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ORIGINAL

February 20, 2004

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

RE: Docket Nos. 030851-TP
SUPRA'S REVISED MOTION TO ACCEPT LATE FILED EXHIBITS TO BE PLACED IN THE RECORD AND TO BE USED FOR IMPEACHMENT PURPOSES

Dear Mrs. Bayo:

Enclosed is the original and fifteen copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Revised Motion To Accept Late Filed Exhibits To Be Placed In The Record And To Be Used For Impeachment Purposes to be filed in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

Jorge Cruz-Bustillo /HWA

Jorge Cruz-Bustillo
Assistant General Counsel

AUS ___
CAF ___
CMP ___
COM ___
CTR ___
ECR ___
GCL ___
OPC ___
MMS ___
SEC ___
OTH ___

CERTIFICATE OF SERVICE
Docket No. 030851-TP

I HEREBY CERTIFY that a true and correct copy of the following was served via E-Mail, Hand Delivery, and/or U.S. Mail this 20th day of February 2004 to the following:

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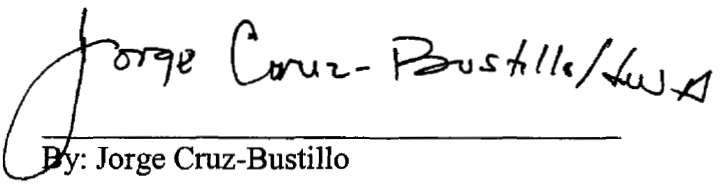

By: Jorge Cruz-Bustillo

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission Triennial UNE Review: Local Circuit Switching For Mass Market Customers	)	Docket No. 030851-TP Served: February 20, 2004

REVISED MOTION TO ACCEPT LATE FILED EXHIBITS TO BE PLACED IN THE RECORD AND TO BE USED FOR IMPEACHMENT PURPOSES

Supra Telecommunications and Information Systems, Inc., ("Supra"), by and through its undersigned attorney files this Motion To Accept Late Filed Exhibits To Be Placed In The Record And To Be Used For Impeachment Purposes, and in support thereof, states as follows:

The late filed exhibits ("Exhibits") are necessary to impeach BellSouth claims made with respect to the BellSouth Analysis of Competitive Entry ("BACE") model. The Exhibits can be placed into two subject matters: (1) Winback campaigns and (2) Exempted high-spending customers not accounted for in the BACE model.

Winback Campaigns

The Federal Communications Commission ("FCC") stated in its *Triennial Review Order* ("TRO"): "We find that this movement, or churn, happens most frequently in the first few months after the customer switches to a new carrier and is often driven by 'winback' activities." ¶471. The evidence in the record demonstrates that customer churn exacerbates the operational and economic barriers to serving mass customers." ¶471. Thus, incumbent "winback" activities, as a component of churn, is a relevant consideration in this proceeding in determining whether the economic barriers[1] - found to presently exist by the FCC - can be overcome.

[1] We found significantly more probative the evidence that in areas where competitors have their own switches for other purposes (e.g. enterprise customers) they are not converting them to serve mass market customers and are instead relying on unbundled loops combined with unbundled local circuit switching. Given the fixed costs already invested in these switches, **competitors have every incentive to spread**

AT&T Witness Don J. Wood includes Exhibit DJW-4 to his Rebuttal Testimony. This exhibit is a page from BellSouth's 2002 Annual Report. The page is entitled: "Ackerman Answers. CEO Duane Ackerman responds to shareholder's questions about four important issues that impact BellSouth's business." On the issue of customer reacquisition, Ackerman claims that for year ending 2002 small business reacquisition was 22%. Ackerman states that for large business "the reacquisition rate last year [2002] was six times higher than in 2001." This reference to "six times higher than 2001" demonstrates that BellSouth's reacquisition or winback efforts were substantially more successful in 2002, than in 2001. BellSouth's low churn rate can be attributed to its successful reacquisition efforts.

BellSouth witness Dr. Debra J. Aron stated in her February 19, 2004 deposition that the bases for BellSouth's substantial reacquisition success in 2002 appeared to be a "phenomenon" occurring in the industry. Dr. Aron testified that she had no knowledge of or ever heard of Operation Sunrise. Supra seeks to introduce into the record FPSC Order PSC-03-1392-FOF-TP ("Operation Sunrise Order") issued in Docket No. 030349-TP. **Operation Sunrise Order is attached hereto as Exhibit A.** The Operation Sunrise Order establishes that Operation Sunrise began targeting local service customers in August 2001. The Operation Sunrise Order affirmed BellSouth's existing practice of taking the working telephone number ("WTN") of each and every Local Service Request ("LSR"), that is submitted by a CLEC, and matching that information – immediately upon the completion of the conversion - with the customer's name, address and products history stored in BellSouth's billing programs in order to develop a direct marketing piece. The defecting customer is targeted with a win-back marketing piece within days of the completion of the conversion to the CLEC.

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costs over a broader base. Their failure to do so bolsters our findings that significant barriers caused by hot cuts and other factors make entry uneconomic." (Emphasis added). ¶447, fn. 1365.

BellSouth is not prejudiced by the introduction of the Operation Sunrise Order. BellSouth is fully aware of this order and its own program. Conversely, the prejudice that can result to all Florida CLECs and consumers is great, as this docket can result in the elimination of UNE-P in certain markets. This proceeding must account for a full hearing on the merits. The Operation Sunrise Order is being submitted to explain BellSouth's actual and substantial reacquisition success in order to impeach the claim that its success was merely by chance or a "phenomenon." Further, this reacquisition success is likely to continue year after year as BellSouth becomes more proficient at utilizing Operation Sunrise or other reacquisition programs. The higher reacquisition success results in a lower churn for BellSouth. Conversely this necessarily results in a higher churn rate for the CLEC community. Fairness dictates that the Operation Sunrise Order be accepted and placed in the record for the above referenced reasons.

Exempted High-spending Customers Not Accounted For In The BACE Model

BellSouth witness Dr. Debra J. Aron writes in her Direct Testimony (pg. 21, L 16-19) that: "The ability to target attractive customers selectively is one such advantage that CLECs have exploited in reality and is highlighted in the TRO ("competitors often are able to target particular sets of customers." TRO at n. 1539)." BellSouth witness Mr. James W. Stegeman responded, "yes," when asked in his Commission Staff deposition - on February 16, 2004 – whether the "BACE model assume[s] that BellSouth will migrate all customers to a CLEC over UNE-L." (Emphasis added at the time the question was asked). Mr. Stegeman also confirmed that the BACE model expects a CLEC to target "high spending" customers, which include customers with DSL.

BellSouth's existing policy, however, is to disconnect a customers Fast Access DSL service and a customers' wholesale DSL if that customer migrates to a CLEC over UNE-P or

UNE-L. The facts of BellSouth's anti-competitive practice were established in Florida Commission Docket Nos. 001305-TP ("Supra Arbitration")[2] and 010098-TP ("FDN Arbitration")[3]. All of BellSouth's actions since the entry of these arbitration orders have been designed to overturn the FPSC's decisions. BellSouth appealed this Commission's decision regarding customers with DSL in Docket No. 001305-TP to the Northern District of Florida on September 20, 2002. See **BellSouth Appeal of Supra Arbitration attached hereto as Exhibit B.** On page 16 of the appeal, BellSouth asks the Northern District to declare that: "the FPSC's decision is unlawful." BellSouth also appealed this Commission's decision regarding customers with DSL in Docket No. 010098-TP to the Northern District of Florida on July 29, 2003. See **BellSouth Appeal of FDN Arbitration attached hereto as Exhibit C.** On page 14 of the appeal, BellSouth, again, asks the Northern District to declare that: "the FPSC's decision is unlawful."

On December 9, 2003, BellSouth filed an Emergency Request for Declaratory Ruling ("Request") with the FCC. In this Request BellSouth writes: "BellSouth urgently requests that the Commission issue a declaratory ruling specifying that (1) state commission decisions requiring ILECs to provide broadband Internet access to CLEC UNE voice customers are contrary to the *Triennial Review Order* and this preempted[.]" This Request is designed to preempt all state utility commissions. See **BellSouth Emergency Request for Declaratory Ruling attached hereto as Exhibit D.** In Florida, BellSouth's present policy and intent is to

[2] BellSouth is yet to comply with the Order in the Supra Arbitration. The Commission indefinitely deferred whether BellSouth must comply with the Order.

[3] BellSouth renegotiated portions of the FDN interconnection agreement to entice FDN to accept its "two loop" option when a customer migrates to FDN over UNE-L. FDN accepted the favorable interconnection terms offered by BellSouth. Thus, BellSouth was able to avoid the intent of the FPSC Order. Thus, BellSouth has yet to comply with the FPSC's Order in either arbitration. BellSouth also refuses to allow customers to migrate to any other CLEC in Florida. The Kentucky and Louisiana utility commissions have both required that BellSouth allow the migration to take place on the "same" line.

refuse to allow CLECs to compete for "high spending" voice customers - if those voice customers also subscribe to BellSouth's retail Fast Access or xDSL from one of BellSouth's wholesale xDSL resellers.

Exhibits B, C and D are essential to impeach BellSouth's assertion that CLECs can compete for "all" customers that have voice service over a wire-line phone.

At year-end 2002, BellSouth had acquired 1,021,000 DSL subscribers in its territory. See **January 24, 2003, BellSouth News Release entitled: "BellSouth Achieves DSL Subscriber Target for 2002, Completes Year With More Than 1,000,000 DSL Customers" – attached hereto as Exhibit E.** BellSouth claims a 64% growth rate of DSL customers. See Exhibit E, 1st ¶. At year-end of 2003, BellSouth had acquired approximately 1.46 million DSL subscribers. See **January 22, 2004, BellSouth News Release entitled: "BellSouth Reports Fourth Quarter Earnings" – attached hereto as Exhibit F.** BellSouth claims it added 126,000 net DSL customers in the fourth quarter of 2003. See Exhibit F, 4th ¶, under caption "Communication Group."

BellSouth's own statements (i.e. party opponent admissions) demonstrate that CLECs presently cannot compete for 1.5 million of BellSouth voice customers or voice customers with BellSouth's wholesale DSL. This number grows on a net basis by 125,000 customers per quarter. By the end of 2004, this translates into 2 million "high spending" customers that CLECs cannot compete for because of BellSouth's anti-competitive policy.

BellSouth is not prejudiced by the introduction of its own filings in Federal Court and the FCC, nor its own statements found on BellSouth's website. Again, the magnitude of this docket to Florida CLECs and consumers is great, as this docket can result in the elimination of UNE-P in certain markets. This proceeding must account for a full hearing on the merits.

BellSouth witness Dr. Aron and Mr. Stegeman state that CLECs can compete for "all" customers with voice service on a wire-line phone. Exhibits B, C, D, E and F are being filed to impeach this assertion. BellSouth's existing policy and intent is to deny CLEC access to 1.5 million voice customers presently and to deny access to 125,000 customers new voice customers each and every quarter. Fairness dictates that the se exhibits should be accepted and placed in the record to impeach the input values used in the BACE model and the testimony by Dr. Aron and Mr. Stegeman.

Conclusion

The enormous reacquisition success of Operation Sunrise – which lowers BellSouth's churn rate and correspondingly increases the CLECs churn (*i.e.* line loss) rate - coupled with the inability to target over 1.5 million high spending mass-market customers and the inability to target 125,000 new voice customers each and every quarter fundamentally undermines the practical use of the BACE model. No prudent investor would provide capital with these market realities.

WHEREFORE, Supra respectfully requests that this Commission accept these late filed exhibits and allow them to be placed in the record and allow them to be used for impeachment purposes at the hearing.

Respectfully submitted this 20th day of February 2004.

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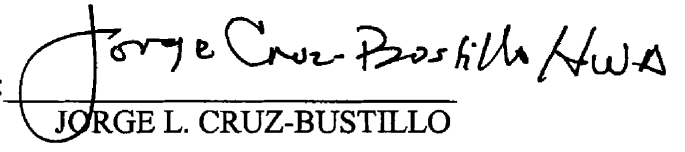
By: 
JORGE L. CRUZ-BUSTILLO

EXHIBIT - A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information.	DOCKET NO. 011049-TP ORDER NO. PSC-03-1392-FOF-TP ISSUED: December 11, 2003

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

FINAL ORDER ON BELLSOUTH'S ALLEGED USE OF CARRIER TO CARRIER INFORMATION

APPEARANCES:

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On behalf of BellSouth Telecommunications, Inc.

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On behalf of Supra Telecommunications & Information Systems, Inc.

LINDA H. DODSON, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

BY THE COMMISSION:

I. CASE BACKGROUND

On April 18, 2003, Supra Telecommunications and Information Systems, Inc. (Supra) filed an Emergency Petition for Expedited Review of BellSouth Telecommunications, Inc.'s (BellSouth) $75 Cash Back Promotion and Investigation into BellSouth's Pricing and Marketing Practices. On May 5, 2003, BellSouth filed its Answer to Supra's Emergency Petition.

On June 9, 2003, Supra filed for leave to amend its petition, attaching its Amended Emergency Petition alleging BellSouth's violation of 47 U.S.C. Section 222 and Florida Public Service Commission policies regarding the use of wholesale information in retail marketing. In its original petition, Supra alleged that BellSouth's $75 Cash Back Promotion violated Florida law and that BellSouth was allegedly using carrier-to-carrier information for marketing purposes in violation of 47 U.S.C. Section 222(b) and Section 364.01(4)(g), Florida Statutes. In its Amended complaint, Supra removed the allegations regarding the $75 Cash Back Promotion, stating that the purpose of the amendment is to narrow the focus of its petition to issues involving violations of 47 USC § 222, Section 364.01(4)(g), Florida Statutes, and Commission policy. This removed the anti-competitive elements of Supra's complaint.

On June 12, 2003, BellSouth filed a Motion for Continuance and/or Rescheduling to extend the date of the hearing. On June 17, 2003, by Order No. PSC-03-0721-PCO-TP, Supra was granted leave to amend its petition. On the same date, Order No. PSC-03-0718-PCO-TP, the Order Establishing Procedure, was issued. Supra also filed its response to BellSouth's Motion for Continuance and/or Rescheduling on June 18, 2003. BellSouth's Motion for Continuance was denied by Order No. PSC-03-0763-PCO-TP, issued on June 25, 2003.

On June 20, 2003, BellSouth filed its Answer to Supra's Amended Petition and a Partial Motion to Dismiss. On June 24, 2003, Supra filed its response to the Partial Motion to Dismiss. This was considered and deferred at the August 5, 2003 Agenda Conference. On June 30, 2003, Supra filed a Motion for Leave to

file direct testimony one day late. By Commission Order PSC-03-0746-PCO-TP, issued July 2, 2003, Supra's Motion for Leave to file direct testimony one day late was granted.

On July 16, 2003, BellSouth filed a Motion for Extension of Time requesting a three day extension of time, or until July 25, 2003, to file its rebuttal testimony. By Commission Order PSC-03-0840-PCO-TP, issued July 21, 2003, the Commission granted BellSouth's extension of time to file rebuttal testimony and first order modifying order establishing procedure.

