the HFPL at no cost.

As for the required system changes, BellSouth itself acknowledged that it was providing FastAccess service to customers served by CLECs using UNE-P, but that edits were later installed in

its systems to prevent this from happening. Further, the Louisiana Commission has required BellSouth to create two processes to facilitate the provision of FastAccess service. The Louisiana Commission dictated that BellSouth create a process so that BellSouth could continue to provide wholesale and retail DSL service to existing wholesale and retail DSL customers who switch to UNE-P voice providers and also required BellSouth to create a process whereby BellSouth could accept new orders from UNE-P customers who subsequently choose to receive BellSouth's wholesale or retail DSL service.<sup>41</sup> (EXH 20) Witness Bradbury attests that BellSouth's OSS systems are region-wide and while they contain tables that are state-specific, the other state's tables could be changed very easily. (TR 262) Staff believes that it is reasonable to assume that processes implemented in Louisiana to facilitate the provision of FastAccess to customers that migrate to a CLEC, could be duplicated for Florida. Similarly, the process implemented to allow existing CLEC customers to obtain FastAccess could also be duplicated for Florida.

The final technical problem addressed by BellSouth involved its inability to utilize mechanized maintenance and trouble isolation systems on such stand-alone unbundled loops purchased by ALECs. This problem can be addressed by requiring those CLECs whose customers obtain FastAccess from BellSouth to provide the necessary testing on BellSouth's behalf. (TR 257)

Based on the above analysis, the problems cited by BellSouth can be overcome and do not appear to be overly burdensome. As BellSouth must be working to resolve these problems to comply with the requirements ordered by the Louisiana Commission, staff reasons that these problems alone should not warrant acceptance of BellSouth's FastAccess disconnection practices.

In addition to the technical problems addressed above, witness Ruscilli contends that if the Commission were to require BellSouth to provide FastAccess service to customers that migrate to a CLEC, BellSouth would be in violation of its FCC tariff. (TR 297) BellSouth's FCC Tariff Number 1 establishes DSL as an overlay service and requires the existence of an in-service, BellSouth

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<sup>41</sup>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 (April 3, 2003).

provided exchange line facilities. (TR 304-305 and EXH 18) In response to staff Interrogatory No. 20, BellSouth acknowledges that it could make a business decision to change the provisioning of its service, and modify the FCC tariff accordingly. (EXH 5 and TR 368-369) Witness Ruscilli agrees that BellSouth is currently in violation of its FCC Tariff Number 1 as the Louisiana Commission and the Florida Commission have both ordered BellSouth to continue to provide FastAccess service to migrating customers. (TR 369) Witness Ruscilli agrees that it is within BellSouth's discretion whether or not it wants to change its FCC tariff and further agrees that it is BellSouth's business decision to be in violation of its FCC tariff. (TR 369)

Staff does not believe that BellSouth's argument that it would be in violation of its FCC tariff warrants acceptance of its disconnection practices. BellSouth is already in violation of its FCC Tariff Number 1 and has not attempted to modify that tariff to comply with mandates from this Commission or the Louisiana Commission. Whether or not BellSouth modifies its federal tariff is not a direct concern of this Commission, unless, such failure results in some failure or violation of state law.

While staff does not believe the technical issues or the tariff compliance issues raised by BellSouth are significant enough to warrant acceptance of BellSouth's disconnection practices, staff contends that to make a proper determination of whether BellSouth's disconnection practices should be condoned, requires an analysis of the competitive impact of the disconnection practices. As such, the competitive aspects are addressed in each of the four options that follow.

**A. OPTION 1**

1. Summary

Under Option 1, BellSouth would be prohibited from disconnecting FastAccess to those customers that migrate to a CLEC. This prohibition would be reevaluated by December 31, 2006, to determine whether it is necessary to maintain the prohibition in order to promote local voice competition. Further, the requirement would be subject to the terms set forth in Issue 6A. If during the Commission's on-going market monitoring process staff determines that the competitive conditions have changed in either the local voice market or the broadband market, staff would inform the

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Commission and seek guidance as to whether the re-evaluation process should be undertaken sooner.

## 2. Analysis

The Commission has determined that BellSouth's practice to disconnect FastAccess service if a customer migrates to a CLEC is a barrier to competition in the local exchange telecommunications market (Commission Order Nos. PSC-02-0765-FOF-TP and PSC-02-0878-FOF-TP.) Specifically, the Commission stated in Order No. PSC-02-0878-FOF-TP):

We fashion an appropriate remedy for the situation pursuant to our authority under Section 364.014(4)(g), Florida Statutes, which provides, in part, that we shall, "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anti-competitive behavior..." (Order at 51.)

Within this Order No. PSC-02-765-FOF-TP, the Commission stated that it agreed with FDN that BellSouth's practice of disconnecting its FastAccess Internet Service when its customers change to another voice provider unreasonably discriminates among customers. As provided by Section 364.10(1), Florida Statutes:

A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

BellSouth's policy provides a disadvantage to those customers that seek to obtain local telecommunications service from a CLEC. Should the customer seek to maintain FastAccess service, he must maintain local service with BellSouth. Those customers that migrate their local service from BellSouth, will lose FastAccess. BellSouth's FastAccess disconnection practice unduly disadvantages its own customers by limiting their local voice options.

Should BellSouth be allowed to continue its disconnection practice, customers will continue to be disadvantaged. The customer would be forbidden from obtaining the combination of services he prefers.

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Over the past five years, the number of access lines in BellSouth territory, being served by CLEC's, has been increasing. While the number of access lines being served by CLECs has continued to increase, the growth rate has decreased over the past two years. (EXH 5)

With respect to BellSouth, it has experienced a significant demand for UNE-P lines. Demand for resale lines, on the other hand, has continued to decrease since December 2001. Overall, the growth in demand for wholesale lines has slowed during the twelve month period ending June 30, 2003. The peak period of growth for wholesale lines was between June 2000 and June 2002. (EXH 5)

BellSouth's disconnection practice serves to discourage competition in the local exchange telecommunications market. For those customers who wish to maintain FastAccess service, they are foreclosed from choosing another local service provider. Acceptance of this limitation would be contrary to the edict in Section 364.01(b) which dictates the Commission's responsibility to:

"... ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services."

BellSouth's region-wide DSL goal for 2003 is to have 1.5 million DSL access lines (both wholesale and retail) in service. BellSouth's region-wide DSL goal for 2004, is to have 1.671 million DSL lines (both wholesale and retail) in service. (EXH 5)

Witness Gillan states that the available data indicates that there is in excess of an 80 percent chance a customer would remain with BellSouth if he were told that his FastAccess would be disconnected if he migrated to a CLEC for local voice service. (TR 131)

Witness Gillan asserts that customers are reluctant to change local voice providers, if doing so causes them to lose their FastAccess service. Based on this assertion, as the number of BellSouth DSL customers continues to increase, there could be fewer customers willing to migrate to a CLEC. (TR 53) Such a result could dampen competition in the local exchange telecommunication market.

As provided in Chapter 364.01(4)(d), Florida Statutes, the Commission is charged with promoting competition by encouraging new entrants into the telecommunications markets. If the Commission allows BellSouth to continue its practice of disconnecting its FastAccess customers, this practice could diminish competition in the local exchange telecommunications which would be in opposition to the directive in the Florida Statutes. Further, Chapter 364.01(4)(d), Florida Statutes, requires the Commission to promote competition by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than incumbent local exchange telecommunications companies. The inclusion of a transitional period suggests that at a point where competition is established, the incumbent local exchange company and the CLEC should be subject to the same level of regulatory oversight.

An argument can be made that if customers had multiple options for high speed internet access, there would be no need to require BellSouth to maintain its FastAccess service to its customers. Today, it appears that customers may have access to a high speed internet service via cable modem, but other alternatives, such as wireless internet access and internet access via electric lines are not widespread. In most cases, the average residential consumer would not have access to these services. Further, whether cable modem service can be considered a viable alternative to BellSouth's FastAccess service, may vary from customer to customer.