On August 11, 2003, the Commission issued Prehearing Order No. PSC-03-0922-PHO-TP. A hearing was conducted on August 29, 2003. Also on the same date, the Commission issued Order No. PSC-03-0981-PCO-TP, which denied BellSouth's Motion to Strike David Nilson's Supplemental Testimony on page one, lines 15-23 and page two, lines 1-14, relating to Exhibit DAN-6. In addition, BellSouth's Motion to Strike David Nilson's Supplemental Testimony was granted with respect to Bates Stamped Nos. 798-840 of DAN-7.

This Order addresses Supra's Amended Emergency Petition alleging BellSouth's violation of 47 U.S.C. Section 222 and Florida Public Service Commission policies regarding the use of wholesale information in retail marketing.

II. JURISDICTION

Federal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes. Curtis v. Taylor, 648 F.2d 946 (5th Cir. 1986). State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374, 375 (1986); Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1254-1255 (Fla. 1990); Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, 1082 (Fla. 1st DCA 1995).

However, the U.S. Supreme Court, in FERC v. Mississippi, 456 U.S. 742 (1982), also recognized that the effect of federal and state legislation is often intertwined and requires that state agencies act in accordance with laws mandated by Congress's vision when implementing similar state law. Thus, to the extent we need

to construe and apply the federal provision in order to make sure our decision under state law does not conflict, we can and should make such an analysis of federal law. See Testa v. Katt, 330 U.S. 386 (1947); see also Bernice Richard v. Rosenman Colin Freund Lewis & Cohen, 1985 U.S. Dist. LEXIS 15483 (S.D.N.Y. 1985) (interpretation of federal law does not invariably raise a substantial question of federal law); and Petersburg Cellular Partnership d/b/a 360° Communications v. Bd., 205 F.3d 688 (4th Cir. 2000) (state commission may not take action in an area where Congress has demonstrated a desire for the federal government to act, because it would promote conflicting patchwork of [state and federal] requirements "that the Act was designed to eliminate.")

Section 222 of the Act, which was included as part of the 1996 Federal Telecommunications Act, does not recognize a role for state commissions in the enforcement of the provision, unlike other provisions of the Act[1]. 47 U.S.C. Section 222(b) reads as follows:

> CONFIDENTIALITY OF CARRIER INFORMATION. - A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.[2]

We are not aware of any instance in which this Commission has asserted jurisdiction to enforce an alleged violation of the 1996

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[1]The Federal Telecommunications Act of 1996 (Act) provides a jurisdictional scheme of "cooperative federalism." In the Act, Congress has specifically designated areas in which it anticipates that state commissions should have a role. Some of the areas in which Congress has either specifically stated, or recognized, that state law may be affected, are Sections 252(b)(1), 252(b)(4)(c), 261(b) and (c), 230(d)(3), 251(e)(1); 252(d)(3), 252(e)(3), 253(b) and (c), 254(f).

[2]However, in Comments of the Florida Public Service Commission Regarding Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, dated October 7, 2002, Dockets 96-115, 96-149, and 00-257, the PSC agreed with FCC Chairman Powell when he commented that "states continue to be uniquely positioned to assess the proper scope of CPNI use and may adopt more stringent notification requirements . . . ." The PSC emphasized that the Florida Legislature has already taken steps to address this issued in the context of Section 364.24(2), Florida Statutes.

not in any situation in which it could not also claim state authority for doing so.

Supra relies on Commission Order No. PSC-03-0578-FOF-TP, issued May 6, 2003, in Docket No. 030200-TP, and Order No. PSC-03-0726-FOF-TP, issued June 19, 2003, in Docket No. 021252-TP, which reaffirmed the Commission's finding in Order No. PSC-02-0875-PAA-TP, issued June 28, 2002. We agree with Supra's reliance on these orders, but emphasize that, in both dockets, we based our decisions only on the broad authority granted under Section 364.01(4)(g), Florida Statutes, to prevent anticompetitive behavior.

In addition, the FCC has stated, in FCC Order 03-42 at ¶28, that states are not precluded from taking actions under state law so long as those actions are consistent with FCC rules. See also FCC 02-214, 17 FCC Rcd. 14860 at ¶69 (wherein the FCC stated that it will only preempt state law when the regulation would interfere with FCC authority). The Florida Legislature has also authorized us to employ procedures consistent with the Act. See Section 120.30(13)(d), Florida Statutes.

Pursuant to Section 364.285(1), Florida Statutes, we are authorized to impose upon any entity subject to our jurisdiction a penalty of not more than $25,000 for each day a violation continues, if such entity is found to have *refused to comply with* or *to have willfully violated* any lawful rule or order of this Commission, or any provision of Chapter 364, Florida Statutes, or revoke any certificate issued by it for any such violation.

Based on the above, we find we cannot provide a remedy (federal or state) for a violation of 47 U.S.C. §222(b). If however, the conduct at issue also constitutes anticompetitive behavior as prohibited by Section 364.01(4)(g), Florida Statutes, we may impose penalties as provided in Section 364.285, Florida Statutes, for the violation of state law. In order to ensure that our decision under state law does not conflict with the federal provision, we may interpret the federal provision and apply it to the facts of this case. Findings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper jurisdiction to hear and remedy complaints regarding violations of Section 222 of the Act.

III. Sharing of wholesale information with retail operations

Wholesale information is information that BellSouth has in its possession because it provides services to other carriers that provide services to end user customers. Both parties in this docket agree that BellSouth cannot share wholesale, or carrier to carrier, information with its retail marketing operations in order to trigger marketing reacquisition efforts. The primary question for Supra in this docket, which will be addressed in Section V, is whether the information BellSouth receives on a Supra local service request (LSR) (which indicates a customer is switching carriers from BellSouth to Supra), remains wholesale information even after the customer switch is complete.

Supra, in its opening statement at hearing, acknowledged the prohibition on use of wholesale information by stating "BellSouth cannot share information from its wholesale side to its retail side." BellSouth recognized the prohibition on use of wholesale information in witness Ruscilli's direct testimony, stating:

> The Commission determined in its June 28, 2002 order in Docket No. 020119-TP, that BellSouth is prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC. *(See* FPSC Order No. PSC-02-0875-PAA-TP at page 21). More recently in its June 19, 2003 Order in Docket Nos. 020119-TP, 020578-TP, and 021252-TP ("Key Customer Order"), the Commission reaffirmed its previous finding when it examined BellSouth's policies concerning Customer Proprietary Network Information ("CPNI") and use of wholesale information, concluding that it was "satisfied that BellSouth has the appropriate policies in place.". *(See* FPSC Order No. PSC-03-0726- FOF-TP at page 47)

We believe it is important to distinguish customer proprietary network information (CPNI), from wholesale or carrier-to-carrier information. BellSouth witness Ruscilli differentiates the two in his rebuttal testimony, stating:

> Customer Proprietary Network Information or CPNI as defined in Section 222(f)(1) of the Telecommunications Act of 1996, means "(A) information that relates to the quantity, technical configuration, type, destination, and

> amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." Therefore, the phone number and address information of a customer is not CPNI. However, information pertaining to the features the customer has on their line is CPNI.
>
> Wholesale information, on the other hand, is information that BellSouth has in its possession because it provides services to other carriers that provide services to end user customers.

The FCC has addressed the use of CPNI and wholesale information when winback activities are initiated and explains that winback marketing can involve two types of marketing. In Order FCC 99-223, released September 3, 1999, at ¶ 64, the FCC stated:

> ..."win-back" can be divided into two distinct types of marketing: marketing intended either to (1) regain a customer, or (2) retain a customer. Regaining a customer applies to the marketing situation where a customer has already switched to and is receiving service from another provider. Retention marketing, by contrast, refers to a carrier's attempts to persuade a customer to remain with that carrier before the customer's service is switched to another provider.

For purposes of this docket, we will only concentrate on the marketing situation in which BellSouth attempts to regain a customer lost to Supra, in other words, when the transition to Supra is complete. During cross examination by BellSouth, witness Nilson was asked if Supra was alleging that BellSouth targets, through direct mailings or through leads, customers who have pending orders. He replied, "Not in this docket sir." Therefore, retention marketing is not an issue in this docket.

The FCC has addressed win-back marketing promotions to regain customers in a number of orders. In Order FCC 99-223, released September 3, 1999, at ¶ 69, the FCC states:

> Some commenters argue that ILECs should be restricted from engaging in "win-back" campaigns, as a matter of policy, because of the ILECs' unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation at Part V.C.3, *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice. Because "win-back" campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.

The FCC again addressed "win-back" campaigns in Order No. FCC 02-147[1], released May 15, 2002. In answer to commenters remarks about BellSouth's marketing tactics, the FCC acknowledged state commission actions and stated:

> We find that, in the absence of a formal complaint to us that BellSouth has failed to comply with section 222(b), the winback issue in this case has been appropriately handled at the state level, and that the actions undertaken by the state commissions and BellSouth should be sufficient to ensure it does not recur. The Georgia Commission issued an interim measure to prohibit BellSouth from engaging in any winback activities once a customer switches to another local telephone service

[1]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.

> provider. Since the Georgia Commission issued the interim measure, the Georgia Commission has opened a proceeding to investigate the allegations submitted to the state Commission, and determined that the staff of the Georgia Commission and the interested parties should develop a code of conduct for the industry. While there have been no formal complaints against BellSouth on this issue in Louisiana, the Louisiana Commission ordered BellSouth to abstain from any winback activities for seven days after a customer switches to another local telephone service provider, prohibited BellSouth's wholesale divisions from sharing information with its retail division, and prohibited the inclusion of marketing information in the final bill sent to a customer that has switched providers.

It should be noted that the interim measure discussed in the above paragraph, which the Georgia Commission issued to prohibit BellSouth from engaging in any winback activities once a customer has switched to another service provider, was a 7-day waiting period. The FCC also addressed retention marketing and the use of CPNI and wholesale information in FCC Order 03-42, issued March 17, 2003, at ¶ 27-28, stating:

> We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. This is consistent with our finding in the Second Report and Order that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier. Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations.

> We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

These orders clearly indicate that wholesale information received by BellSouth cannot be shared with its retail division. By Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, in Docket No. 020119-TP, In Re: Petition for Expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc., we agreed with the FCC's finding, stating:

> ...BellSouth's wholesale division shall be prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC.

By Order No. PSC-03-0726-PAA-TP, issued June 19, 2003, in consolidated Docket Nos. 020119-TP, In Re: Petition for Expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc., 020578-TP, In Re: Petition for Expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association, and 021252-TP, In Re: Petition for Expedited review and cancellation or suspension of BellSouth Telecommunications, Inc.'s

In Customer tariff filed 12/16/02, by Florida Digital Network, Inc., we affirmed that finding by stating:

> We have examined BellSouth's policies concerning CPNI and use of wholesale information, and are satisfied that BellSouth has the appropriate policies in place. However, we affirm our finding contained in Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, prohibiting BellSouth's wholesale division from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC. That finding by us was not protested.

We believe that these findings, in these Orders, are supported by both federal and state law. Not only is sharing of information prohibited by Section 222 of the federal Act, it also appears to present a barrier to competition as prohibited by state law.

Both parties agree that BellSouth cannot share wholesale, or carrier-to-carrier, information with its retail marketing operations in order to trigger marketing reacquisition efforts. Therefore, we affirm our findings in Order PSC-02-0875-PAA-TP, issued June 28, 2002, and Order PSC-03-0726-FOF-TP, issued June 19, 2003, which prohibit BellSouth's wholesale division from sharing information with its retail division.

IV. BellSouth cannot share wholesale information with in-house or third-party marketers.

Both parties agree that BellSouth cannot use wholesale information to furnish leads to its in-house and third party marketers. BellSouth witness Ruscilli addresses whether BellSouth uses wholesale information to furnish leads to its marketers in his direct testimony, stating:

> BellSouth's wholesale operations do not provide leads to its retail operations. Any information used by BellSouth's retail operations to develop lists of former customers that are potentially eligible for promotional offerings are obtained from retail information sources - not wholesale sources.

Both parties agree on how the information regarding a customer change of provider from BellSouth to Supra is provided through BellSouth's OSS system for purposes of winback marketing to regain a customer. The remaining question, which is addressed here, is whether the information that is relayed to BellSouth in-house marketing, or outside third-party marketers, is wholesale or retail information. In this section we will limit the scope of its discussion to the question as to whether BellSouth can share wholesale information with in-house or third-party marketers.

The third sentence of paragraph 28 of FCC 03-42 contains the pertinent verbiage relating to this issue:

> ...carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier.

We believe the FCC, by this order, clearly indicates that wholesale information cannot be used to furnish leads and/or marketing data to its in-house or third-party marketers to initiate winback activities to regain a customer.

As noted above, both parties agree that BellSouth cannot use wholesale information to furnish leads to its in-house and/or third-party marketers. We believe this position conforms with paragraph 28 of Order FCC 03-42, and Commission Orders PSC-02-0875-PAA-TP, and PSC-03-0726-FOF-TP. Therefore, we find that BellSouth shall not be allowed to use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, to furnish leads and/or marketing data to its in-house and third party marketers.

V. BellSouth's Use of Wholesale Information

Supra is alleging that BellSouth is using wholesale information to furnish leads and/or marketing data to its in-house or third-party marketers. Witness Nilson states:

> The questions raised in this docket (i.e. Docket No. 030349-TP) are quite different from the Key Customer Tariff Docket. This docket involves a specific admitted "practice" - not addressed in any way in the former

> Docket - in which BellSouth's Marketing Information Support ("MKIS") group: (1) utilizes information that originates from a carrier change request Local Service Request "LSR") for purposes of triggering market retention efforts, and (2) then shares that same information with an outside third party for market retention efforts. The question is whether this admitted practice is legal. This question was not addressed in any way in the Key Customer Tariff Docket.

For efficiency purposes, we will breakdown this issue into four categories: A) BellSouth's Competitive Local Exchange Company (CLEC) ordering system; B) Operation Sunrise; C) Supra's Complaint; and D) the Second Sweep Incident of Sharing Wholesale Information.

a. BellSouth's CLEC Ordering System

To address this issue, a basic understanding of BellSouth's OSS system for CLEC ordering is necessary. It is important to note that Supra is not suggesting that BellSouth does not provide non-discriminatory access to its OSS systems. In an August 22, 2003, deposition of Supra witness Nilson, BellSouth asked if it is Supra's position in this case that BellSouth is not providing nondiscriminatory access to its OSS. Witness Nilson replied "that's not the purpose of this testimony. The purpose of this testimony was to provide background information so that people could understand the way orders flow. I'm not making a claim of discriminatory or nondiscriminatory access or parity or anything of that nature."

BellSouth witness Pate describes what an OSS system involves in his rebuttal testimony, stating:

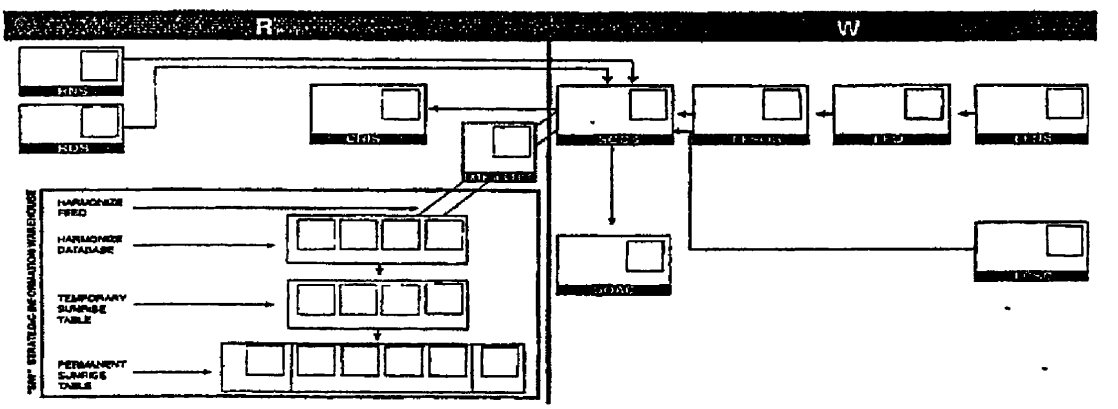
> The Federal Communications Commission("FCC") has defined OSS "as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. OSS includes the manual, computerized, and automated systems, together with associated business processes and the up-to-date data maintained in those systems ... Specifically, the Commission identified the five functions of OSS that incumbent LECs must make available to competitors on an unbundled basis: pre-

ordering, ordering, provisioning, repair and maintenance and billing."

The following copy of Supra Exhibit 15 is a visual representation of BellSouth's CLEC ordering system that was presented and used at the August 29, 2003, Commission hearing. "R" represents BellSouth's retail operation, while "W" represents BellSouth's wholesale operation. This exhibit demonstrates the flow of a CLEC LSR order.

1. LOCAL EXCHANGE NAVIGATION SYSTEM (LENS) - When Supra places an order to switch a customer from BellSouth to Supra, an LSR is typically placed in LENS. For conversions from BellSouth to Supra over resale or UNE, a single C order is used. A single C order is a non-complex change order developed by BellSouth and used by the wholesale community for resale or UNE-P conversions in lieu of having to initiate separate disconnect (D) and new (N) orders. Supra uses the single C

→ BellSouth Retail ← → BellSouth Wholesale ←



conversion order process approximately 99 percent of the time. The other one percent of orders are usually complex orders which are handled through BellSouth's local carrier service center (LCSC). The LCSC handles CLEC orders which are submitted manually, along with electronically submitted LSRs that fall out during the electronic ordering process and need manual intervention. All LSRs submitted via LENS are routed from LENS to the service gate gateway (SGG) which performs

some high level edits, then to the local service request router (LSRR) which sends it to the local exchange ordering system (LEO) if it is not a Local Number Portability (LNP) request.

2. Local Exchange Ordering System (LEO) - Accurate and complete non-LNP and non-Digital Subscriber Line (DSL) LSRs flow mechanically to the LEO system. The LEO system receives the LSR and mechanically performs edit checks to determine if all the required fields have been correctly populated. If the LSR fails the edit checks in LEO, it will be returned to the CLEC via the applicable interface as a fatal reject. Fatal rejects are errors that prevent an LSR from being processed further. The CLEC receives a fatal error notification that contains an error code and an English-language description of the fatal reject. If an LSR passes LEO's edit checks, it then will mechanically "flow" from LEO to the local exchange service order generator.

3. Local Exchange Service Order Generator (LESOG) - LESOG performs further checks for errors and provides manual fallout for LSRs that cannot be mechanically handled. If the LSR contains an error or errors, or if it is not a candidate for mecnanical handling, it will not flow-through to Service Order Communications System (SOCS).

If an LSR is "passed" by LESOG, LESOG will mechanically transform the LSR into the service order format that can be accepted by the SOCS and by the other downstream BellSouth systems through which BellSouth's own service orders, as well as CLEC orders, are processed. From LESOG, the CLEC service order flows to and is accepted by SOCS without any manual intervention.

4. Service Order Communications System (SOCS) - SOCS is responsible for the collection, storage, and distribution of service orders, either CLECs' or BellSouth's, to all user departments, including service order-driven mechanized systems. SOCS is an on-line system used by many departments to process service orders. In addition to the SOCS online programs, the SOCS daily off-line cycle performs data base maintenance and report generation functions necessary to administer the pending order file. The major functions of the

off-line programs are to purge completed and canceled orders, create statistical and administrative reports, and create service order files for other mechanized systems. BellSouth believes it is important to note that SOCS is the common point of entry into the BellSouth OSS for provisioning of service orders by both the BellSouth retail units and the CLECs.

SOCS receives service requests from BellSouth retail operations and from the CLECs. BellSouth's retail operations use the Regional Negotiation System (RNS) for most types of residential service requests, and the Regional Ordering System (ROS) for business customers.

Service requests submitted via RNS and ROS are handled similarly to the way CLEC requests are handled. In both systems, pre-order transactions are performed to validate addresses, calculated due dates, determine available products and services, reserve telephone numbers or circuit IDS, and perform loop qualification. For its own business needs, BellSouth also obtains end user credit information and customer profile information so that the service representative can determine the best product mix to offer the end user. A CLEC can, likewise, perform similar functions with its end user customer. Upon completion of gathering all the necessary information for submission of a service request and basic edit validations are "passed", ROS/RNS mechanically transforms the request into the service order format that can be accepted by SOCS and by the other downstream BellSouth systems for provisioning. At the time SOCS accepts the request, whether it be from a CLEC or BellSouth retail, the request is considered to be a completed order and the provisioning process begins.

5. Service Order Activation and Control System (SOAC) - SOCS communicates the order with the SOAC, which manages the service order process with respect to the specialized systems that design and activate network-based services, assign facilities, maintain central office inventory, and manage customer account information. In doing so, SOAC directs each service order through all steps necessary to complete the order and provision the service.

6. Customer Record Information System (CRIS) - Upon completion of the order and provision of the service, SOCS provides the necessary information to CRIS which is located on the retail side of BellSouth's operation, so that BellSouth's retail end-user customer records will be updated to process a final bill and so that a new record will be established to bill the acquiring CLEC.

b. OPERATION SUNRISE

Operation Sunrise, or Sunrise, is a program of activities that was developed by BellSouth's consumer marketing to address three specific areas: (1) retail residential local service reacquisition; (2) residential local toll reacquisition; and (3) retail residential product or feature reacquisition. Beginning in the fall of 2002, BellSouth has also used Operation Sunrise for residential interLATA long distance reacquisition.

BellSouth's marketing information systems organization (MKIS), through Operation Sunrise, provides marketing support in terms of list management and distribution for target marketing. MKIS is an organization within BellSouth that supports the marketing organization by providing various statistics and information about the sales performance of various BellSouth retail products and services. MKIS tracks information such as retail line loss, the ordering and cancellation by BellSouth retail customers of various products and services, and numerous other retail data that assist the Marketing organization in creating products and services that appeal to customers.

When an end user's local service is disconnected from BellSouth for any reason, a disconnect or change order is generated. In the case of a CLEC converting a BellSouth rétail customer to the CLEC, the disconnect or change order originates from the CLEC's LSR, which is sent to BellSouth either manually or electronically. In the case of a BellSouth retail customer calling to disconnect his or her service, an abandoned station, a retail customer's nonpayment of his account, or numerous other reasons, the disconnect order originates from BellSouth's retail operations. In either case, a specialized reason code is assigned to each order.

For an LSR sent by a CLEC, the disconnect or change order and the appropriate disconnect reason code are generated electronically by BellSouth's OSS or generated by the LCSC if the CLEC has sent the LSR manually. For a retail customer who has called BellSouth to disconnect service, the reason code is assigned by the retail customer service agent who handles the call. Regardless of origin, this reason code indicates why the disconnection occurred, if known.

Each night, SOCS creates an extract file of all orders from the preceding 24-hour period. Also each night, various types of orders - including retail and wholesale disconnect orders and orders of other types - are harvested from this extract file and downloaded into a database called the Harmonize database.

Once each week, completed residential orders from the preceding seven days are downloaded into a temporary table known as the Operation Sunrise temporary table. If an order has not completed or is not associated with a residential account, it is not downloaded into the temporary table. Next, Operation Sunrise eliminates all orders except disconnect (D) and single C (or change) orders. At this point, the temporary table contains all orders in SOCS from the previous seven days that involve completed disconnections of residential retail service - both CLEC-initiated disconnections and those initiated by BellSouth's retail operations.

Next, Operation Sunrise eliminates from the temporary table orders that do not have disconnect reason codes, and orders that have certain retail-inserted disconnect reason codes indicating that the disconnect was for a reason other than a switch to a competitor. What remains is a pool of disconnect orders with no disconnect reason codes. BellSouth presumes that all of these remaining orders are competitive disconnections; in reality, some of them are, but others are non-competitive retail-initiated disconnections.

Next, Operation Sunrise copies into a permanent table in the Sunrise database certain data from each remaining disconnect order: the NPA, the NXX, the line, the customer code, and the date the data was extracted from SOCS. The temporary table is then purged completely. At this point, all information contained in the

disconnect order that could be considered CPNI or wholesale information is gone.

Then, using the data in the permanent Sunrise table, Operation Sunrise matches each disconnect order to a former BellSouth customer service record. The customer service record, which is actually a snapshot extract from the CRIS database, shows the last information BellSouth had concerning the customer's name, address, and subscribed-to services before the disconnection occurred.

Once the information from the permanent Sunrise table is matched with the CRIS snapshot data, it is put in a target table where leads are generated. Operation Sunrise uses that information to generate leads for the retail marketing organization, which, in turn, are sent to third-party vendors.

The BellSouth records sent to the third-party vendors include the former BellSouth customer's name, billing address, working telephone number, account number, language preference, NPA state code, and, in some cases, a product availability indicator, geographical indicator, and a feature spend calculation, along with directions instructing the vendor what letter or marketing piece should be sent to that former customer and when it should be sent.

Once the above process is complete, Operation Sunrise conducts a second sweep of the Harmonize Database to identify D orders containing certain retail noncompetitive disconnect reasons codes, such as NF (No Further Activity), CO (Competition), and AS (Abandoned Station), which were previously excluded in the first sweep addressing competitive disconnects. Once identified, Operation Sunrise extracts the selected D order information into the empty temporary table. From the temporary table, Operation Sunrise then extracts the following service order information and places it in the permanent candidate table: retail noncompetitive disconnect reason code, NPA, NXX, line, customer code, and the order completion date. The temporary table is purged again and the information in the permanent candidate table is matched against the CRIS snapshot of retail customer data, and leads are generated.

c. Supra Complaint

In order to address the Supra Complaint, we have identified the following Supra issues for discussion: 1; Operation Sunrise

Information vs Line Loss Reports; 2) Supra Evidence of Alleged Wholesale Information Sharing - BellSouth Mailings; 3) Local Toll Reacquisition; 4) Business Customer Reacquisition; and 5) Wholesale vs Retail Information.

1. Operation Sunrise Information vs Line Loss Reports

BellSouth maintains that the information obtained from Operation Sunrise is comparable to the information received by CLECs through the Performance Measurement and Analysis Platform (PMAP) Line Loss Notification reports. The Line Loss Notification reports provide notification to CLECs that they have lost an entire account or portion of an account. The reports contain a Disconnect Reason code for each account providing an indication to the losing carrier of the reason for the disconnect or partial disconnect.

The Line Loss Notification reports post daily, except Sunday, to the CLECs' individual Internet web pages and contain only the individual CLEC's accounts. BellSouth asserts that the PMAP line loss report actually provides more information than Sunrise provides, since it provides the name of the customer and specifically notifies Supra that they lost a customer to another carrier.

Supra agrees that the PMAP line loss report provides it with a list of customers that have disconnected service from Supra, but it stated that, although it could, it does not use the PMAP line loss report to identify potential winback targets. Supra believes that when it comes to form, the information that is available to them in PMAP is not substantially different on a technical basis than what BellSouth has available to it in its Sunrise table. Under Supra's interpretation of FCC rules and orders, it believes it could use the fact that it received notice through PMAP that it lost a customer for winback purposes, but BellSouth can't use the notice it receives from Operation Sunrise for winback purposes.

The FCC addressed the use of wholesale information for winback purposes in FCC Order 03-42, issued March 17, 2003, stating:

> We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier

change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. This is consistent with our finding in the Second Report and Order that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier. Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations.

We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

A discussion was held at hearing regarding the phrase "in a form available throughout the retail industry" contained in the first sentence of paragraph 27. Supra believes that "in order for it to be available throughout the retail industry, it would have to be available to anyone who wanted to either acquire it or purchase it if there was a charge for acquiring it and not be something that was available to only one carrier like Supra."

We disagree. We find that "in a form available throughout the retail industry" means that equivalent information is provided throughout the industry, not exact information. Supra would not

want its PMAP report available to other carriers, just as BellSouth would not want its Operation Sunrise information available to the entire industry. As mentioned above, Supra believes the PMAP information it receives is not substantially different than what BellSouth receives from Operation Sunrise. We find that BellSouth should be allowed to receive equivalent information regarding lost customers just as it provides to the CLECs through the PMAP reports.

2. Supra Evidence of Alleged Wholesale Information Sharing - BellSouth Mailings

In his direct testimony, Supra witness Nilson alleges that three BellSouth mailings received by Supra employees show that BellSouth is sharing wholesale information with its retail unit.

The first mailing is a notice from BellSouth Advertising and Publishing Corporation (BAPCO) stating that BAPCO's records indicate that a change in telephone service has occurred, and states that if the customer needs a directory, to contact them through a special 800 number. A pin number is provided to identify the customer needing the directory. Witness Nilson states that this mailing was received on two occasions this year, once when his Supra line was converted from resale to UNE, and once when his number was placed in a list of lines scheduled for disconnection for non-payment.

In response to the first mailing, BellSouth states that the letter simply advises him of a automated toll-free number, along with an order number and pin number that can be used to order directories through an automated system. The letter was sent by BAPCO, not BellSouth's retail operations. BAPCO gets notification of service orders for both BellSouth and CLEC customers that are not true new connects, and these customers may or may not need directories. In answer to Interrogatory No. 16 of staff's second set of interrogatories, BellSouth did state that BAPCO determined that certain "C" orders were carrying an indicator in the directory section that was interpreted as a request for directories. Subsequently, BAPCO put a block on these "C" orders to prevent the directory cards from being sent out to customers who did not need directories.

The second mailing is a general BellSouth letter that is addressed to "Neighbor", offering BellSouth service and BellSouth's Complete Choice Plan. Supra alleges that this letter was sent to a Supra attorney within a week of the attorney converting to Supra from BellSouth. BellSouth responds that this letter is typical of an effort by BellSouth's retail operations to reacquire a customer that has left BellSouth for another local carrier, and believes that there is nothing improper about the letter. It believes that it is evidence that information is properly flowing from SOCS to initiate disconnection of the customer from BellSouth's retail operations when the customer leaves BellSouth for another local carrier.

The third mailing is a BellSouth winback letter which includes a $75.00 cash back offer for signing up for the Complete Choice plan, along with a waiver of the local service connection fee. Supra states that the customer that received this letter has not had a single change to his service, and nothing regarding his service flowed through SOCS for 619 days. Supra believes that the only way for BellSouth to know which lines are in service is to broach the retail/wholesale barrier and exchange information.