At this time, customers are being faced with the choice to migrate from BellSouth and lose FastAccess, or maintain local voice service with BellSouth. If other opportunities for high speed internet access were available to the customer that he believed were true alternatives to BellSouth's FastAccess, BellSouth's disconnection policy might not impair competition in the local exchange market. If, however, the customer's only options were BellSouth's FastAccess service or a single high speed cable modem offering, the customer would be forced to accept cable modem service or remain with BellSouth for his local voice service.

The major element that results in BellSouth's policy being a barrier to competition is that the high speed internet market has not matured to a level where customers have access to a number of providers. Witness Ruscilli agrees that the evidence shows that DSL penetration is growing. (TR 364) As demand for a service increases, there is a likelihood that other providers will enter



the market to fulfill the demand. This is demonstrated by WorldCom's targeted entrance into the DSL market in Miami, Florida. (TR 195)

Staff believes that there likely will be a point in time when customers have various competitive alternatives to BellSouth's FastAccess service and therefore, will not be harmed if BellSouth refuses to provide FastAccess service. Staff does not believe the high speed internet access market of today has matured to the point whether customers have various competitive alternatives. Staff believes that this issue should be evaluated in the future to determine whether competition has increased in the high speed internet access market to the point where BellSouth's policy would not harm the FastAccess subscriber.

As a result, this option suggests that the Commission prohibit BellSouth from disconnecting its FastAccess customers that migrate to another carrier for local telecommunications service, but should reevaluate the issue no later than December 2006 to determine whether the prohibition should continue to be imposed. Further, the requirement would be subject to the terms set forth in Issue 6A. If during the Commission's on-going market monitoring process staff determines that the competitive conditions have changed in either the local voice market or the broadband market, staff would inform the Commission and seek guidance as to whether the re-evaluation process should be undertaken sooner.

## **B. OPTION 2**

### 1. Summary

Under this option, BellSouth would be prohibited from disconnecting FastAccess to its customers that migrate to another carrier for local telecommunications service, but, the prohibition would end after three years from the date of the final order. Further, during the three year period, the provision of FastAccess service would be subject to the terms set forth in Issue 6A.

### 2. Analysis

An argument can be made that after three years, the high speed internet access market should have expanded to the extent that customers have opportunities to choose different high speed internet access providers. On August 21, 2003, the Federal

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Communications Commission's (FCC) released Order No. FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (TRO), in CC Docket Nos. 01-338, 96-98, and 98-147. While the TRO did not specifically address the disconnection of BellSouth's FastAccess service, statements related to broadband deployment and the policy established by this order can provide guidance related to the disconnection of FastAccess customers.

In paragraph 234 of the TRO, it states:

...we believe that the goal of swift and ubiquitous broadband deployment is so important to the United States that we consider the statutory goal in section 706 and how they relate to broadband as additional factors when considering loops.

In paragraph 242, of the TRO, it states:

Section 706 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using regulatory measures that "promote competition in the local telecommunications market" and remove barriers to infrastructure investment."

In the TRO, the FCC concluded that incumbent LECs do not have to unbundle the HFPL, subject to a three-year grandfather provision. In paragraph 259, the FCC recognized that some incumbent LECs have refused to provide xDSL service to customers that obtain voice service from a competitive LEC, and acknowledge that over 11 million voice customers served by competitive LECs, who seek xDSL service, would have to obtain that service from a competing carrier. However, the FCC concluded that allowing the competitive LECs unbundled access to the whole loop and to line splitting, but not requiring the HFPL to be separately unbundled, creates a competitive incentive. (TRO paragraphs 264-266)

As a result, the FCC adopted a three-year transition period for new line sharing arrangements for requesting carriers. The FCC indicated that the purpose of the transition period was to minimize disruption to the customers that obtain xDSL service through line-shared loops. Further, the use of the transition period is designed to provide a period of sufficient length to enable CLECs

to move their customers to alternative arrangements and modify their business practices and operations going forward.

As addressed in Option No. 1, staff believes there will come a point in time when competition in the high speed internet market has grown to a level where BellSouth's policy of disconnecting its FastAccess customers will not have a detrimental affect on competition in the local voice market.

By establishing a date certain when BellSouth would be allowed to disconnect its FastAccess service from customers that migrate to a CLEC, both BellSouth and the CLECs would have the information necessary to establish the course of action they believe appropriate. The establishment of a three-year transition period provides regulatory certainty to BellSouth, CLECs, customers, and the investment community. Further, during the three year period, the provision of FastAccess service would be subject to the terms set forth in Issue 6A.

### **C. OPTION 3**

#### 1. Summary

Option 3 allows BellSouth to maintain its current disconnection practice.

#### 2. Analysis

BellSouth argues that it should be entitled to maintain its current disconnection practices because: (1) if forced to provide FastAccess over a UNE-P or UNE-L line, BellSouth would be in violation of its FCC tariff (TR 306); (2) the FCC has determined that BellSouth's practices are neither discriminatory or anti-competitive (TR 308); and, (3) CLECs have opportunities to provide DSL service to their customers, they have simply chosen not to pursue them. (TR 311)

With respect to the tariff issue raised by BellSouth, this issue has been addressed in the General Analysis section of this issue. In that section, staff concluded that it does not believe BellSouth's argument that it would be in violation of its FCC tariff warrants acceptance of its disconnection practices.

Another reason that BellSouth argues it should not be forced to provide FastAccess service to customers that migrate to a CLEC is because its refusal to provide FastAccess is neither discriminatory or anti-competitive. Witness Ruscilli cites FCC Order No. 01-247, 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 Georgia and Louisiana, CC Docket No. 02-35, Released May 15, 2002, where the FCC has determined that BellSouth's refusal is not discriminatory. At ¶157 of the referenced order, the FCC rejected complaints about BellSouth's DSL policy:

BellSouth states that its policy "not to offer its wholesale DSL service to an ISP or other network services provider [] on a line that is provided by a competitive via the UNE-P" is not discriminatory nor contrary to the Commission's rules. Commenters allege that BellSouth will not offer its DSL service over a competitive LEC's UNE-P voice service on that same line. We reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities. Furthermore, a UNE-P carrier has the right to engage in line splitting on its loop. As a result, a UNE-P carrier can compete with BellSouth's combined voice and data offering on the same loop by providing the customer with line splitting voice and data service over the UNE-P loop in the same manner. Accordingly we cannot agree with commenters that BellSouth's policy is discriminatory. (TR 298, FCC Order No. 01-247<sup>42</sup>, ¶157)

In further support of its position that its disconnection practices are not discriminatory or anti-competitive, witness Ruscilli explains that BellSouth is simply offering the customer an overlay DSL service to meet the customer's broadband needs. (TR 321) Witness Ruscilli argues that BellSouth should be entitled to differentiate their offerings to encourage customers to buy them.

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<sup>42</sup>FCC Order No. 01-247, 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 Georgia and Louisiana, CC Docket No. 02-35, Rel. May 15, 2002.

(TR 322) Witness Ruscilli points out that consumers should be allowed to choose the arrangements that best suit their needs.

Another area addressed by witness Ruscilli is that the CLECs have the opportunity to provide DSL service to their customers through various means. Witness Ruscilli asserts that if CLECs were serious about serving a residential customer that wished to retain BellSouth's DSL service, it could provide local service over a BellSouth resold line. (TR 307) Once the CLEC served a significant number of voice customers over resold lines, it could collocate a small DSLAM at the central office or remote terminal. (TR 307) Another option for the CLEC would be to voluntarily contract with other carriers to provide broadband service to its customer using the unbundled network elements the CLEC purchased from BellSouth. (TR 318) Witness Ruscilli concludes that the CLECs want something that BellSouth has merely because the CLECs are unwilling to provide the service at their own cost. (TR 319)

Based on the above arguments, BellSouth should be allowed to continue its disconnection practices related to FastAccess because forcing BellSouth to maintain FastAccess to its customers that migrate to a CLEC provisioning local service via UNE-P or UNE-L would punish BellSouth for simply providing its customers an opportunity to obtain DSL as an overlay service; and, the policy would serve to discourage CLECs from exploring alternative ways to provide DSL to its customers.

### **CONCLUSION**

While staff has presented three viable options, staff recommends that the Commission select either Option 1 or Option 2 because they set forth the most appropriate course of action.

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

**RECOMMENDATION:** Staff believes there are three viable options available to address this issue. The three options are set forth as follows: **(BULECZA-BANKS)**

Option 1: BellSouth should not be ordered to provide FastAccess Internet Service, where feasible, to any CLEC end user that requests it.

Option 2: BellSouth should be required to provide FastAccess service to CLEC customers that request it, but the requirement to provide FastAccess would be reevaluated by December 31, 2006, to determine whether the mandate is necessary to promote competition in the local exchange market. Further, the requirement would be subject to the terms set forth in Issue 6B. If during the Commission's ongoing market monitoring process staff determines that the competitive conditions have changed in either the local voice market or the broadband market, staff would inform the Commission and seek guidance as to whether the re-evaluation process should be undertaken sooner.

Option 3: BellSouth should be required to provide FastAccess service to CLEC customers that request it, but the requirement to provide FastAccess would expire after three years from the date of the final order. Further, the requirement would be subject to the terms set forth in Issue 6B.

**POSITION OF THE PARTIES**

**AT&T, MCI, ITC^DELTACOM, ACCESS:** Yes. The Commission should require BellSouth to provide FastAccess to any CLEC end user who requests it. It is just as anti-competitive 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.

**BELLSOUTH:** No.

**STAFF ANALYSIS:**

**I. AT&T, MCI, ITC^DELTACOM, ACCESS**

According to the Petitioners, the Commission has already 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 harmful impact on the competitive provision of local telecommunications service and creates a barrier to competition in the local exchange market. (TR 50)

The Petitioners believe that there is no distinction - legally, technically, or otherwise, between the customer who first obtained voice service from a CLEC then subsequently decides to order FastAccess, and those customers who migrate their local voice service from BellSouth to a CLEC. (TR 58) According to the Petitioners, creating a distinction between these two groups of customers violates Chapter 364's prohibitions on anti-competitive behavior and discrimination, and also thwarts the Commission's established policy objective of preventing or eliminating barriers to competition in the local exchange market. (BR 31)

The Petitioners assert that everything BellSouth needs to provide FastAccess over UNE facilities is physically present. Witness Bradbury claims that in those instances where a customer is an existing BellSouth FastAccess customer, the facilities are present to serve; similarly, in those cases where BellSouth has already planned to offer FastAccess, and has invested to serve those customers, the facilities are also present. The Petitioners state that they are not asking BellSouth to provide FastAccess service to end users that it would not otherwise be able to serve. (TR 223)

According to witness Bradbury, there are no significant changes required to any of BellSouth's systems or technology to provide FastAccess to customers who choose a CLEC. For every alleged operational problem, there already is a solution in place that either eliminates the so-called problem or mitigates its impact so there is no significant burden on BellSouth. (TR 235) In support of his assertion, witness Bradbury points out that BellSouth has provided FastAccess to UNE-P-served customers in the past and then modified its systems to prevent the process from working. (TR 235)

The Petitioners hold that the reasons discussed in Issue 4 for requiring BellSouth to continue to provide FastAccess to migrating customers are equally applicable to customers obtaining voice service from CLECs using UNE-P who want to subscribe to BellSouth's FastAccess for the first time.

## **II. BELLSOUTH**

BellSouth believes that the CLECs are mistaken when they claim there is no distinction between a migrating customer and a customer that establishes voice service initially with a CLEC. (TR 58) As addressed by witness Ruscilli, when a customer establishes service with a CLEC, the customer has knowledge of the CLEC's available offerings. (TR 331) BellSouth believes that if the CLEC does not provide DSL service and the customer accepts service anyway, one can presume that the availability of DSL service is not important to the customer. (TR 331) In contrast, the customer that has FastAccess and desires to change local service providers, has shown interest in broadband prior to deciding to switch providers.

BellSouth witness Fogle contends that if the Commission were to impose on BellSouth a "new" obligation to provide broadband service, rather than just a continued obligation, effectively BellSouth would essentially become the broadband provider of last resort. (TR 494) Further, BellSouth witness Taylor states that in a competitive market, firm profit is paramount. (TR 270) Should a service provider supply all services, to all customers, and such choices are unprofitable, then eventually, that service provider will perish. (TR 270)

BellSouth witnesses Taylor and Ruscilli caution that the Commission could negatively impact future investment and innovation by imposing unbalanced regulatory obligations. Such regulatory burdens would do little to further advanced services in Florida. (TR 287 & 313) Since three of the CLEC parties admit they have no plans to deploy DSL networks of their own, BellSouth alone must expend the funds necessary to expand broadband service. If the Commission continues to force BellSouth to share the benefits of its investments and its research and development, BellSouth, nor the CLECs, would have any incentive to invest in new facilities and technology. (TR 286-287)



### III. GENERAL STAFF ANALYSIS

While the Commission has ordered BellSouth in the FDN and Supra arbitration cases to continue to provide FastAccess service to customers that migrate to a CLEC, it has not ordered BellSouth to provide FastAccess service, where feasible, to any CLEC customer that requests it. It is clear that in Commission Order No. PSC-03-0395-FOF-TP, issued March 21, 2003, Order Resolving Parties' Disputed Language (FDN/BellSouth Arbitration, Docket No. 010098-TP), the Commission reiterated its finding that BellSouth shall continue to provide its FastAccess service to end users who obtain voice service from FDN over UNE loops. The Commission did not expand BellSouth's obligation to provide FastAccess to any CLEC customer that requests it.

To properly assess whether BellSouth should be required to provide FastAccess service to any CLEC customer that requests it, an assessment must be made whether such an obligation is technically possible, and if technically possible, whether the obligation is so economically burdensome as to make the obligation unreasonable. If the obligation is technically possible and does not impose an economic burden upon BellSouth, then, one can continue to evaluate the competitive impact of either imposing the obligation or refusing to impose the obligation.

As addressed in Issue 4, BellSouth has identified several problems it believes arise when BellSouth provides FastAccess but does not provide the voice service. In Issue 4, staff concluded that these problems were not substantial enough to immediately absolve BellSouth of its obligation to continue to provide FastAccess to its customers that migrate to a CLEC.

Similar to Issue 4, staff does not believe the problems addressed by BellSouth, either individually, or collectively are unduly burdensome. The technical problems can be overcome, and in fact, BellSouth is currently addressing these problems, as a result of the Louisiana Commission's Orders (R-26173 and R-26173A) requiring BellSouth to provide FastAccess to both BellSouth customers that migrate to a CLEC and existing customers of a CLEC that desire FastAccess. The Louisiana Commission concluded that they were not persuaded by BellSouth that the operational problems were substantial enough to warrant it being absolved of providing its DSL service to CLEC voice customers.

While the technical problems addressed by BellSouth do not warrant an immediate dismissal of its obligation to provide FastAccess, where feasible, to all CLEC customers that request it, an analysis of the competitive impact must be undertaken. Such analyses are included in each of the four options presented below.

**A. OPTION 1**

1. Summary

Under this option, BellSouth would not be mandated to provide FastAccess, where feasible, to any CLEC customer that requests it.