BellSouth responds to the third mailing by stating that BellSouth may send winback mailings to former customers for a period of months or even years, and that it is not unrealistic for former BellSouth customers that left several years ago to be the subject of reacquisition efforts.

Supra would like the Commission to require BellSouth to personalize any winback mailing with the date of printing at the same time the letter is printed for mailing. It believes a dated letter would help to clearly identify when winback marketing efforts are initiated.

BellSouth believes dating the winback letters is not necessary. It believes that the 10-day waiting period before winback marketing is initiated is sufficient to ensure that there is no issue with BellSouth undertaking winback activity prior to the completion of a disconnect of BellSouth's service.

Supra also suggests in its testimony that the Commission should prohibit BellSouth from sending any sort of letter to former customers for a period of 90-days after the switch is complete. By

Commission Order No. PSC-03-0726-FOF-TP, the Commission acknowledged BellSouth's voluntary 10-day waiting period after a customer has switched to a competitor, before winback marketing is initiated. We see no sufficient evidence in the record as to why the 10-day waiting period should be expanded to 90 days. Winback campaigns can promote competition in the marketplace and result in lower prices for Florida consumers.

After review of each of the mailings, our staff has found no evidence contained in them which would suggest any violations of the use of wholesale information. We find that BellSouth has provided a satisfactory explanation for each of the mailings. We also find that dating winback letters is unnecessary since winback marketing cannot begin until 10 days after the transfer of the customer is complete.

3. Local Toll Reacquisition

Supra alleges that BellSouth's use of the Customer Account Record Exchange (CARE) as its source to generate targeted marketing leads is a violation of section 222(b) and our previous Orders.

CARE is an industry-wide interface, created and managed by BellSouth's interconnection services, that interexchange carriers (IXCs) and local exchange carriers (LECs) use to communicate when an interLATA or intraLATA toll customer has been acquired or lost. Any time a transaction occurs that affects an end user's interLATA or intraLATA toll service, CARE sends certain data to (1) the acquiring interLATA or intraLATA carrier, (2) the losing interLATA or intraLATA carrier, and (3) the end user's local exchange carrier. The first two pieces of data serve to notify the acquiring and losing interLATA or intraLATA carriers that a customer has been lost or gained. The third piece of data serves to notify the end user's local exchange carrier that one of its customers has undergone a change in interLATA or intraLATA toll carriers.

Supra believes that the establishment of CARE was appropriate, but that BellSouth's use of it as its source to generate targeted marketing leads is improper. CARE data is used as part of BellSouth's local toll reacquisition. The CARE records flow nightly into Sunrise, which processes these feeds once each week. Sunrise uses the information in the records to identify leads for

various local toll campaigns. BellSouth's retail operating unit subscribes to CARE like any other carrier, and receives exactly the same data as any other carrier.

We find that the use of CARE information by BellSouth's retail unit for local toll reacquisition is appropriate since, as any other carrier, it only receives notification of a lost local toll customer when the transfer is complete.

4. Business Customer Reacquisition

Supra believes that if it is illegal for MKIS to harvest records from SOCS and CRIS to generate a marketing list, then it is also illegal for BellSouth's Marketing Communications Database (MCDB) to generate a similar list for business accounts using the same sources for information.

BellSouth's business customer reacquisition program is handled through MCDB. The database uses retail information to develop a list of retail locations where service with BellSouth has been disconnected. The leads are developed by taking a monthly snapshot of the monthly billing data to see if the retail service has been discontinued; and then, the Harmonize database is used to make sure that the customer is not contacted during BellSouth's ten-day voluntary waiting period. No Operation Sunrise data or processes are used in BellSouth's business customer reacquisition efforts.

We find the process used by BellSouth for business customer reacquisition does not violate any wholesale information rules or Orders. BellSouth uses retail information that a customer already has left BellSouth, and then verifies that the ten-day waiting period has passed, before initiating winback marketing of business customers.

5. Wholesale vs Retail Information

Supra's complaint alleges that BellSouth is using carrier-to-carrier, or wholesale information, to trigger marketing reacquisition efforts. Supra does not have a problem with the way the information flows through BellSouth's ordering system to populate the permanent Operation Sunrise table. BellSouth has also stated that "the parties agree pretty much to the process." Supra

does contend that all of the records and orders that populate the permanent Operation Sunrise table are orders which originated from the wholesale side of BellSouth's operations and not the retail side. Supra believes that the information contained in the permanent Operation Sunrise table is wholesale information and thus cannot not be used for winback efforts by BellSouth retail marketing operations or third party vendors.

Supra believes that information contained on the Supra LSR must remain wholesale information throughout, and after, the completion of the conversion of the customer to Supra. Supra references FCC Order 03-42 which discusses WorldCom's request that the FCC clarify that an executing carrier is prohibited from using information obtained from a carrier change request to winback the customer after carrier change completion and disconnection, even if the disconnect information reveals that a customer's service was disconnected as the result of a carrier change order. The FCC clarified its position regarding WorldCom's request by stating in FCC 03-42, at ¶ 27:

> We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts.

We disagree with Supra's position that carrier change information obtained from an LSR remains wholesale information even after the carrier change is completed. We believe that once the information in CRIS is updated showing that Supra is now the provider of service, the information that a customer has switched to Supra is no longer wholesale information.

Both parties agree that the CRIS database is located on the retail side of BellSouth. Supra agrees that certain functions on the retail side of BellSouth's operations have to be updated when a BellSouth customer is switching to Supra. However, Supra contends that the MKIS winback operations are the only people that cannot get this information.

We find that once CRIS is updated showing Supra as the new provider, the information regarding the switch of a BellSouth

customer to Supra is no longer wholesale information, it becomes retail information, not subject to the wholesale information rules contained in the FCC orders, or Order Nos. PSC-02-0875-PAA-TP, and PSC-03-0726-FOF-TP. We find the information of the carrier change is obtained in the normal course of business as CRIS is updated.

a. The Second Sweep Incident of Sharing Wholesale Information

On August 27, 2003, BellSouth advised the Commission (via letter), and Supra (via e-mail) that beginning on July 18, 2003, the second sweep of the Harmonize data base extracted disconnect orders associated with at least two wholesale disconnect codes because of a coding error. The two wholesale codes were CC and RT. CC is UNE CLEC to reseller, UNE CLEC to UNE CLEC, or reseller to UNE CLEC. RT is reseller to reseller. This resulted in a sharing of BellSouth wholesale information with its retail division in violation of Commission Order No. PSC-02-0875-PAA-TP which states:

> ...BellSouth's wholesale division shall be prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC.

As a result of the list, which included CC and RT as well as legitimate and appropriate codes, at least 478,457 marketing pieces were sent in BellSouth's region, of which at least 140,555 of which were sent in Florida. Eleven CC and nine RT customers received these marketing pieces. Out of those twenty customers, one CC and two RT Florida customers received them. None of the CC and RT customers who were sent marketing pieces returned to BellSouth.

To correct these coding errors, BellSouth has stated that it immediately suspended all marketing efforts or customer contact associated with any customer list that could have included customers identified through D orders containing the disconnect code of CC and RT, and also removed CC and RT from the list of disconnect codes that the second sweep of Operation Sunrise extracts.

Our staff examined BellSouth's OSS ordering system and believes that the system itself, as designed, does not allow wholesale information to be shared with BellSouth's retail division. This incident of sharing wholesale information was

caused by a manual coding error which BellSouth discovered and then reported.

Supra believes that the fact that BellSouth acknowledged that it had sent marketing letters out using wholesale information is not central to this case. It believes that the issue is whether or not BellSouth can use information initially obtained from CLEC LSRs for marketing purposes. Although the coding errors which began on the July 18, 2003, second sweep of the Harmonize database did not cause harm to Supra since no customers were lost, BellSouth did cause wholesale information to be shared with its retail winback operations in violation of a Commission Order.

Supra, in its petition, has recommended that the following penalties be imposed on BellSouth if the Commission finds that BellSouth has shared wholesale information with its retail division:

1. $25K for each day that violation has been occurring until now. (Statutory option)

2. Suspension of certificate. (Statutory option)

3. Dismantle the harmonize feed/or order that BST provide direct access to the harmonize feed for when a customer switches away from the CLEC, the CLEC can send a Letter of Acknowledgment.

4. Require BST to print a date on the letter at the same time they personalize the customer name/address showing "when" the letter was mailed. This date must not be preprinted, or postdated. It must be the actual date the letter is printed.

5. Prohibit a Letter of any sort from being sent to the customers for 90 days - presently Commission policy is 10 days. The - feed takes 7 days for the letter to be generated so 10 days is right on target for when a customer could receive the letter at the earliest. 90 day ban would ensure that if BST continues to use - in the future, the customer is with the competitor for at least three billing cycles.

> 6. Order that BST shall be required to allow a CSS expert to examine BST's system, twice a year at random. The expert shall be chosen by Supra, but paid for by BellSouth. This expert will report back to see if BellSouth is still utilizing this feed or some other similar system.

Jurisdiction for penalties for violations of Commission Orders can be found in Section 364.285(1), Florida Statutes, which provides that:

> The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than $25,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by it. Each day that such refusal or violation continues constitutes a separate offense. Each penalty shall be a lien upon the real and personal property of the entity, enforceable by the commission as a statutory lien under chapter 85. Collected penalties shall be deposited in the General Revenue Fund unallocated.

Notification of the coding error which resulted in BellSouth's sharing of wholesale information with its retail division was provided to the PSC by BellSouth through an August 27, 2003 letter, and notification at hearing by BellSouth Counsel. The second sweep of BellSouth's harmonize database which included the CC and RT codes by error, was initiated July 18, 2003.

Pursuant to Section 364.285(1), Florida Statutes, we are authorized to impose upon any entity subject to its jurisdiction a penalty of not more than $25,000 for each day a violation continues, if such entity is found to have *refused to comply with* or *to have willfully violated* any lawful rule or order of this Commission, or any provision of Chapter 364, Florida Statutes, or revoke any certificate issued by it for any such violation.

Section 364.285(1), Florida Statutes, however, does not define what it is to "willfully violate" a rule or order. Nevertheless, it appears plain that the intent of the statutory language is to penalize those who affirmatively act in opposition to a Commission order or rule. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 & n.4 (Fla. 1963); c.f., McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1st DCA 1982) (there must be an intentional commission of an act violative of a statute with knowledge that such an act is likely to result in serious injury) [citing Smit v. Gever Detective Agency, Inc., 130 So.2d 882, 884 (Fla. 1961)]. Thus, a "willful violation of law" at least covers an act of purposefulness.

However, "willful violation" need not be limited to acts of commission. The phrase "willful violation" can mean *either* an intentional act of commission or one of omission, that is *failing* to act. See, Nuger v. State Insurance Commissioner, 238 Md. 55, 67, 207 A.2d 619, 625 (1965)[emphasis added]. As the First District Court of Appeal stated, "willfully" can be defined as:

> An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or *with the specific intent to fail to do something the law requires to be done;* that is to say, with bad purpose either to disobey or to disregard the law.

Metropolitan Dade County v. State Department of Environmental Protection, 714 So.2d 512, 517 (Fla. 1st DCA 1998)[emphasis added]. In other words, a willful violation of a statute, rule or order is also one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation. See, L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982).

We find that the inclusion of the CC and RT codes in Operation Sunrise's permanent table was simply a glitch in initiating a new marketing program. Only three customers in the State of Florida wrongfully received winback letters, and none of the three returned their service to BellSouth, therefore Supra was not harmed. BellSouth is the party which brought this wholesale/retail breach to the attention of the Commission as soon as it was discovered. BellSouth also took immediate steps to correct the coding errors, suspending all marketing efforts or customer contact associated

with any customer list that could have included customers identified through D orders containing the disconnect code of CC or RT, and removed CC and RT from the list of disconnect codes that the second sweep of Operation Sunrise extracts.

Therefore, we find that BellSouth, due to a manual coding error, did, between July 18, 2003, and August 27, 2003, share and/or use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail division, with its in-house marketers and/or third party marketers for marketing purposes. However, this was an isolated incident immediately corrected by BellSouth. Since the mistake was minor, no harm was caused to Supra, and the error was corrected immediately by BellSouth, BellSouth shall not be penalized or fined for this coding error, but BellSouth is put on notice that future non-compliance of Order No. PSC-02-0875-PAA-TP, or any other order or rule of this Commission, will not be tolerated.

Based on the foregoing, it is,

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that this docket shall remain open for 32 days after issuance of this Order, to allow the time for filing an appeal to run.

By ORDER of the Florida Public Service Commission this 11th Day of December, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

LHD

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by

the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT - B

001305-TP

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.; THE FLORIDA PUBLIC SERVICE COMMISSION; LILA A. JABER, in her official capacity as Chairman of the Florida Public Service Commission, J. TERRY DEASON, in his official capacity as Commissioner of the Florida Public Service Commission; BRAULIO L. BAEZ, in his official capacity as Commissioner of the Florida Public Service Commission; MICHAEL A. PALECKI, in his official capacity as Commissioner of the Florida Public Service Commission, and RUDOLPH BRADLEY, in his official capacity as Commissioner of the Florida Public Service Commission

Defendants.

Civil Action No. 4:02CV325-RH/WS

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Nature of the Action

1. Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") brings this action seeking relief from a decision of the Florida Public Service Commission ("FPSC") that is contrary to federal law.

2. This case involves a decision of the FPSC requiring BellSouth to provide its DSL-Based[1] High-Speed Internet Access Service to customers who obtain voice service from Supra Telecommunications and Information Systems, Inc. ("Supra") over what are known as "unbundled network elements." What BellSouth terms "DSL-Based High-Speed Internet Access" involves two components: (1) high-speed DSL transmission service, and (2) the data manipulation and processing capabilities used to offer Internet access.

3. The market for high-speed Internet access is highly competitive, and local exchange carriers such as BellSouth are decidedly secondary players in that market. The majority of consumers who purchase a high-speed Internet access product buy cable modem service from the cable companies. The provision of cable modem service is generally unregulated.

4. The question here is whether, consistent with federal law, the FPSC could impose a significant regulation on BellSouth, a secondary provider in this market, that would impede BellSouth's choices as to how to offer its service in competition with the market-leading cable providers and others.

[1] DSL is an acronym for Digital Subscriber Line.

5. More specifically, at issue here is whether BellSouth can be required to provide DSL-Based High-Speed Internet Access Service to customers in Florida who are receiving voice service from Supra over unbundled network elements. The Federal Communications Commission ("FCC") has clearly stated that BellSouth has no such obligation.

6. This case also raises, among several other issues, the question whether the FPSC has the authority to require BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to competitive local exchange carriers' ("CLEC") voice customers, given the jurisdictionally interstate nature of DSL-Based High-Speed Internet Access Service and the action the FCC has taken to ensure that such "information services" remain unregulated.

7. Because DSL-Based High-Speed Internet Access Service is an unregulated, interstate information service, the FPSC lacks jurisdiction over this issue. Indeed, the FCC has expressly preempted state regulation of interstate information services, and that decision has been upheld by several of the United States Courts of Appeals. In addition, the FCC has clearly held that incumbent carriers are not required to provide DSL service in the circumstances presented here. The FPSC has no legal authority to override the FCC's binding determination.