2. Analysis

As argued by BellSouth witness Smith, BellSouth was in the same position as the CLECs when it began investing in DSL in Florida, in the late 1990's. BellSouth had no DSL-related equipment deployed, nor had it invested any substantial time or money in DSL operations. (TR 522) Witness Smith further argued that if BellSouth is not permitted to take full advantage of its DSL investments, BellSouth would have little incentive to make such investments in the future. (TR 525)

BellSouth draws a distinction between customers that migrate to a CLEC and obtain FastAccess versus those customers who are currently with a CLEC and desire FastAccess. (TR 331) Expanding on BellSouth's view, customers that chose to be served by a CLEC knew, or should have known, the services offered by a CLEC. If those customers chose a CLEC, knowing that they would not be able to obtain FastAccess, the customer made an informed choice and BellSouth should not be penalized for that customer's choice.

Witness Smith points out that BellSouth saw a business opportunity and devoted substantial resources to take advantage of the opportunity. BellSouth carefully studied the demand for Internet services and efficiently invested shareholders' capital to offer DSL services throughout the state. (TR 535-536) Investment in DSL allows BellSouth to offer a package of services to meet customers' total communications needs. (TR 536)

By investing in DSL, BellSouth has distinguished itself as a provider of bundled telecommunication services. Witness Smith argues that there is nothing unfair about BellSouth packaging its

voice service with FastAccess. (TR 524) Such a bundled offering is BellSouth's way of competing with other carriers.

The Commission has determined that BellSouth's FastAccess Internet Service is an enhanced, nonregulated, nontelecommunications Internet access service (Order No. PSC-02-0276-FOF-TP, FDN/BellSouth Arbitration.) Within that same order, the Commission found that disconnecting a customer's FastAccess service created a barrier to competition. Disconnecting a customer acts to discourage a customer from switching to a CLEC.

However, the Commission cautioned that its decision should not be construed as an attempt by the Commission to exercise jurisdiction over the regulation of DSL service, but as an exercise of its jurisdiction to promote competition.

There is a clear distinction between disconnecting a customer's FastAccess service and refusing to provide a service. Dictating how, and to whom, BellSouth must offer a non-regulated, non-telecommunications Internet service is contrary to the Commission's prior finding. As a result, BellSouth should not be mandated to provide FastAccess service, where feasible, to any CLEC customer that requests it.

## **B. OPTION 2**

### **1. Summary**

Option 2 requires BellSouth to provide FastAccess service to CLEC customers that request it, subject to the terms addressed in Issue 6B, but requires the Commission to assess the need for the mandate by December 31, 2006. Further, the requirement would be subject to the terms set forth in Issue 6B. If during the Commission's on-going market monitoring process staff determines that the competitive conditions have changed in either the local voice market or the broadband market, staff would inform the Commission and seek guidance as to whether the re-evaluation process should be undertaken sooner.

### **2. Analysis**

Witness Gillan argues that BellSouth has used its advanced service offering as a hostage to try and retain its local dominance. (TR 55-56) He asserts that it is just as

discriminatory and anti-competitive for BellSouth to refuse service to customers that have chosen an alternative provider as it is to refuse service to customers that are choosing an alternative (but which already have FastAccess installed.) The fundamental policy should be that BellSouth should not be allowed to punish Florida consumers for their choice of local voice provider. (TR 58)

Florida consumers that currently obtain local voice service from a CLEC who wish to obtain FastAccess service are precluded from this option. From a consumer's standpoint, he understands that to obtain FastAccess service, he must obtain local voice service from BellSouth. As a result, he is in a similar position to the customer that has FastAccess and wishes to migrate to a CLEC. In both cases, the customer must obtain his local voice service from BellSouth in order to obtain FastAccess service. The situation can result in customer confusion as demonstrated in the example below:

Assume that BellSouth has facilities in place to provide FastAccess to a specific neighborhood. Customer A is obtaining local service from BellSouth while Customer B is obtaining local voice service from a CLEC. Both customers see advertisements for FastAccess and decide they want the service. Both customers call BellSouth for FastAccess and Customer A is told the service is available but Customer B is told they are not eligible. When Customer B finds out that Customer A is receiving FastAccess service but they are unable to receive it, confusion results.

From Customer B's perspective, he must migrate to BellSouth in order to obtain FastAccess, obtain high speed cable modem service, if available, or resign himself to dial-up service. If Customer B desires a high speed internet service, his ability to choose an alternative provider has been either diminished or eliminated.

As addressed in Issue 4, as demand for high speed internet access increases, there is a greater opportunity for BellSouth to achieve a greater penetration of its FastAccess service. While staff sees nothing wrong with BellSouth achieving success in the broadband market, the more success it has in offering FastAccess, the more customers will be bound to obtaining local voice service from BellSouth if the current BellSouth policy remains in place.

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The conditioning of FastAccess upon local voice service, can impact the level of competition in the local voice market.

Staff is concerned that as the demand for FastAccess increases, competition in the local voice market may diminish. Further, allowing BellSouth to refuse to provide FastAccess service to customers that obtain voice service from a CLEC is inconsistent with encouraging local voice competition and the deployment of advanced services. (TR 59)

Witness Bradbury emphasizes that the Petitioners have requested that BellSouth only be required to serve customers it has already planned to serve and invested to serve. (TR 223) As an example, if BellSouth has held itself out as a provider of FastAccess service to a neighborhood, it has installed the necessary equipment to provide the service.

As a result, BellSouth is not, under this Option, being required to act as a DSL provider of last resort. This option limits BellSouth's obligation to those situations where BellSouth itself would have been willing and capable of providing FastAccess service had the customer obtained local voice service from BellSouth.

Staff believes that BellSouth has other options available to market its FastAccess service without requiring the customer to obtain BellSouth local voice service. As an example, BellSouth can win the customer merely by bundling FastAccess and local service at a price and level of service that the customer would be driven to accept, rather than remain with the CLEC. In this case, the customer is allowed to choose between obtaining local service from the CLEC with BellSouth providing FastAccess, or obtaining a bundled package of BellSouth local and FastAccess. As addressed by witness Gillan, the Petitioners acknowledge that there are times when FastAccess would be discounted as part of a BellSouth bundle. (TR 111) Witness Gillan purports that the purpose of the complaint was not to prevent BellSouth from offering bundles of services. (TR 111-112)

Similar to Issue 4, Option 1, an argument can be made that if customers had multiple options for high speed internet access, there would be no need to require BellSouth to provide FastAccess service, where feasible, to CLEC customers that request it.

At this time, customers are being faced with the choice to migrate to BellSouth to obtain FastAccess, or resign that FastAccess is not an alternative for high speed internet access. Again, the major element that results in BellSouth's policy being a barrier to competition is that customers have a limited choice of high speed internet service providers.

As in Issue 4, Option 1, staff believes that there will be a point in time when customers have various competitive alternatives to BellSouth's FastAccess service and therefore, will not be harmed if BellSouth refuses to provide FastAccess service. Staff does not believe the high speed internet access market has matured to the point where customers have various competitive alternatives. Staff believes that this issue should be evaluated in the future to determine whether competition has increased in the high speed internet access market to the point where BellSouth's policy would not harm the FastAccess subscriber.

As a result, BellSouth should be required to provide FastAccess service to CLEC customers that request it, subject to the terms addressed in Issue 6B. However, this obligation should be reevaluated no later than December 31, 2006, to determine whether such an obligation is necessary to promote competition in the local exchange telecommunications market. If during the Commission's on-going market monitoring process staff determines that the competitive conditions have changed in either the local voice market or the broadband market, staff would inform the Commission and seek guidance as to whether the re-evaluation process should be undertaken sooner.

**C. OPTION 3**

1. Summary

Under this Option, BellSouth would be required to provide FastAccess to CLEC customers, subject to the terms addressed in Issue 6B. However, under this option, the requirement would end three years from the date of the final order.

2. Analysis

As in Issue 4, Option 2, the same arguments can be made for removing the obligation placed on BellSouth as of a date certain. After three years, the high speed internet access market should

have expanded to the extent that customers have opportunities to choose different high speed internet access providers.

As addressed in Issue 4, Option 2, the FCC addressed a three-year transition period related to line sharing. The use of a transition period is designed to provide a period of sufficient length to enable CLECs to move their customers to alternative arrangements and modify their business practices and operations going forward.

Staff believes there will come a point in time when competition in the high speed internet market has grown to a level where BellSouth's policy of refusing to provide FastAccess service to CLEC customers will not have a detrimental affect on competition in the local voice market.

By establishing a date certain when BellSouth would no longer be obligated to provide its FastAccess service to CLEC customers, both BellSouth and the CLECs would have the information necessary to establish the course of action they believe appropriate. The establishment of a three-year transition period provides regulatory certainty to BellSouth, CLECs, customers, and the investment community. Further, during the three year period, the provision of FastAccess service would be subject to the terms set forth in Issue 6B.

**(D) CONCLUSION**

Staff has presented three viable options with respect to this issue. Any of the three options presented could be selected to resolve this issue.

**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 condition 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?

**RECOMMENDATION**: Staff has identified two aspects that the Commission should consider in addressing Issues 6(a) and (b). As a result, staff is presenting options related to: (i) provisioning of FastAccess service, and (ii) the pricing of FastAccess service. The pricing options presented apply equally to Issue 6(a) and 6(b).

If the Commission votes to require BellSouth to provide FastAccess service in Issues 4 and/or 5, staff recommends that one of the following provisioning options be selected: **(BULECZA-BANKS)**

**(1) Provisioning**

**Option 1**: BellSouth would be required to provision FastAccess on the high frequency portion of the loop for a customer migrating to a CLEC, provided the CLEC allows BellSouth access to the HFPL free of cost. With respect to those situations where a CLEC customer requests FastAccess, BellSouth may provision FastAccess on a stand-alone loop.

**Option 2**: BellSouth may provision FastAccess via a stand-alone loop in the case of a BellSouth customer migrating to a CLEC or in the case where a current CLEC customer requests FastAccess.

**Option 3**: BellSouth should be required to provision FastAccess via the high frequency portion of the loop regardless if the customer is migrating from BellSouth to a CLEC or if a CLEC customer is requesting FastAccess for the first time, provided the CLEC allows BellSouth access to the HFPL free of cost.



With respect to pricing, if the Commission requires BellSouth to provide FastAccess service in Issues 4 or 5, staff recommends that the Commission select one of the following options:

**(2) Pricing**

Option 1: BellSouth should be required to offer FastAccess service at a price that provides the same percentage contribution to the company as it derives from its customers receiving both local service and FastAccess service.

Option 2: BellSouth should be required to offer FastAccess service to CLEC customers at the same price that it offers FastAccess to CLEC customers that are being provided local voice service via resale.

Option 3: BellSouth should be free to price the service as whatever rate it chooses.

**POSITION OF THE PARTIES**

**AT&T, MCI, ITC^DELTACOM, ACCESS:** The terms and conditions of the Louisiana Clarification Order should apply to BellSouth in Florida. The Order encompasses customers who migrate and customer 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.

**BELLSOUTH:** 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.

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**STAFF ANALYSIS:**

**A. AT&T , MCI , ITC^DELTACOM, ACCESS**

**(1) PROVISIONING**

The Petitioners in this docket seek to have the terms and conditions identified in the Louisiana Clarification Order apply in Florida. The Petitioners believe BellSouth should use the two-page contract amendment used in Louisiana. According to the Petitioners, the two-page contract contains all the implementation steps that would be required in Florida. (TR 118-119)

The Petitioners argue that the Commission should prohibit the provisioning of FastAccess over a second line. In support of their position, the Petitioners note that in the FDN Reconsideration Order, (Order No. PSC-02-1453-FOF-TP), the Commission specifically ordered:

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. (Order at p. 8)

With respect to customer migration, the Petitioners argue that the same UNE-P loop/port combination that served the customer originally, should be used to provide voice service to the customers. They contend that 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) The Petitioners believe that if such changes are permitted, a new and additional barrier to competition would be created.

In the Petitioners opinion, provisioning FastAccess via a second line would be extremely disruptive to UNE-P customers and cannot be considered seamless. The Complainant identify several actions that must occur if a second line is used to provide service:

- I. BellSouth must install a new facility;
- II. BellSouth must make an appointment with the customer to enter the house;
- III. BellSouth must dispatch a truck to the consumers's house to install the new facility;
- IV. Installation of a second line makes only one jack operational so the customer can only use FastAccess in one location in the house;
- V. Service disruption to the customer;
- VI. Unavailability of all FastAccess services, such as on-line fax and dial-up back up;
- VII. FastAccess service will not be offered if a second facility is not available. (TR 138-143, EXH 3)

Such activities point out that BellSouth's desire to provision FastAccess to UNE-P customers over a second line is not seamless.

The only action the Petitioners believe BellSouth must take in transitioning customers to a CLEC is to establish a new billing arrangement. In their brief, the Petitioners acknowledge that CLEC customers being served via resale pay their FastAccess service via credit card and the customers appear to accept the requirement. Further, the Petitioners accept this requirement as reasonable. (BR 27)

## **(2) PRICING**

With respect to the pricing of FastAccess, the Petitioners argue that BellSouth should not be permitted to discriminate among similarly situated customers, because this simply creates another barrier to competition.

Witness Gillan asserts that BellSouth should not assess any additional charges to a migrating customer. He maintains that BellSouth should be required to provide FastAccess service to any ALEC customer under the same prices that BellSouth offers its own end users. (TR 61) However, witness Gillan acknowledges that there are times when FastAccess would be discounted as part of a bundle. (TR 111) As noted by witness Gillan, the purpose of the complaint was not to prevent BellSouth from offering customer bundles, it was to prevent customers from disconnection of their FastAccess service. (TR 111-112)

Witness Gillan acknowledged that BellSouth should only be required to provide FastAccess to customers where the carrier purchasing the loop has agreed to allow BellSouth free use of the HFPL. By providing free access to the HFPL, witness Gillan argues that the economic characteristics of the service offering are the same for BellSouth. (TR 100)

According to the Petitioners, BellSouth should not discriminate between CLEC customers merely because their local voice providers use different entry strategies. As the facilities used to provide the local service are identical, there is no reason to charge the customers different prices for FastAccess service.

## **B. BELLSOUTH**

### **(1) PROVISIONING**

BellSouth argues that the Commission should not impose any requirement that effectively sets the terms of an unregulated offering. As testified by witness Fogle, the stand-alone (second line provisioning method) FastAccess offering is BellSouth's preferred method of implementing BellSouth's requirements under the FDN and Supra Orders. (TR 464)

According to witness Fogle, the cost of offering stand-alone FastAccess is less than implementing the widespread system changes necessary to provide FastAccess over UNE-L or UNE-P loops. As asserted by witness Fogle, many of BellSouth's systems are based on an end user telephone number, requiring many qualification and provisioning methods to be changed. (TR 460-461) He estimates that the costs and time required to provide FastAccess service over a UNE-P loop would be several million dollars and for UNE-L, would be tens of millions of dollars. (TR 468) However, if FastAccess is provisioned on a second line, BellSouth estimates the costs to be a minimum of \$150 per stand-alone loop. (TR 468-469) BellSouth believes that incurring such costs on an individual stand-alone basis is more cost effective than spending millions of dollars that would otherwise be required to provide FastAccess over existing UNE-L or UNE-P loops. (TR 469) BellSouth acknowledges that it has already absorbed additional costs associated with the stand-alone offering.