8. The FPSC's decision compelling BellSouth to provide DSL-Based High-Speed Internet Access Service to Supra's customers receiving voice service over UNE platform ("UNE-P") lines violates the 1996 Act and numerous FCC decisions implementing the requirements of the Act, is beyond the FPSC's authority, and is preempted by federal law and applicable FCC decisions. For those reasons, and because

the PSC's decision is arbitrary and capricious, inconsistent with the agency record, and results from a failure to engage in reasoned decision-making, it should be reversed.

Parties, Jurisdiction, and Venue

9. Plaintiff BellSouth is a Georgia corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida, and it is a Local Exchange Carrier under the Federal Telecommunications Act of 1996 ("1996 Act" or "Act").

10. Defendant Supra is a Florida corporation with its principal place of business in Florida. Supra provides local phone service to customers in the State of Florida and, on information and belief, is a Competitive Local Exchange Carrier under the 1996 Act.

11. Defendant FPSC is an agency of the State of Florida. The FPSC is a "State commission" within the meaning of the 1996 Act.

12. Defendant Lila A. Jaber is Chairman of the FPSC. Chairman Jaber is sued in her official capacity for declaratory and injunctive relief only.

13. Defendant J. Terry Deason is a Commissioner of the FPSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

14. Defendant Braulio L. Baez is a Commissioner of the FPSC. Commissioner Baez is sued in his official capacity for declaratory and injunctive relief only.

15. Defendant Michael A. Palecki is a Commissioner of the FPSC. Commissioner Palecki is sued in his official capacity for declaratory and injunctive relief only.

16. Defendant Rudolph Bradley is a Commissioner of the FPSC. Commissioner Bradley is sued in his official capacity for declaratory and injunctive relief only.

17. This Court has subject matter jurisdiction over the action pursuant to the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6), and pursuant to 28 U.S.C. § 1331. The Court also has subject matter jurisdiction over the action pursuant to the Supremacy Clause of the U.S. Constitution and 42 U.S.C. § 1983.

18. Venue is proper in this district under 28 U.S.C. § 1391. Venue is proper under section 1391(b)(1) because the Commission resides in this District. Venue is proper under section 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the FPSC sits.

Provision of Unbundled Network Elements Under the 1996 Act

19. Prior to this decade, local telephone service was generally provided in a particular geographic area by a single, heavily regulated company such as BellSouth that held an exclusive franchise to provide such service. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. *See* 47 U.S.C. §§ 251-253. As Congress explained, the 1996 Act creates a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf. Rep. No. 104-230, at 113 (1996). To achieve that goal, Congress not only preempted all state and local exclusive franchise arrangements, *see* 47 U.S.C. § 253, but also placed certain affirmative duties on incumbent local exchange carriers ("incumbent LECs" or "ILECs") such as BellSouth to assist new entrants in the local market.

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20. Among those duties is BellSouth's obligation to provide access to the piece-parts of its existing local exchange network to new market entrants such as Supra. Specifically, BellSouth has a duty to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). The Act defines "network element" to include "a facility or equipment used in the provision of a telecommunications service." *Id.* § 153(29).

21. The Act directs the FCC to determine "what network elements should be made available" on an unbundled basis, *id.* § 251(d)(2), and articulates a clear limiting standard that the FCC must apply in carrying out that statutory role, *see id.*; *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366 (1999). According to the statute, ILECs are required to provide access to proprietary network elements only where such access is "necessary,"47 U.S.C. § 251(d)(2)(A), and they must provide access to non-proprietary network elements only where the "failure to provide access . . . would impair" the ability of other carriers to provide service, *id.* § 251(d)(2)(B).

22. Interpreting the mandate of section 251(c)(3), the FCC has required incumbent LECs to offer a variety of unbundled network elements to CLECs. Most relevant to this case, the FCC has required ILECs to engage in what is known as "line sharing." Line sharing requires ILECs to offer CLECs *high-speed data services* such as DSL on the same "local loop" – the basic wire that connects each subscriber to the public switched telephone network -- over which BellSouth offers *voice services.* To enable line sharing, the FCC has required ILECs to make available as a UNE the "high frequency

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portion of the local loop" – that is, the portion of spectrum over which data services are provided. *See* Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20915, ¶ 4 (1999) ("*Line Sharing Order*").[2] While the FCC has required BellSouth to permit CLECs to offer *data* services on the same facilities that BellSouth uses to offer *voice* service, it has never required the converse. That is, the FCC has expressly declined to require BellSouth and other ILECs to offer the low frequency portion of the loop on an unbundled basis so that CLECs could provide voice service on the same loop that BellSouth uses to provide data services, including DSL-Based High-Speed Internet Access.

23. The FCC has also required ILECs to provide CLECs with access to a combination (also known as the UNE-P) of all of the facilities used to provision basic telephone service – the local loop, switching, and transport – including the complete platform of features, functions, and capabilities of those facilities. CLECs purchasing the UNE-P can, in turn, offer service over that complete platform to their end-user customers. When a CLEC purchases a UNE-P from an ILEC, the CLEC becomes the owner of all the features, function, and capabilities that the local loop is capable of providing. Because the CLEC has control of the entire loop, not just a particular band of frequencies on that loop, the ILEC's has no legal obligation or ability to provide any service over that facility.

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[2] The D.C. Circuit has vacated and remanded the FCC's decision to require line-sharing because it was inconsistent with the robustly competiive nature of the broadband market.

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24. A CLEC that provides voice service via the UNE-P can nevertheless provide a combination of both voice and DSL services over the same copper loop either individually or in conjunction with another CLEC. This practice has been labeled "line splitting."

The Internet and the Nature of DSL-Based High-Speed Internet Access Service

25. The Internet is "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1). The Internet includes the now familiar World Wide Web.

26. Digital subscriber line, or DSL, technology enables digital or data signals to be transmitted over the copper loop facilities used for ordinary telephone service, and at much higher speeds than can be reached using traditional dial-up modem service. DSL is one of several platforms – such as cable modem, wireless, and satellite services – used to provide high-speed access to the Internet.

27. As noted at the outset, such DSL-Based High-Speed Internet Access services are comprised of two components: (1) high-speed communications provided over phone lines (the DSL service itself), which is offered by BellSouth on a wholesale basis through a federal tariff; and (2) the data processing and manipulation capabilities to provide access to the Internet in the way that Internet Service Providers such as America Online and Earthlink do.

See USTA v. FCC, 290 F.3d 415, 428 (D.C. Cir. 2002). The D.C. Circuit has stayed its mandate in the line sharing case until the end of this year.

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28. When offered in this combination, DSL-Based High-Speed Internet Access Service is an unregulated, interstate "information service"[3] offered directly by BellSouth to end-users. For more than thirty years, the FCC has consistently held that information services should remain free from federal and state regulation. The FCC has taken numerous steps to ensure that the information services market is unregulated, and its *Computer Inquiry* orders have expressly preempted state regulation of interstate information services. Moreover, the federal courts have routinely upheld this exercise of preemptive authority. For instance, in the *Computer II Further Reconsideration Order*,[4] the Commission made clear that its decisions served to preempt any state regulation of enhanced services (which are now known as information services). *See* 88 F.C.C.2d at 541, ¶ 83 n.34. The D.C. Circuit upheld this exercise of preemptive authority on petitions, explaining that "[f]or the federal program of deregulation to work, state regulation of CPE and enhanced services ha[ve] to be circumscribed." *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 D.C. Cir. 1982). *See also id.* at 214 (expressing agreement with FCC determination "that preemption of state regulation is justified . . . because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE"). Accordingly, that court held, "state regulatory power must yield to the federal." *Id.* at 216; *see also People of California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) (recognizing that state regulation of interstate information services would "essentially negat[e] the FCC's goal").

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[3] The 1996 Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

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The 1996 Act's Requirement that BellSouth Enter Into Interconnection Agreements

29. In addition to the requirement to sell unbundled network elements to CLECs, the 1996 Act also requires incumbent carriers to "negotiate" with CLECs in order to establish "the particular terms and conditions of agreements to fulfill" the other duties prescribed by section 251 of the Act. *See* 47 U.S.C. § 251(c)(1). If the parties are unable to reach an agreement voluntarily, either party may ask the state commission to arbitrate any open issues. *See id.* § 252(b)(1). The state commission may then resolve the disagreements between the parties, "ensur[ing] that such resolution and conditions meet the requirements of section 251 of [the Act], including the regulations prescribed by the Commission pursuant to section 251." *See id.* § 252(c).

30. Additionally, after the parties have reached a full agreement – whether through negotiation, arbitration, or both – the state commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. *Id.* § 252(e)(1)-(3). Any party aggrieved by a state commission determination has a statutory right to bring suit in a federal district court. 47 U.S.C. § 252(e)(6)

The FPSC Proceedings

31. On September 1, 2000, BellSouth filed in the FPSC a petition for arbitration of certain issues related to a new interconnection agreement it was in the process of negotiating with Supra. BellSouth's petition raised fifteen disputed issues. Supra filed a response in which it sought arbitration of an additional fifty-one issues. After several meetings ordered by the FPSC, the parties reduced the number of open

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[4] Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512 (1981) ("*Computer II Further Reconsideration Order*").

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issues to thirty-seven. Among these unresolved issues was the question whether BellSouth was required to continue to provide retail DSL-Based High-Speed Internet Access to BellSouth customers who opted to switch their local phone companies and receive voice service from Supra through the arrangement, discussed above, that is known as the "UNE-P." In accordance with then-existing FCC rules, BellSouth's Federal tariff for its wholesale DSL service specifies that the service can only be offered over those lines where BellSouth provides the telephone voice service to the end user.

32. The FPSC held a hearing on September 26-27, 2001. On March 26, 2002, it issued its Final Order on Arbitration, in which it denied Supra's request that the FPSC compel BellSouth to continue to offer retail DSL-Based High-Speed Internet Access Service to its customers who have opted to receive voice service over UNE-P lines provided by Supra. *See* Final Order on Arbitration, *Petition by BellSouth Telecommunications, Inc.*, Docket No. 001305-TP, Order No. PSC-02-0413-FOF-TP, at 137-40 (FPSC rel. Mar. 26, 2002) ("Order No. PSC-02-0413-FOF-TP") (attached hereto as Exh. A).

33. On April 10, 2002, Supra filed a Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP in which it argued, in part, that the FPSC should reconsider its decision not to require BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to BellSouth's customers who switched to Supra for voice service.

34. On July 1, 2002, the FPSC held that, although Supra had not met the conditions required for the FPSC to reconsider its decision on this point, it would reconsider its decision *sua sponte* in order to harmonize the outcome of the Supra

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arbitration with its decision in a different arbitration (involving BellSouth and Florida Digital Network, Inc.[5]), in which the FPSC, claiming to rely on both federal and state law, held that BellSouth must continue to provide DSL-Based High-Speed Internet Access Service to customers receiving voice service from a CLEC over a UNE-P line. *See* Order on Procedural Motions and Motions for Reconsideration, *Petition by BellSouth Telecommunications, Inc.*, Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP (FPSC rel. July 1, 2002) (attached hereto as Exh. B).

35. On July 15, 2002, BellSouth filed with the FPSC an interconnection agreement for BellSouth and Supra that met the requirements set forth in the various FPSC orders, reserving the rights of both parties to seek relief from the FPSC's determinations.

36. On August 22, 2002, the FPSC approved this agreement. *See* Order Approving Final Arbitrated Interconnection Agreement and Adopting Agreement, *Petition by BellSouth Telecommunications, Inc.*, Docket No. 001305-TP, Order No. PSC-02-1140-FOF-TP (FPSC rel. Aug. 22, 2002) (attached hereto as Exh. C).

The FPSC's Decision Is Contrary to Federal Law

37. Regardless of whether it is authorized under state law, the FPSC's decision is contrary to federal law. The retail DSL-Based High-Speed Internet Access Service that the FPSC ordered BellSouth to provide to Supra's voice customers is an unregulated interstate information service. Because the FCC repeatedly has preempted state regulation of interstate information services, the FPSC's decision must give way to the supremacy of federal law.

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[5] The BellSouth/Florida Digital Network arbitration has not yet resulted in an appealable

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38. Even if the FCC had not acted to preempt state regulation of interstate information services, Internet access service is, as a matter of federal law, interstate, not local. Applying its traditional "end-to-end" analysis, the FCC has repeatedly held that an end-user's communications with an ISP are jurisdictionally interstate in nature. *See, e.g.*, Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South Inc.*, 17 FCC Rcd 6873, 6891 ¶41(2002) (*"Starpower Order"*), *petitions for review pending, Starpower Communications, LLC v. FCC*, Nos. 02-1131 & 02-1177 (D.C. Cir.). Because the FPSC has no authority to regulate interstate services except to the extent provided by the 1996 Act, and because the 1996 Act does not grant the FPSC any such authority over interstate information services, the FPSC lacked jurisdiction to order BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to its customers who opted to switch to Supra for their voice service.

39. Moreover, the FPSC's decision is contrary to well-established FCC precedent making clear that ILECs are not required to provide even wholesale DSL transmission service to the voice customers of CLECs such as Supra, much less, as here, whole DSL transmission combined with Internet access service. In numerous orders, the FCC has definitively and plainly stated that ILECs have no obligation to provide their wholesale DSL services over phone lines when the ILECs are no longer the provider of voice services over those lines. *See* 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, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of*

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order approving an interconnection agreement.

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Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provision of the Telecommunications Act of 1996, 16 FCC Rcd 2101, 2114, ¶ 26 (2001); *Line Sharing Order*, 14 FCC Rcd at 20946-47, ¶ 71; *see also* Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18515, ¶ 324 (2000) ("*Texas Order*"); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17472, ¶ 97 (2001) (declining to require Verizon to provide DSL service on lines over which Verizon did not provide voice service), *appeal pending, Z-Tel Communications Inc. v. FCC*, No. 01-1461 (D.C. Cir.). The FCC's unambiguous determinations in this regard preempt the FPSC's authority to make a decision to the contrary.

40. Additionally, BellSouth's federal wholesale DSL tariff makes clear that BellSouth will only provide that service over loops over which BellSouth provides voice service. The FPSC lacks authority to add to or alter the terms of that federally filed tariff.

41. The FPSC's decision requiring BellSouth to provide DSL-Based High-Speed Internet Access Service to Supra's UNE-P voice customers is also unlawful because it effectively establishes a new UNE – the low frequency portion of the loop. Because the 1996 Act expressly grants to the FCC the authority to identify the network elements that must be unbundled, the FPSC has no authority under the statute to create a new UNE obligation that the FCC has expressly declined to mandate. The FPSC's decision here conflicts with the FCC's express determination that only the high-

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frequency portion of the spectrum used for DSL service should be subject to a separate network element. *See Texas Order*, 15 FCC Rcd at 18517-18, ¶ 330 (noting that the FCC has "unbundled the high frequency portion of the loop when the incumbent LEC provides voice service" but has "not unbundle[d] the low frequency portion of the loop and did not obligate incumbent LECs to provide xDSL service" where end-users received their voice service from CLECs).

42. Even if the FPSC somehow did possess the authority to create additional UNE obligations, the FPSC nevertheless failed to undertake the "necessary and impair" analysis expressly required by the 1996 Act. *See* 47 U.S.C. § 251(d)(2). Accordingly, the FPSC's determination violates the plain language of the 1996 Act.