In addition to the system changes, witness Fogle points out that if BellSouth was required to provide FastAccess over a UNE-L

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or UNE-P loop, additional equipment may need to be installed in order to connect the BellSouth DSLAM to the ALEC loop. Should additional equipment be necessary, this could add days to the current provisioning process. (TR 457)

In support of the second line provisioning method, witness Fogle indicates that if BellSouth owns the loops over which stand-alone FastAccess is provided, it would still have the end user telephone number and related information in its systems. As a result, BellSouth would not have to change its existing methods and procedures of provisioning such facilities. He points out that if an end user does not have two lines to their premises, a second line (loop) would be deployed; there would be no change in the FastAccess service. (TR 465) However, the provision of the second line would be contingent upon whether the necessary facilities are available. Witness Fogel anticipates that facilities will not be available less than five percent of the time. (TR 467)

BellSouth believes that the provision of stand-alone FastAccess would not disrupt the broadband service and would only momentarily change the local voice service at the time the voice was switched to the UNE-L or UNE-P loop. (TR 466)

In support of its proposed provisioning, BellSouth states that the Commission has approved the terms and conditions for BellSouth's standalone offering. (Order PSC-03-0690-FOF-TP)

## **(2) PRICING**

BellSouth believes the Commission should clearly and definitively state that BellSouth has the freedom to increase the price for its wireline broadband service at its discretion.

With respect to pricing, BellSouth notes that Complainant witness Gillan acknowledged that there are times when FastAccess would be discounted as part of a bundle. (TR 111) BellSouth witness Smith explained that bundles of service are priced differently and as a result, the stand-alone price of FastAccess would likely be in the \$60 to \$69 range. (TR 554) As a result, BellSouth requests the if the Commission were to require BellSouth to offer FastAccess at all (which it should not), at a minimum, it should include language in its order recognizing the stand-alone price for FastAccess may increase and that BellSouth has the

flexibility to set the appropriate stand-alone price in its discretion.

**C. GENERAL STAFF ANALYSIS**

**(1) PROVISIONING**

If the Commission requires BellSouth to provide FastAccess service with respect to Issues 4 and/or 5, various provisioning options are available. However, two basic provisioning methods form the basis for the options: use of a second line or use of the HFPL.

In the situation where a customer is taking both local and FastAccess from BellSouth, the loop facilities are currently in place. BellSouth is providing local voice service over the low frequency portion of the loop and is providing FastAccess over the HFPL. When a customer migrates to a CLEC that is providing local voice service via BellSouth resale, no changes in loop facilities are necessary or required by BellSouth. Similarly, when a customer migrates to a CLEC providing local service via UNE-P, technically, no changes in loop facilities are required. The same facilities used by BellSouth in providing local voice service and FastAccess can still be used to provide the local service through the CLEC and FastAccess through BellSouth. (TR 223, 234-235)

In a UNE-L situation, a cross connect would need to be installed so that the voice output from the existing splitter directs the voice output to the CLEC Collocation facility. This is necessary because the voice portion that comes from the BellSouth splitter would flow to the BellSouth switch and since in UNE-L, the CLEC has its own switch, the voice portion would need to be transferred to the CLEC switch. This is achieved by installing a cross connect. (EXH 9)

The Petitioners' witness Bradbury does not believe there is any justification for changes in the terms and conditions associated with FastAccess service to UNE-P or UNE-L serviced end users. (TR 223) He affirms that everything necessary to provide service is in place and need only be placed in service. (TR 223) Witness Bradbury claims that there are no technical challenges or additional equipment necessary to grant the relief requested in the complaint.

BellSouth has not provided information that would lead to the conclusion that provisioning FastAccess over the high frequency portion of an UNE-P loop is technically challenging. In fact, BellSouth provided DSL service over UNE-P lines for approximately one and a half years. (TR 412) The two problems that BellSouth did identify were: 1) the inability for service representatives to determine customer account information and history, and 2) the lack of a process whereby BellSouth could coordinate the testing required with the ALEC. (EXH 7)

With respect to problem 1, witness Bradbury offers that regardless if the customer is served via UNE-P, the telephone number resides in BellSouth's switch and in various provisioning, maintenance, and billing databases, exactly the same way as a BellSouth retail number or resale number. (TR 222) He asserts that the representatives in all of BellSouth's service centers have everything they need in order to validate numbers or addresses, or place orders for FastAccess. (TR 253)

In addressing the UNE-L situation, witness Bradbury alleges that if the number was not originally in BellSouth's switch, the loop's circuit identification and the end user's service address resides in BellSouth's data bases along with the identification of the CLEC serving end user. Witness Bradbury stresses that the only time that BellSouth does not always have the working telephone number in all of its systems, is in certain UNE-L situations. (TR 229)

With respect to problems related to a lack of testing procedures, witness Bradbury points out that testing procedures exist today. He maintains that BellSouth helped establish a testing procedure to be used between DLECS. Further, he informs that procedures are available that apply to UNE-L environments with and without DSL. (TR 257) The issue of appropriate testing procedures was address in the General Staff Analysis Section in Issue 4.

While BellSouth did not raise any compelling arguments to rebut the Petitioners claims that providing FastAccess over a UNE-P or UNE-L is technically feasible, BellSouth did assert that to provide FastAccess over UNE-P or UNE-L would require extensive systems development and process changes that could result in BellSouth being required to expend hundreds of millions of dollars. (EXH 7)

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Witness Bradbury counters BellSouth's argument, maintaining that virtually all BellSouth Operations Support Systems (OSS) and associated databases can be used with equal effectiveness when presented with any one of three key identifiers: the telephone number, a circuit identification number, or a service address. (TR 227) He contends that the systems necessary to perform the functions necessary to allow a CLEC to provide local voice service on a UNE-P line while BellSouth provides FastAccess over the HFPL already exists and are available to BellSouth. (TR 229) Witness Bradbury concludes that there are no significant changes required to any of BellSouth's systems or technology to provide FastAccess to customers who choose a CLEC. (TR 235)

Staff notes that the Louisiana Commission has ordered BellSouth to provide FastAccess to customers that migrate to a CLEC providing local voice service via UNE-P and to current CLEC customers served via UNE-P that desire FastAccess. (TR 150) According to the Louisiana Commission's April 4, 2003 Order, BellSouth is required to provide its DSL service over UNE-P lines for new and existing DSL customers. In response to this Order, BellSouth implemented a manual solution for migrating customers within a couple months. BellSouth is implementing an electronic solution to be completed in the February-March 2004 time frame. (TR 479) As BellSouth's OSS are region-wide (TR 262), it would appear that the bulk of the necessary system changes have been, or are in the process of being modified. Witness Bradbury asserts that BellSouth's OSS contain tables that are state-specific and once one state's tables have been changed, the other state's tables could be changed very easily with no additional work on the system as a whole. (TR 262)

One other issue addressed by BellSouth is that it needs the flexibility to require CLECs to provide a splitter for an end user served via UNE-L. BellSouth acknowledges that when a CLEC is purchasing UNE-P from BellSouth, they are only using BellSouth equipment and an additional splitter is unnecessary. (EXH 7) However, BellSouth is unsure whether an additional splitter will be necessary in the situation where a CLEC has their own DSLAM and their own DSL service. BellSouth is in the process of investigating the situation and conducting tests to see if one splitter will provide the proper level of isolation to protect its DSLAMs and other services from the CLECs services, and vice versa. BellSouth does not have an estimate when the testing will be concluded. (EXH 9)



The other primary provisioning method is to allow the local voice service provided by a CLEC to be provisioned over a second line. In a customer migration situation, FastAccess service would be provided over the same line that was formerly used by BellSouth to provide a combination of local voice service and FastAccess service. The local voice service would be transferred to a second line. With respect to the situation where a CLEC is currently providing local voice service to a customer that subsequently requests FastAccess, FastAccess service would be provisioned on a separate line.

The Petitioners argue that BellSouth should not be permitted to require the deployment of new facilities or different loops. (TR 61) They argue that this Commission has already determined in the FDN/BellSouth Arbitration, that in the situation where a customer migrates to a CLEC from BellSouth, and wishes to retain FastAccess, the transition must be seamless and at no additional cost. (TR 60) Witness Gillan points out that when a second line is used, a BellSouth technician would install another jack in the house associated with the second line. However, the customer would only have one jack in which to use his computer and would not have the ability to move from room to room as was possible when FastAccess was provisioned over the same loop as the local service. (TR 138-139) Witness Gillan argues that under BellSouth's proposed use of a second line, the customer's service would be physically brought down and physically reinstalled in a different way. He does not believe that such a process can be considered "seamless" as envisioned by the Commission. (TR 141)

BellSouth argues that the use of a second line is the preferred method to provision FastAccess when local service is provided by a CLEC. (428) BellSouth witness Fogle offers that this Commission recognized that even with a "seamless" transition, a momentary disruption of FastAccess and voice services could occur. Witness Fogle acknowledges that when a stand-alone provisioning method is used for FastAccess, the FastAccess service would not be disrupted. Only the voice service would undergo a momentary change. (TR 466) To provision FastAccess on a stand-alone basis, witness Fogle estimates that the cost to be \$150 per stand-alone loop. Witness Fogle believes that incurring this cost per line is more cost effective than spending the millions of dollars necessary to provide FastAccess over existing UNE loops or UNE-P loops. (TR 468-469) Witness Fogle admits that FastAccess service will not be provided if there are not sufficient facilities available to switch

voice to a UNE loop or UNE-P. However, it is anticipated that such a situation will occur in less than five percent of the time. (TR 467)

### PROVISIONING OPTIONS

#### **a. Option 1 - Provisioning**

##### i. Summary

Under Option 1, BellSouth would be required to provision FastAccess on the high frequency portion of the loop for customers migrating to a CLEC, provided the CLEC allows BellSouth free access to the HFPL. With respect to those situations where a CLEC customer requests FastAccess, BellSouth may provision FastAccess on a second line.

##### ii. Analysis

In the FDN/BellSouth Arbitration (Dkt. 010098- TP), the Commission favored an approach that would make the transition of the voice customer as seamless as possible, but did not specify a method to achieve the transition. Further, the Commission dictated that there should be no additional charge to the customer. (EXH 9)

Webster defines seamless as:

1: having no seams 2: having no awkward transitions or indications of disparity: perfectly smooth.

In Order No. PSC-02-1453-FOF-TP, the Commission declined to impose specifically how the FastAccess should be provisioned. The Commission did however, acknowledge that there may be a momentary disruption of service when a customer changes to FDN's voice service.

In the instant case, witness Gillan has identified seven actions that must occur when a customer's FastAccess is provided on a stand-alone basis. Of the seven items, four items need to be evaluated more closely to determine whether they impact the seamlessness of the transition.

I. Installation of a second line makes only one jack operational.

In the situation where a customer migrates to a CLEC and BellSouth provides FastAccess over a stand-alone loop, the customer's existing line is used for FastAccess. A second line is installed, requiring the installation of a jack inside the house. The customer must dictate where the jack will be placed. As BellSouth has not offered to install multiple jacks, the customer will only have use of FastAccess at the single jack; the customer could, however, pay for additional jacks to be installed. Prior to the migration, the customer was able to use their computer in any activated jack in their house.

II. Service disruption to the customer.

As proposed by BellSouth, when FastAccess service is provided on a stand-alone basis, the customer's local voice service is provided over the newly installed line. At the time of the cut over, the customer's service will be "momentarily" disrupted. In response to staff Interrogatory No. 86, BellSouth believes that a service disruption of fifteen minutes would be considered a seamless and momentary transition. (EXH 7) In response to staff Interrogatory No. 4, MCI defined seamless as a transition that is not visible to the customer. In a seamless transition, loss of dial tone would be longer than five minutes; there would be no change in telephone number; and, there would be no unexpected loss of features the customer has on his/her line. (EXH 7)

III. Unavailability of all FastAccess services, such as on-line fax and dial-up back up.

When FastAccess service is provisioned on a stand-alone line, two features of the service would no longer be available. As a result, the customer's FastAccess service would not be the same as it was prior to the migration to the CLEC.

IV. FastAccess will not be offered if a second facility is not available.

Witness Fogle acknowledged that BellSouth would not be willing to provide FastAccess where there were not sufficient facilities to switch a voice service to a UNE-L or UNE-P loop. (TR 466-467) In the case where there were insufficient facilities to implement a

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second line, BellSouth would be unable to transfer the local voice service to a second loop, while maintaining FastAccess over the original loop. Witness Fogle tempers this limitation by pointing out that this situation would likely occur less than five percent of the time. (TR 467)

In reviewing the factors impacting the customer that migrates to a CLEC, an argument can be made that the use of a stand-alone facility does not appear to rise to the level of "seamless." For a migrating customer, local service is disrupted, but more notable, the terms and conditions of the customer's FastAccess service will change. The customer no longer can use FastAccess from any jack in their house and features of FastAccess service will no longer be operational. Further, in those cases where necessary facilities were not available to install a second line, the customer's FastAccess would be disconnected.

For a migrating customer, provisioning FastAccess on a stand-alone loop will not be seamless. The customer that has FastAccess would likely be discouraged from changing local voice providers if his FastAccess service was disconnected or even modified. To allow modification or disconnection of a customer's FastAccess service could impact competition in the local exchange market.

With respect to current CLEC customers that wish to procure FastAccess service, an argument can be made that the importance of the transition being seamless is not as critical as with a migrating customer. These customers do not have FastAccess service and likely acknowledge that some type of equipment installation and transition period will be necessary to activate the service. The need for seamlessness stems from the edict that competition in the local exchange market should not be discouraged. In this situation, the customer is currently with a CLEC so there is no need to ensure that barriers to customer migration are eliminated.

As a result, it would be reasonable to allow BellSouth to provide FastAccess service to a current CLEC customer over a stand-alone loop. However, BellSouth should not be allowed to charge the customer any additional fees for provisioning on a stand-alone loop that it would not otherwise charge its own local voice customers.

Staff questions whether it would be more difficult to maintain different provisioning methods depending on whether the customer is migrating or whether the customer is a current CLEC local voice

customer, however, under this option, BellSouth is merely being provided the flexibility to choose to provision current CLEC customers on a stand-alone loop; BellSouth would not be mandated to provision on a stand-alone loop.

**(b) Option 2 - Provisioning**

i. Summary

Under Option 2, BellSouth would be given the flexibility to provision FastAccess via a stand-alone loop in the case of a BellSouth customer migrating to a CLEC or in the case where a current CLEC customer requests FastAccess.

ii. Analysis

BellSouth maintains that it is more efficient to provision FastAccess over a stand-alone loop rather than offer the service over the HFPL. BellSouth and FDN have agreed to contract language that allows BellSouth the flexibility to provision FastAccess over a stand-alone loop. By providing FastAccess over a stand-alone loop, BellSouth maintains the telephone number and related information in its systems. (TR 465) Since BellSouth does provision UNE loops and UNE-P loops, it does not need to change existing methods and procedures of provisioning such facilities.

Further, the momentary disruption that would occur would only affect the local voice service and would not impact the FastAccess service. Witness Fogle notes that such a momentary disruption would occur anytime voice service is switched to a UNE loop or UNE-P loop. In further support of its position, BellSouth estimates that less than five percent of the time, facilities will not be available to provide FastAccess on a stand-alone loop. The availability of BellSouth's FastAccess service to even its own local voice customers is always contingent upon the availability of facilities. (TR 467)

One can reason that as long as FastAccess service is not denied to CLEC customers, these customers are not disadvantaged. The inconveniences of the stand-alone provisioning method should not be sufficient to warrant a mandate that BellSouth provide FastAccess over the HFPL.