43. In addition, the FPSC's determination that BellSouth must provide DSL-Based High-Speed Internet Access to Supra's customers over UNE-P lines is arbitrary, capricious, and otherwise unlawful.

44. Finally, BellSouth's has designed its DSL-Based High-Speed Internet Access to be an overlay to its voice service. In order to comply with the FPSC's requirement that BellSouth make its DSL-Based High Speed Internet Service available to customers not receiving their voice service from BellSouth, BellSouth will incur substantial costs. Because the FPSC's order does not make any provision by which BellSouth may recoup those costs, BellSouth has suffered a taking of property without due process in violation of the Fifth and Fourteenth Amendments.

CLAIM FOR RELIEF

45. BellSouth incorporates paragraphs 1-44 of this Complaint as if set forth completely herein.

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46. For all the reasons discussed above, the FPSC's and the Commissioner Defendants' decision directing BellSouth to provide DSL-Based High-Speed Internet Access Service to Supra UNE-P voice customers is contrary to federal law and is preempted by the Federal Communications Act and the FCC decisions cited in this Complaint. The FPSC's decision is also beyond its lawful authority, arbitrary and capricious, inconsistent with the evidence presented to the FPSC, and results from a failure to engage in reasoned decision-making.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BellSouth prays that the Court enter an order:

1. Declaring that the FPSC's decision is unlawful.

2. Enjoining all the Defendants, and all parties acting in concert therewith, from seeking to enforce that unlawful decision against BellSouth.

3. Granting BellSouth such further relief as the Court may deem just and reasonable.

Respectfully submitted,

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Counsel for BellSouth Telecommunications, Inc.

September 19, 2002

EXHIBIT - C

State of Florida

ORIGINAL

Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

DATE: July 29, 2003
TO: Division of the Commission Clerk and Administrative Services
FROM: Samantha M. Cibula, Office of the General Counsel S.M.C.
RE: Docket No. 010098-TP - 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

Attached is a copy of BellSouth's Complaint filed in the United States District Court for the Northern District of Florida in the above-referenced matter to be included in the docket file.

AUS ___
CAF ___
CMP ___
COM ___
CTR ___
ECR ___
GCL ___
OPC ___
MMS ___
SEC 1
OTH Magente

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff, v. FLORIDA DIGITAL NETWORK, INC.; THE FLORIDA PUBLIC SERVICE COMMISSION; LILA A. JABER, in her official capacity as Chairman of the Florida Public Service Commission, J. TERRY DEASON, in his official capacity as Commissioner of the Florida Public Service Commission; BRAULIO L. BAEZ, in his official capacity as Commissioner of the Florida Public Service Commission; MICHAEL A. PALECKI, in his official capacity as Commissioner of the Florida Public Service Commission, and RUDOLPH BRADLEY, in his official capacity as Commissioner of the Florida Public Service Commission Defendants.	Civil Action No. 4:03 CV 212-RH-4

COMPLAINT

Nature of the Action

1. Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") brings this action seeking declaratory and injunctive relief from a decision of the Florida Public Service Commission ("FPSC") that is contrary to, and preempted by, federal law.

2. This case involves a decision of the FPSC requiring BellSouth to provide its DSL-Based[1] High-Speed Internet Access Service to customers who obtain voice service from Florida Digital Network, Inc. ("FDN") over certain "unbundled network elements" or "UNEs." What BellSouth terms "DSL-Based High-Speed Internet Access" involves two components: (1) high-speed DSL transmission service, and (2) the data manipulation and processing capabilities used to offer Internet access.

3. The market for high-speed Internet access is highly competitive, and local exchange carriers such as BellSouth are decidedly secondary players in that market. The majority of consumers who purchase a high-speed Internet access product buy cable modem service from the cable companies. The provision of cable modem service is generally unregulated.

4. The question here is whether, consistent with federal law, the FPSC could impose a significant regulation on BellSouth that would impede BellSouth's choices as to how to offer its service in competition with the market-leading cable providers and others. More specifically, the issue is whether BellSouth can be required to provide DSL-Based High-Speed Internet Access Service to customers in Florida who are receiving voice service from FDN over leased UNE loops (the wires or equivalent facilities that connect a customer's premises to the public telecommunications network).

5. The FPSC may not do so for a series of independent reasons. First, the Federal Communications Commission ("FCC") has clearly stated on multiple occasions that BellSouth has no obligation to provide its DSL-Based High-Speed Internet Access Service over leased UNE loops.

6. Second, given the jurisdictionally interstate nature of DSL-Based High-Speed Internet Access Service and the action the FCC has taken to ensure that such "information services" remain unregulated, the FPSC lacks authority to require BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to customers who receive UNE-based voice service from a Competitive Local Exchange Carrier ("CLEC") such as FDN. The FPSC lacks authority to regulate interstate services, much less to regulate interstate information services, which as a matter of federal law are unregulated. For these reasons as well, the FPSC's decision is inconsistent with federal law, beyond its authority, and preempted.

7. Equally important, the FPSC's decision is contrary to BellSouth's filed federal tariff for DSL transmission and, for that reason as well, is unlawful and preempted.

8. For these and other reasons, the FPSC's decision compelling BellSouth to provide DSL-Based High-Speed Internet Access Service to FDN's customers receiving voice service over UNE loops violates the Federal Telecommunications Act of 1996 ("1996 Act" or "Act"); is inconsistent with and violates numerous FCC decisions implementing the requirements of the Act; is beyond the FPSC's authority; and is preempted by federal law. Moreover, the FPSC's decision is arbitrary and capricious,

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[1] DSL is an acronym for Digital Subscriber Line.

inconsistent with the agency record, and results from a failure to engage in reasoned decision-making. It should therefore be reversed and vacated and its enforcement enjoined.

Parties, Jurisdiction, and Venue

9. Plaintiff BellSouth is a Georgia corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida, and it is a Local Exchange Carrier under the Federal Telecommunications Act of 1996 ("1996 Act" or "Act").

10. Upon information and belief, Defendant FDN is a Florida corporation with its principal place of business in Florida and is a Competitive Local Exchange Carrier under the 1996 Act. FDN provides local phone service to businesses and other customers in Florida and Georgia.

11. Defendant FPSC is an agency of the State of Florida. The FPSC is a "State commission" within the meaning of the 1996 Act.

12. Defendant Lila A. Jaber is Chairman of the FPSC. Chairman Jaber is sued in her official capacity for declaratory and injunctive relief only.

13. Defendant J. Terry Deason is a Commissioner of the FPSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

14. Defendant Braulio L. Baez is a Commissioner of the FPSC. Commissioner Baez is sued in his official capacity for declaratory and injunctive relief only.

15. Defendant Michael A. Palecki is a Commissioner of the FPSC. Commissioner Palecki is sued in his official capacity for declaratory and injunctive relief only.

16. Defendant Rudolph Bradley is a Commissioner of the FPSC. Commissioner Bradley is sued in his official capacity for declaratory and injunctive relief only.

17. This Court has subject matter jurisdiction over the action pursuant to the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6), and pursuant to 28 U.S.C. § 1331. Although BellSouth believes that its claims arise under federal law, to the extent that state law is implicated, this Court has supplemental jurisdiction under 28 U.S.C. § 1367. The Court also has subject matter jurisdiction over the action pursuant to the Supremacy Clause of the U.S. Constitution and 28 U.S.C. § 1343(a)(3).

18. Venue is proper in this district under 28 U.S.C. § 1391. Venue is proper under section 1391(b)(1) because the Commission resides in this District. Venue is proper under section 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the FPSC sits.

Regulatory Background

19. Prior to the 1990s, local telephone service was generally provided in a particular geographic area by a single, heavily regulated company such as BellSouth that held an exclusive franchise to provide such service. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. *See* 47 U.S.C. §§ 251-253. As Congress explained, the 1996 Act creates a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf.

Rep. No. 104-230, at 113 (1996). To achieve that goal, Congress not only preempted all state and local exclusive franchise arrangements, *see* 47 U.S.C. § 253, but also placed certain affirmative duties on incumbent local exchange carriers ("incumbent LECs" or "ILECs") such as BellSouth to assist new entrants in the local market.

20. Among those duties is BellSouth's obligation to provide access to the piece-parts of its existing local exchange network to new market entrants such as FDN. Each of these piece-parts is called a "network element." The Act defines a "network element" to include "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). Under the Act, BellSouth has a duty to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). Network elements subject to this requirement are called "Unbundled Network Elements" or "UNEs."

21. The Act directs the FCC to determine "what network elements should be made available" on an unbundled basis, *id.* § 251(d)(2), and articulates a clear limiting standard that the FCC must apply in carrying out that statutory role, *see id.*; *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366 (1999). According to the statute, ILECs are required to provide access to proprietary network elements only where such access is "necessary,"47 U.S.C. § 251(d)(2)(A). As to non-proprietary network elements, ILECs must furnish access only when the "failure to provide access . . . would impair" the ability of other carriers to provide service. *Id.* § 251(d)(2)(B).

22. The FCC has required ILECs to provide CLECs with access to, among other things, the local loop -- the basic copper wire or equivalent facility that connects each subscriber to BellSouth's network -- as a UNE. When a CLEC leases a local loop, it obtains exclusive control over that facility. See 47 C.F.R. § 51.309(c).

23. Within the relevant legal rules, an ILEC has no control over the services provided over a leased UNE loop facility and no legal obligation (or ability) to provide any service over that facility.

24. A CLEC that provides voice service via a UNE loop can provide a combination of both voice and DSL services over the same copper loop either individually or in conjunction with another carrier. This practice is known as "line splitting."

25. In addition, the FCC has required ILECs to engage in what is known as "line sharing." Line sharing obliged ILECs to offer CLECs high-speed data services such as DSL on the same local loop over which BellSouth offers voice services. To enable line sharing, the FCC required ILECs to make available as a UNE the "high frequency portion of the local loop" – that is, the portion of spectrum over which data services are provided. The D.C. Circuit has vacated and remanded the FCC's decision to require line-sharing because it was inconsistent with the robustly competitive nature of the broadband market. *See United States Telecom. Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002). In a February 20, 2003 Press Release, the FCC indicated that it would end ILEC's line sharing obligation. As of this date, however, the FCC has not released its order addressing that issue.

The Internet and the Nature of DSL-Based High-Speed Internet Access Service

26. The Internet is "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1). The Internet includes the now familiar World Wide Web.

27. DSL technology enables digital or data signals to be transmitted over the copper loop facilities used for ordinary telephone service, and at much higher speeds than can be reached using traditional dial-up modem service. DSL is one of several platforms – such as cable modem, wireless, and satellite services – used to provide high-speed access to the Internet. Cable modem is by far the market-leading technology. To provide high-speed Internet access, a provider combines (1) DSL transmission, cable modem service, or another form of high-speed transmission purchased at wholesale with (2) the information-processing functionalities provided by an Internet Service Provider ("ISP"), such as America Online or Earthlink.

28. When offered in this combination, DSL-Based High-Speed Internet Access Service is an unregulated, interstate "information service."[2] The 1996 Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). For more than thirty years, the FCC has consistently held that information services should remain free from federal and state regulation. The FCC has taken numerous steps to ensure that the information services market is unregulated, and its *Computer Inquiry* orders have expressly preempted state regulation of interstate information services. Federal courts have upheld this exercise of

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[2] *See* 88 F.C.C.2d at 541, ¶ 83 n.34.

preemptive authority. For instance, in the *Computer II Further Reconsideration Order*,[3] the Commission made clear that its decisions served to preempt any state regulation of enhanced services (which are now known as information services). The D.C. Circuit upheld this exercise of preemptive authority, explaining that "[f]or the federal program of deregulation to work, state regulation of CPE [customer premises equipment, i.e., customer telephones] and enhanced services ha[s] to be circumscribed." *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982). *See also id.* at 214 (expressing agreement with FCC determination "that preemption of state regulation is justified . . . because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE"). Accordingly, that court held, "state regulatory power must yield to the federal." *Id.* at 216; *see also People of California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) (recognizing that state regulation of interstate information services would "essentially negat[e] the FCC's goal").

The 1996 Act's Requirement that BellSouth Enter Into Interconnection Agreements

29. In addition to the requirement to sell unbundled network elements to CLECs, the 1996 Act also requires incumbent carriers to negotiate with CLECs in order to establish "the particular terms and conditions of agreements to fulfill" the other duties prescribed by section 251 of the Act. *See* 47 U.S.C. § 251(c)(1). If the parties are unable to reach an agreement voluntarily, either party may ask the state commission to arbitrate any open issues. *See id.* § 252(b)(1). The relevant state commission may then resolve the disagreements between the parties, "ensur[ing] that such resolution and conditions

[3] Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, 541 ¶ 83 n.34 (1981) ("*Computer II Further Reconsideration Order*").

meet the requirements of section 251 of [the Act], including the regulations prescribed by the Commission pursuant to section 251." *See id.* § 252(c)(1).

30. Additionally, after the parties have reached a full agreement – whether through negotiation, arbitration, or both – the state commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. *Id.* § 252(e)(1)-(3). Any party aggrieved by a state commission determination has a statutory right to bring suit in a federal district court. 47 U.S.C. § 252(e)(6).

The FPSC Proceedings

31. On January 24, 2001, FDN filed in the FPSC a petition for arbitration to resolve outstanding issues with BellSouth related to a new interconnection agreement. BellSouth responded on February 19, 2001. Thereafter, FDN filed a Motion to Amend its arbitration petition on April 9, 2001. BellSouth filed its Response in Opposition to the Motion on April 16, 2001. FDN filed its Reply to BellSouth's Opposition on April 30, 2001. On May 22, 2001, the FPSC issued its order granting FDN's Motion to Amend its arbitration petition. *See* FPSC Order No. PSC-01-1168-PCO-TP (attached as Exhibit A). The parties resolved all issues but one prior to the Administrative Hearing on the petition for arbitration: whether BellSouth was required to continue to provide retail DSL-Based High-Speed Internet Access to customers who opted to switch their local phone companies and receive voice service from FDN over UNEs loops.

32. The FPSC held a hearing on August 15, 2001. On June 5, 2002, the FPSC issued its Final Order on Arbitration, in which it held that BellSouth must continue to provide DSL-Based High-Speed Internet Access to customers who receive FDN voice service over UNE loops. *See* FPSC Order No. PSC-02-0765-FOF-TP (attached as

Exhibit B). Upon both parties' request, the FPSC granted an extension of time in which to file an interconnection agreement. Additionally, both parties filed motions for reconsideration, which the FPSC denied on October 21, 2002. *See* FPSC Order No. PSC-02-1453-FOF-TP (attached as Exhibit C). On November 20, 2002, BellSouth filed its FDN interconnection agreement. That agreement was replaced on February 5, 2003 to reflect updated Florida rates for UNEs. The parties had some difficulty reaching agreement on the precise language to use in order to capture the FPSC's order that BellSouth continue to provide its DSL-Based High-Speed Internet Access Service to end users who obtain voice service from FDN over UNE loops. Briefs were exchanged on this issue before the FPSC. On March 21, 2003, the FPSC issued its decision resolving the disagreement, and the parties were instructed to file a final interconnection agreement within 30 days. *See* FPSC Order No. PSC-03-0395-FOF-TP (attached as Exhibit D).