**(c) Option 3 - Provisioning**

i. Summary

Option 3 requires BellSouth to provision FastAccess via the high frequency portion of the loop regardless if the customer is migrating from BellSouth to a CLEC or if a CLEC customer is requesting FastAccess for the first time, provided that the CLEC allows BellSouth free access to the HFPL.

ii. Analysis

While BellSouth witness Fogle argues that it would be inefficient and inordinately costly to require BellSouth to provision FastAccess via the HFPL, BellSouth has already begun to modify its systems to comply with the Louisiana Commission's Order that required BellSouth to implement a mechanized procedure to process FastAccess requests from UNE-P carriers. (TR 468 and 478) Currently, BellSouth estimates that the changes to its systems required to comply with the Louisiana Commission's Order will be completed sometime in the February - March 2004 time frame. (TR 479)

Petitioners' witness Bradbury notes that BellSouth's OSS systems are region-wide and while they contain state-specific tables, once one state's tables have been changed, other states' tables could be changed very easily. (TR 262)

As BellSouth estimates that changes to comply with the Louisiana Order could be completed by March 2004, there is no overwhelming reason why BellSouth could not implement changes to the Florida-specific OSS tables without incurring several million dollars of additional expense. As a result, BellSouth could reasonably be expected to provide FastAccess service via the HFPL to both migrating customers and customers currently taking local voice service from a CLEC.

**(d) Conclusion**

Staff has presented three provisioning options. Any of the three options presented could be chosen to resolve this issue.

## **(2) PRICING**

With respect to pricing, the record is limited to arguments related to whether any pricing adjustments should be allowed. The Petitioners argue that CLEC customers should be charged the same price for FastAccess as BellSouth customers. They acquiesce that BellSouth customers receiving a bundled package of service may, however, be entitled to a discount. BellSouth, on the other hand, argues that the Commission should not attempt to establish parameters on its ability to price its nonregulated service.

In reference to the FDN/BellSouth Arbitration, the Commission determined that the method of provisioning should not result in an additional charge to the customer. With respect to pricing, the Commission did not dictate a pricing structure that BellSouth must follow. However, the Commission did agree that there could be legitimate justification for discounts for customers that obtain all of their services from BellSouth.

BellSouth witness Smith believes that there exists a price at which BellSouth would be willing to offer FastAccess to CLEC customers. He believes the price is in the range of \$60 to \$69 range on a stand-alone basis. (TR 554) However, in response to staff Interrogatory No. 74, BellSouth states that if a CLEC customer wanted FastAccess installed on a stand-alone basis, the customer's monthly rate for FastAccess would be \$49.95. (EXH 7) BellSouth also responded that nonrecurring charges would apply and would be in the range of \$50 to \$150, depending on whether promotions were available.

### **PRICING OPTIONS**

#### **(a) Option 1 - Pricing**

##### **i. Summary**

Under Option 1, BellSouth would be required to offer FastAccess service at a price that provides the same percentage contribution to the company as it derives from its customers receiving both local service and FastAccess service. For example, if BellSouth received a contribution of 25 percent when providing local voice service and FastAccess, BellSouth would price its FastAccess service so that it received a 25 percent contribution when it only provided FastAccess service.

ii. Analysis

BellSouth willingly provides FastAccess service to CLEC customers when those customers are served via a resale strategy. Only when the customer is served via UNE-L or UNE-P, does BellSouth refuse to provide FastAccess. Based on this situation, staff believes that BellSouth's refusal to provide FastAccess to customers served via UNE-P is directly related to the margin that BellSouth obtains or fails to obtain from the two scenarios.

BellSouth acknowledges that there is a price at which it would be willing to offer FastAccess to CLEC customers. (TR 553) BellSouth witness Smith recognizes that BellSouth's best customers are typically the ones that want DSL. (TR 550)

For customers that are migrating from BellSouth to a CLEC that provides their local service via UNE-L or UNE-P, staff believes it would be reasonable to allow BellSouth to price FastAccess service at a level where it received the same margin that it received when BellSouth provided the customer both local voice service and FastAccess.

Similarly, with respect to CLEC customers wishing to subscribe to FastAccess, it would be reasonable for BellSouth to price FastAccess at a level where BellSouth receives the same margin that it receives when BellSouth provides a customer both local voice service and FastAccess.

**(b) Option 2 - Pricing**

i. Summary

Under Option 2, BellSouth would be required to offer FastAccess service to CLEC customers at the same price that it offers FastAccess to CLEC customers that are being provided local voice service via resale.

ii. Analysis

Currently, BellSouth offers its customers FastAccess service for \$49.95 per month. This is the same price that BellSouth offered to charge CLEC customers served via UNE-P or UNE-L, if



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FastAccess were provided on a stand-alone loop. BellSouth also charges CLEC customers being served via resale \$49.95. (EXH 7)

Staff does not believe it would be unreasonable for BellSouth to charge migrating customers the same price that it charges other CLEC customers that are being provided local service via resale. Similarly, staff believes it would be reasonable for BellSouth to charge current CLEC customers served via UNE-P or UNE-L who desire FastAccess the price BellSouth charges CLEC resale customers.

BellSouth differentiates the price it would be willing to charge customers served on a stand-alone loop, versus serving customers served via the HFPL. Based on BellSouth's arguments the cost to serve a customer whose local voice service is provided by a CLEC using UNE-L or UNE-P with BellSouth providing FastAccess over the HFPL, are anticipated to be higher because of the potential system changes. As BellSouth is already undergoing system changes to comply with the Louisiana Commission's provisioning requirements, staff contends that much of costs are sunk costs that BellSouth will have incurred regardless if any additional system changes are necessary as a result of the Commission vote in this docket.

When the Commission addressed the provisioning requirements in the FDN/BellSouth Arbitration, it agreed that increasing prices or cutting off service did not equate to seamless. The FDN/BellSouth Arbitration only addressed customer migration, and did not address the situation where a current CLEC customer wanted to obtain FastAccess service.

BellSouth already offered to provide current CLEC customers a price of \$49.95 per month, as long as the service was provided on a stand-alone loop. As \$49.95 is the going rate for FastAccess service via resale, staff believes it would not be unreasonable to suggest that BellSouth offer the same resale rate when FastAccess service is provided over the HFPL to both migrating customers and current CLEC customers. Staff notes however, that BellSouth would be free to raise or lower the price of its FastAccess service, so long as it offers the same price all CLEC customers, irrespective of the provisioning method.

**(c) Option 3 - Pricing**

i. Summary

Under Option 3, BellSouth would be given the flexibility to price FastAccess service at whatever price it deemed appropriate.

ii. Analysis

In support of this option, the Commission acknowledged in the FDN/BellSouth Arbitration, that BellSouth's FastAccess Internet Service is an enhanced, non-regulated, nontelecommunications Internet service. As a result, one could argue that BellSouth should be given the flexibility to price its nonregulated services at a level that it believes appropriate.

Staff believes that a company must undertake appropriate studies to determine the proper pricing strategy for any service it offers. Based on the company's costs, desired return, customer take rate, and customer receptiveness to a particular price, a pricing structure can be developed. As FastAccess is an unregulated service, one can argue that the Commission should not attempt to dictate any pricing parameters and should not be concerned with the price dictated by BellSouth.

**(d) Conclusion**

Staff has presented three viable pricing options. Any one of the three pricing options presented could be selected to resolve this issue.

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**ISSUE 7:** Should this docket be closed?

**RECOMMENDATION:** The docket should be closed after the time for filing an appeal has run. **(CHRISTENSEN)**

**STAFF ANALYSIS:** The docket should be closed 32 days after the issuance of the order to allow time for filing an appeal to run. Upon expiration of the appeal period, this docket should be closed.