33. After the parties filed the agreement, on June 9, 2003, the FPSC issued its final order, approving the interconnection agreement and its amendments. *See* FPSC order No. PSC-03-0690-FOF-TP (attached as Exhibit E).

The FPSC's Decision Is Contrary to Federal Law

34. The FPSC's decision is contrary to federal law. The retail DSL-Based High-Speed Internet Access Service that the FPSC ordered BellSouth to provide to FDN's voice customers is an interstate service that is beyond the FPSC's authority to regulate. Indeed, the service at issue is an interstate information service that, as a matter of federal law, must remain unregulated.

35. Because the FPSC has no authority to regulate interstate services -- much less interstate information services -- except to the extent provided by the 1996 Act, and

because the 1996 Act does not grant the FPSC any authority to enact the regulation at issue here, the FPSC lacked jurisdiction to order BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to its customers who receive voice service from FDN over UNE loops.

36. Moreover, the FPSC's decision is contrary to well-established FCC precedent making clear that ILECs are not required to provide DSL service over UNE loops. In numerous orders, the FCC has definitively and plainly stated that ILECs have no obligation to provide their wholesale DSL services over UNE loops. *See, e.g.*, Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18515, ¶ 324 (2000) ("*Texas Order*"). The FCC has specifically determined, moreover, that the BellSouth policy at issue here is not discriminatory *and* is consistent with federal law. *See* Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, 17 FCC Rcd 9018, 9100-01, ¶ 157 & n.562 (2002); Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595, 17683, ¶ 164 (2002). Under the 1996 Act and standard principles of preemption, the FCC's unambiguous determinations in this regard preempt the FPSC's authority to make an inconsistent determination.

37. Additionally, BellSouth's federal wholesale DSL tariff establishes that BellSouth will only provide that service over loops over which it provides voice service. That tariff is violated when the FPSC requires BellSouth to provide service over UNE

loops leased by -- and thus under the control of -- FDN. The FPSC lacks the authority to add to or alter the terms of that federally filed tariff.

38. The FPSC's decision requiring BellSouth to provide DSL-Based High-Speed Internet Access Service to FDN's UNE voice customers is also unlawful because it effectively establishes a new UNE – the low frequency portion of the loop. Because the 1996 Act expressly grants to the FCC the authority to identify the network elements that must be unbundled, the FPSC has no authority under the statute to create a new UNE obligation that the FCC has expressly declined to mandate. The FPSC's decision here conflicts with the FCC's express determination that only the high-frequency portion of the spectrum used for DSL service should be treated as a separate network element. *See Texas Order*, 15 FCC Rcd at 18517-18, ¶ 330 (noting that the FCC has "unbundled the high frequency portion of the loop when the incumbent LEC provides voice service" but has "not unbundle[d] the low frequency portion of the loop and did not obligate incumbent LECs to provide xDSL service" where end-users received their voice service from CLECs). Moreover, not only is the FPSC's decision preempted, but also the provisions of state and federal law that it has cited in support of its ruling in fact provide no authority for the FPSC's ruling.

39. Even if the FPSC somehow did possess the authority to create additional UNE obligations, the FPSC nevertheless failed to undertake the "necessary and impair" analysis expressly required by the 1996 Act. *See* 47 U.S.C. § 251(d)(2). Accordingly, the FPSC's determination violates the plain language of the 1996 Act.

40. In addition, the FPSC's determination that BellSouth must provide DSL-Based High-Speed Internet Access to FDN's customers over UNE loops is arbitrary,

capricious, and otherwise unlawful. The FPSC based its decision in part on its belief that BellSouth's resistance to provisioning DSL-based High-Speed Internet Access on UNE loops controlled by CLECs is anticompetitive. The FPSC, however, ignored the evidence that BellSouth lacks market power in the market for high-speed Internet service. The majority of consumers receive their high speed internet service through other (unregulated) means: cable modem, predominantly, but also through wireless and satellite technologies. Because BellSouth lacks market power, as a matter of both law and economics, BellSouth cannot act anticompetitively by bundling its DSL-based high-speed Internet access with BellSouth voice service, offered either at retail or on a resold basis. Nonetheless, the FPSC did not address these issues and it cited no record evidence--because there was none--demonstrating any consumer harm as a result of BellSouth's practice. That lack of evidence and the failure to reasonably explain its conclusion on these issues independently render the FPSC's decision arbitrary and capricious and lacking in reasoned decision-making. The FPSC's decision is also arbitrary and capricious because it is internally contradictory.

41. Finally, BellSouth has designed its DSL-Based High-Speed Internet Access to be an overlay to its voice service. In order to comply with the FPSC's requirement that BellSouth make its DSL-Based High Speed Internet Service available to customers not receiving their voice service from BellSouth, BellSouth will incur substantial costs. Because the FPSC's order does not make any provision by which BellSouth may recoup those costs, BellSouth has suffered a taking of property without due process in violation of the Fifth and Fourteenth Amendments.

CLAIM FOR RELIEF

42. BellSouth incorporates the foregoing paragraphs of this Complaint as if set forth completely herein.

43. For all the reasons discussed above, the FPSC's and the Commissioner Defendants' decision directing BellSouth to provide DSL-Based High-Speed Internet Access Service to FDN UNE customers is contrary to, and preempted by, federal law. Additionally, the provisions of state and federal law cited by the FPSC do not support its determination. The FPSC's decision is also beyond its lawful authority, arbitrary and capricious, inconsistent with the evidence presented to the FPSC, internally inconsistent, and results from a failure to engage in reasoned decision-making.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BellSouth prays that the Court enter an order:

1. Declaring that the FPSC's decision is unlawful.

2. Enjoining all the Defendants, and all parties acting in concert therewith, from seeking to enforce that unlawful decision against BellSouth.

3. Granting BellSouth such further relief as the Court may deem just and reasonable.

Respectfully submitted,

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Counsel for BellSouth Telecommunications, Inc.

July 7th, 2003.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

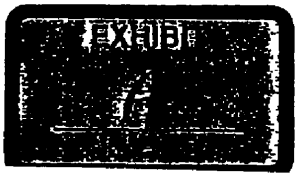
In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-01-1168-PCO-TP ISSUED: May 22, 2001

ORDER GRANTING MOTION TO AMEND ARBITRATION PETITION

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc.(FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. An issue identification meeting was held for this docket on April 12, 2001. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition (Motion). On April 16, 2001, BellSouth filed its Response In Opposition to the Motion (Response). FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. This matter is currently set for an administrative hearing.

MOTION

In its Motion, FDN asserts that prior and subsequent to FDN's filing the Petition, FDN and BellSouth representatives had discussed in negotiations an unbundled network element (UNE) ordering issue that FDN did not include in its Petition. Prior to filing its Petition for Arbitration, FDN alleges that it believed that parties would be able to negotiate a mutually satisfactory resolution of this issue, proposed Issue 10 (See Attachment A). However, on February 21, 2001, BellSouth informed FDN that the issue could not be resolved in a satisfactory time frame. FDN states further that it has not received any information on the issue from BellSouth since that time, and no agreement has been reached.



FDN maintains that it should be allowed to amend its Petition to include the proposed Issue 10. FDN explains that the inclusion of this issue will not prejudice BellSouth's case since BellSouth has been aware of the issue for some time. The parties discussed the issue before and after the Petition was filed and FDN argues adding the issue will not necessitate any change in the established case schedule. Moreover, FDN contends that the arbitration process is designed to resolve issues such as the one presented here. FDN indicates that the parties' current interconnection agreement provides a vehicle for Commission resolution of such an issue, which is addressed in the Bona Fide Request Process and expedited Resolution Procedures. Whether in this case by amendment of the Petition or in a separate request for expedited dispute resolution, FDN asserts that the Commission will be asked to resolve this issue in roughly the same interval if the parties can not reach an agreement. Thus, FDN alleges that administrative economy supports permitting the requested amendment to avoid the inefficient and duplicative efforts inevitable in dual, simultaneous proceedings. Further, FDN states that pursuant to Rule 28-106.202, Florida Administrative Code, a petitioner may amend the petition after the designation of the presiding officer only upon order of the presiding officer. If the Motion is granted, FDN asserts that Section 1.190(c), Fla. R. Civ. Pro., provides that amendments to pleadings, where permitted by rule or order, "shall relate back to the date of the original pleading." Accordingly, FDN states that if the Motion is granted, it should be deemed filed on the date of the original Petition to arbitrate.

RESPONSE

In its Response, BellSouth asserts that the Act does not allow FDN to amend its pleading in order to add issues that were not presented in its Petition or in BellSouth's Response. BellSouth states that the Act establishes an explicit and streamlined timetable for the resolution of issues that remain unresolved after at least 135 days of good-faith negotiations over the terms and conditions of an interconnection agreement. BellSouth contends that even if the Act allows an amendment to the Petition, FDN has not met its burden of proving that its delay in filing the amendment was reasonable. BellSouth explains that the petitioning party is required to submit "all relevant documentation concerning the unresolved issues, the position of each of the parties with

respect to those issues, and any other issues discussed and resolved by parties. Section 252(b)(2)(A) of the Telecommunications of Act of 1996 (Act). BellSouth asserts that the petition and response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings.

BellSouth alleges that FDN's assertion that its Motion cures the fact that proposed Issue 10 does not appear in its Petition because amendments to pleadings "shall relate back to the date of the original pleading" is incorrect. BellSouth explains, however, that federal courts reviewing arbitration rulings in some other jurisdictions have ruled that state commissions have no authority to decide issues not raised in either the petition for arbitration or the response. BellSouth states that although FDN's Motion makes it clear that the proposed Issue 10 was identified during these negotiations and that it remained unresolved at the time that FDN filed its Petition, FDN failed to raise this unresolved issue in its Petition. BellSouth contends that FDN filed its Motion 47 days after FDN knew that proposed Issue 10 would not be resolved. Hence, BellSouth requests that the Commission deny FDN's Motion to Amend Petition because FDN has not provided a reasonable explanation for its delay in seeking leave to amend its Petition.

DECISION

Pursuant to Rule 28-106.202, the petitioner may amend its petition after the designation of the presiding officer only upon order of the presiding officer. Accordingly, it appears that the presiding officer has the authority to render a decision on a motion to amend petition. I note that FDN's Reply to BellSouth Opposition to Motion to Amend arbitration petition is not contemplated by Commission rules; therefore, it is not addressed herein. In its Response, BellSouth states that FDN's Motion should be denied because FDN failed to provide a reasonable explanation for why it had not filed Motion earlier. Although BellSouth asserts that the Act does not provide parties an allowance to amend a petition for arbitration, BellSouth has not presented a compelling argument that the Act requires that I deny FDN's Motion. I concur, nevertheless, with BellSouth in its assertion that the petition and response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings.

However, in Docket No. 970730-TP, Petition for arbitration filed by Telenet, Telenet filed for a Motion to Accept Telenet's Amended Request for Relief. Having found that Telenet should be allowed to amend its request for relief, Order No. 98-0332-PCO-TP was issued granting Telenet's Motion to Accept Amended Request for Relief. In this Order, it was established that the Commission has broad discretion to allow amendment of pleadings and that the Commission should follow a policy of allowing pleadings to be freely amended, if the privilege to amend has not been abused, in order that disputes may be resolved on the merits. Although, it appears that FDN had an opportunity to amend its Petition earlier, there is no indication that FDN abused its privilege to amend its petition. In keeping with the notion of judicial economy, I believe that adding the proposed Issue 10 would allow parties to address the merits of their case in this proceeding. Further, it does not appear that BellSouth will be unduly prejudiced since it was aware that proposed Issue 10 had not resolved by parties. Accordingly, FDN's Motion to Amend Petition is hereby granted. BellSouth shall have seven days from the issuance date of this Order to file its Amended Response to proposed Issue 10 in FDN's Amended Petition for Arbitration.

Based on the foregoing,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Florida Digital Network, Inc.'s Motion to Amend Arbitration Petition, is hereby granted.

ORDERED that BellSouth Telecommunications, Inc. shall respond within seven days from the issuance date of this Order to Florida Digital Network, Inc.'s Amended Petition for Arbitration as set forth in the body of this Order.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 22nd Day of May, 2001.

J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060,

Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

ATTACHMENT A

PROPOSED ISSUE 10: Should BellSouth be required to provide FDN a service order option for all voice-grade UNE loops (other than SL-1 and SL-2) whereby BellSouth will (1) design circuits served through an integrated subscriber loop carrier (SLC), where necessary and without additional requirements on FDN, (2) meet intervals at parity with retail service, (3) charge the SL-1 rate if there is no integrated SLC or the SL-2 rate if there is, and (4) offer the order coordination option?

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-02-0765-FOF-TP ISSUED: June 5, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
MICHAEL A. PALECKI

APPEARANCES:

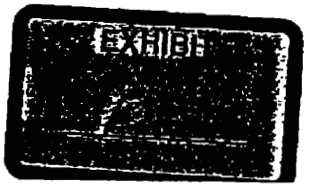
MATTHEW J. FEIL, ESQUIRE, 390 North Orange Avenue, Suite 2000, Orlando, Florida 32801-1640, and MICHAEL C. SLOAN, ESQUIRE, Swidler, Berlin, Shereff, & Friedman, LLP, 3000 K Street, Northwest, Suite 300, Washington, District of Columbia
On behalf of Florida Digital Network, Inc.

NANCY B. WHITE, ESQUIRE and PATRICK W. TURNER, ESQUIRE, c/o Nancy H. Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556
On behalf of BellSouth Telecommunications, Inc.

FELICIA R. BANKS, ESQUIRE and JASON FUDGE, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:



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I. CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

At the issue identification meeting, the parties identified ten issues to be arbitrated. Prior to the administrative hearing, the parties resolved all of those issues except one. An administrative hearing was held on August 15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding.

Although the parties were not able to reach a complete settlement, we commend the good faith efforts of the parties to continue the negotiation process throughout this proceeding.

In this arbitration, FDN requests that this Commission order BellSouth to (1) end the practice of insisting that consumers who buy BellSouth's Digital Subscriber Line (DSL) service also purchase BellSouth voice; (2) unbundle the packet switching functionality of the Digital Subscriber Line Access Multiplexers (DSLAMs) that BellSouth has deployed in remote terminal facilities throughout its network and offer a broadband unbundled network element (UNE) consisting of the entire transmission facility from the customer's premises to the central office; and (3) permit the resale of the DSL transmission services that BellSouth provides to Florida consumers at retail. This Order addresses these requests.

II. JURISDICTION

Pursuant to Chapter 364, Florida Statutes, and Section 252 of Act, we have jurisdiction to arbitrate interconnection agreements, and may implement the processes and procedures necessary to do so in accordance with Section 120.80 (13)(d), Florida Statutes.

III. BELLSOUTH DSL OVER FDN VOICE LOOPS

We have been asked to decide whether BellSouth should be required to continue to provide its FastAccess Internet Service when its customer changes to another voice telecommunications provider. FDN seeks relief from what it claims to be BellSouth's "anticompetitive practice of leveraging its control of the DSL market in Florida to injure competitors in the voice market." FDN witness Gallagher explains that when customers of BellSouth's voice and FastAccess Internet Service seek to switch their voice service to FDN, BellSouth will disconnect their FastAccess Internet Service. He states that because FDN is unable to offer DSL and voice service over the same telephone line in most cases, customers are likely to lose interest in obtaining voice services from FDN.

BellSouth witness Ruscilli confirms that BellSouth will not offer its FastAccess Internet Service to a voice customer of another carrier. Witness Ruscilli explains that the only way a voice customer of FDN could obtain or maintain BellSouth's FastAccess Internet Service would be for FDN to convert that customer from facilities-based service to a resale service, in which FDN would resell BellSouth's voice service to that customer. BellSouth witness Williams states that in the situation in which FDN resells BellSouth's voice service, BellSouth would still be considered the voice provider, and therefore, BellSouth would continue to provide FastAccess Internet Service to that customer.

Witness Williams contends that in any event BellSouth is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop. In support of this position, he cites the FCC's *Line Sharing Reconsideration Order*,[1] which states in ¶16:

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[1] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order No. FCC 01-26; 16 FCC Rcd 2101 (2001).

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

Witness Williams states that "the FCC then expressly stated that its *Line Sharing Order* 'does not require that [LECs] provide xDSL service when they are no longer the voice provider'."

Witness Williams also suggests several "business reasons" for BellSouth's decision not to offer DSL over FDN voice loops. First, witness Williams states that the systems BellSouth uses to provide DSL service do not currently accommodate providing DSL service over an ALEC's UNE loop. He states that prior to provisioning DSL service over a given loop, BellSouth must determine whether that loop is DSL capable. He explains:

> In order to make this determination, BellSouth has developed a database that stores loop information for inventoried working telephone numbers. When an ALEC like FDN provides dial tone from its own switch, the ALEC (not the end user) is BellSouth's customer of record, and the ALEC (not BellSouth) assigns a telephone number to the end user. BellSouth's database, therefore, does not include loop information for facilities-based UNE telephone numbers, and BellSouth cannot use the database to readily determine whether a facilities-based UNE loop is ADSL compatible.

Witness Williams states that BellSouth's troubleshooting, loop provisioning, and loop qualification systems would not contain telephone numbers assigned by ALECs. Therefore, he contends that these mechanized systems do not support the provisioning of DSL service over a UNE loop that an ALEC such as FDN uses to provide voice service. In addition, witness Williams argues that it would be "quite costly to try to take telephone numbers that are not resident in our system today and to put those into those multiple databases."

Further, witness Williams states that processing DSL orders from an end user served by a facilities-based ALEC would be inefficient and costly. He explains that since the ALEC has access to all the features and functionalities of a UNE loop it purchases from BellSouth, for BellSouth to provision DSL it must negotiate with each ALEC for use of the high frequency portion of these loops.

FDN witness Gallagher responds that BellSouth's "business reasons" for not providing DSL over ALEC UNE loops are not adequate grounds for denying FDN's request. He contends that when the Telecommunications Act of 1996 was adopted, "the ILECs did not have in place many of the systems that would ultimately be necessary to support the UNEs, interconnection, collocation and resale requirements of the new Act." Witness Gallagher argues that these systems were developed in response to the Act's requirements and the development of these support systems should continue to be driven by regulatory decisions and applicable law, not the other way around.

Witness Gallagher contends that BellSouth can offer no reasonable justification for its policy of not providing DSL over ALEC UNE loops. He states that this practice is apparently designed to leverage its market power in the DSL market as an anticompetitive tool to injure its competitors in the voice market. Witness Gallagher argues that with numerous competitive DSL providers folding or downsizing, if FDN does not obtain the relief it seeks in this proceeding, there is a very real possibility that BellSouth will eventually be the only DSL provider in its incumbent region in Florida. He states:

> Therefore, BellSouth's ability to exert unreasonable and unlawful anticompetitive pressures on the voice services market will continue to increase. For these reasons, BellSouth's refusal to offer xDSL service to Florida consumers who purchase facilities-based voice service from [ALECs] is unreasonable and unlawful.

In its brief, FDN argues that in the *Line Sharing Reconsideration Order* "the FCC did not find that ILECs may lawfully refuse to provide DSL service on lines on which it is not the retail voice carrier." FDN contends that the FCC simply determined that AT&T's request was beyond the scope of a reconsideration

order, which was limited to consideration of the ILEC's obligation to provide line sharing as a UNE.

In addition, FDN contends that the Line Sharing Order[2] did not address, as a substantive matter, retail issues. FDN argues that "BellSouth cannot cite the *Line Sharing Orders* as a basis for evading its *retail* obligations. FDN UNE voice customers who wish to buy FastAccess DSL *at retail* should be permitted to do so." (emphasis in original)

We note that the *Line Sharing Order* provided that:

> In this Order we adopt measures to promote the availability of competitive broadband xDSL-based services, especially to residential and small business customers. We amend our unbundling rules to require incumbent LECs to provide unbundled access to a new network element, the high frequency portion of the local loop. This will enable competitive LECs to compete with incumbent LECs to provide to consumers xDSL based services through telephony lines that the competitive LECs can share with incumbent LECs.

Line Sharing Order at ¶4.

The *Line Sharing Order* also provided that a state commission may impose additional line sharing requirements. The FCC states:

> It is impossible to predict every deployment scenario or the difficulties that might arise in the provision of the high frequency loop spectrum network element. States may take action to promote our overarching policies, where it is consistent with the rules established in this proceeding.

Order at ¶225. The FCC further emphasized that "States may, at their discretion, impose additional or modified requirements for

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[2] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order No. FCC 99-355; 14 FCC Rcd 20912 (1999), *remanded and vacated line sharing rule requirement*, United States Telecom Association v. FCC, No. 00-1012, Consolidated with 01-1075, 01-1102, 01-1103, No. 1015, consolidated with 00-1025, 2002 WL 1040574 (D.C. Cir. May 24, 2002).

access to this unbundled network element, consistent with our national policy framework." *Line Sharing Order*, 14 FCC Rcd at 20917.

Recently, the *Line Sharing Order* was vacated by the U.S. Court of Appeals for the D.C. Circuit. We note that the Court addressed the FCC's unbundling analysis and concluded that nothing in the Act appears to support the FCC's decision to require unbundling of the high frequency portion of the loop "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition." United States Telecom Association v. FCC, No. 00-1012, Consolidated with 01-1075, 01-1102, 01-1103, No. 1015, consolidated with 00-1025, 2002 WL 1040574 (D.C. Cir. May 24, 2002). We note that we have not relied upon the *Line Sharing Order* for our decision set forth herein.

BellSouth witness Ruscilli contends that BellSouth's FastAccess Internet Service is an "enhanced, nonregulated, nontelecommunications Internet access service." We agree.[3] However, we believe FDN has raised valid concerns regarding possible barriers to competition in the local telecommunications voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN voice service. That is an area over which we do have regulatory authority.

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. In its brief, FDN suggests that this practice amounts to unreasonable denial of service pursuant to Section 201 of the Act and Section 364.03(1), Florida Statutes. In addition, FDN contends that this practice unreasonably discriminates among customers, citing Section 202(a) of the Act and Sections 364.08(1) and 364.10(1), Florida Statutes. FDN also asserts that BellSouth's requirement that an end user seeking to purchase its FastAccess Internet Service must also purchase BellSouth's voice service is an anticompetitive and illegal tying arrangement, and "a *per se* violation of the antitrust laws." We

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[3] See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations, (Computer II Final Decision); 77 FCC 2d 384 (1980).

believe that FDN has demonstrated that this practice raises a competitive barrier in the voice market for carriers that are unable to provide DSL service.

As set forth in Section 706 of the Telecommunications Act, Congress has clearly directed the state commissions, as well as the FCC, to encourage deployment of advanced telecommunications capability by using, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

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

As referenced above, FDN states that BellSouth's practice of disconnecting its FastAccess Internet Service when its customer changes to another voice provider unreasonably discriminates among customers, citing Section 202(a) of the Act, as well as Sections 364.08 and 364.10, Florida Statutes. Although it does not appear that Section 364.08, Florida Statutes, is directly on point, we agree that Section 202(a) of the Act and Section 364.10, Florida Statutes, are applicable. Section 364.10(1), Florida Statutes, provides that:

> 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.

Similarly, Section 202 of the Act, among other things, precludes a common carrier from making any unjust or unreasonable discrimination in practices or services, directly or indirectly. 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 FCC's *Line Sharing Reconsideration Order* is distinguishable here, because in this case BellSouth's practice of disconnecting its FastAccess Internet service has a direct, harmful impact on the competitive provision of local telecommunications service.

We also note that Section 251(d)(3) of the Telecommunications Act provides that the FCC shall not preclude:

> the enforcement of any regulation, order, or policy of a State commission that-
>
> (A) establishes access and interconnection obligations of local carriers;
>
> (B) is consistent with the requirements of this section [251];
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Thus, in the interest of promoting competition in accordance with state and federal law, BellSouth shall continue to provide FastAccess even when BellSouth is no longer the voice provider because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes.

It is incumbent upon us to promote competition. The evidence shows that BellSouth routinely disconnects its FastAccess service when a customer changes its voice provider to FDN, which reduces customers' options for local telecommunications service. The evidence also indicates that this practice is the result of a business decision made by BellSouth. Moreover, BellSouth has declined to eliminate this practice, contending that it would result in increased costs and decreased efficiency. The record does not, however, reflect that BellSouth cannot provision its FastAccess service over an FDN voice loop or that doing so would be

unduly burdensome. As such, we find that this practice 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.

Conclusion

This is a case of first impression and we caution that this decision should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service, but as an exercise of our jurisdiction to promote competition in the local voice market. Pursuant to Sections 364.01(4)(b), (4)(d), (4)(g), and 364.10, Florida Statutes, as well as Sections 202 and 706 of the Act, we find that for the purposes of the new interconnection agreement, BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

IV. BROADBAND UNE LOOP

We have also been asked to decide whether BellSouth should be required to offer an unbundled broadband loop as a UNE to FDN. The point of controversy centers around the fact that FDN's proposed broadband loop would include the packet switching functionality of the DSLAM located in the remote terminal. BellSouth witness Williams argues that "FDN's proposed new broadband UNE is not recognized by the FCC, nor the industry, and includes functionality which the FCC and this Commission have been very clear in their intent not to require ILECs to provide on a UNE basis."

BellSouth witness Ruscilli cites the FCC's 1999 *UNE Remand Order*,[4] in which the FCC stated that "[t]he packet switching

[4] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Report and Order, Order No. FCC 99-238; 15 FCC Rcd 3696 (1999), remanded, United States Telecom Association v. FCC, No. 00-1012, Consolidated with 01-1075, 01-1102, 01-1103, No. 1015, consolidated with 00-1025, 2002 WL 1040574 (D.C. Cir. May 24, 2002).

network element includes the necessary electronics (e.g., routers and DSLAMs)." *UNE Remand Order* at ¶304 He asserts that the "FCC then expressly stated 'we decline at this time to unbundle the packet switching functionality, except in limited circumstances'." (Emphasis added by witness) *UNE Remand Order* at ¶306 The "limited circumstances" in which ILECs are required by the FCC to unbundle packet switching are contained in 47 C.F.R. Section 51.319 (Rule 51.319). Rule 51.319(c)(5) states:

> (5) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability only where each of the following conditions are satisfied.
>
> (i) The incumbent LEC has deployed digital loop carrier systems [DLC], including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);
>
> (ii) There are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer;
>
> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by paragraph (b) of this section; and
>
> (iv) The incumbent LEC has deployed packet switching capability for its own use.

BellSouth witness Ruscilli argues that BellSouth should not be required to unbundle its packet switching functionality except when these specific conditions are met. He contends that the FCC "clearly stated that an incumbent has no obligation to unbundle packet switching functionality 'if it permits a requesting carrier to collocate its DSLAM in the incumbent's remote terminal, on the same terms and conditions that apply to its own DSLAM'." (emphasis added by witness) *UNE Remand Order* at ¶313. Witness Ruscilli states that BellSouth will permit FDN to collocate its own DSLAM at a BellSouth RT, and if BellSouth is unable to accommodate such a collocation it will then unbundle packet switching functionality at that RT.

FDN witness Gallagher acknowledges that the FCC has established a four-part test, but states that this is merely "one set of circumstances where packet switching clearly must be unbundled." (emphasis added) He asserts that nothing in the *UNE Remand Order* suggests that packet switching may not be unbundled in other situations. Nevertheless, witness Gallagher contends, all four of these conditions are met in BellSouth's network. In particular, witness Gallagher disagrees that ALECs are afforded the ability to collocate DSLAMs at RTs on the same terms and conditions as BellSouth's DSLAMs. He argues that although BellSouth "nominally allows" ALECs to collocate DSLAMs in RTs, such collocation is subject to untenable terms and conditions. Witness Gallagher contends that BellSouth refuses to allow ALECs to connect DSLAMs to lit fiber that is used to carry BellSouth's traffic to the central office. He argues that since dark fiber is often not available, FDN's DSLAM would be stranded at the RT. For these reasons, witness Gallagher claims that BellSouth does not permit collocation of DSLAMs at RTs on the same terms and conditions applicable to BellSouth's DSLAM functionality.

Witness Gallagher suggests that we are not required to apply the four-part *UNE Remand Order* test before establishing a broadband UNE. Witness Gallagher contends that "the Florida Commission can and should order unbundling of packet switching if it finds that [ALECs] would be impaired without such access, pursuant to the terms of FCC Rule 51.317." (emphasis added)

Witness Ruscilli acknowledges that we have been granted the authority to establish additional UNEs, but, he argues that we "may

establish a new UNE only if the carrier seeking the new UNE carries the burden of proving the impairment test set forth in the FCC's *UNE Remand Order.*" FDN witness Gallagher agrees, stating that the legal standard to be used by us when creating a new UNE is prescribed in FCC Rule 51.317. We note that the standard set forth in the *UNE Remand Order,* as referred to by BellSouth witness Ruscilli, and that set forth in FCC Rule 51.317 are one and the same. The rule states that if the state commission "determines that lack of access to an element impairs a requesting carrier's ability to provide service, it may require the unbundling of that element. . . ." 47 C.F.R. §51.317(b)(1).

In considering whether lack of access to a network element "materially diminishes" a requesting carrier's ability to provide service, state commissions are to consider whether alternatives in the market are available as a practical, economic, and operational matter. In doing so, the state commissions are to rely on factors such as cost, timeliness, quality, ubiquity, and impact on network operations to determine whether alternative network elements are available. 47 C.F.R. §51.317(b)(2)) State commissions may also consider additional factors such as whether unbundling of a network element promotes the rapid introduction of competition; facilities-based competition, investment and innovation; and reduced regulation. Further, the state commission may consider whether unbundling the network element will provide certainty to requesting carriers regarding the availability of the element, and whether it is administratively practical to apply. 47 C.F.R. §51.317(b)(3)

FDN witness Gallagher argues that the "cost of providing ubiquitous service throughout the state of Florida by collocating DSLAMs at remote terminals would be staggeringly expensive, and well beyond the capability of FDN or other [ALECs]." He states that FDN has spent millions of dollars to collocate equipment in 100 of BellSouth's 196 central offices in Florida. With over 12,000 remote terminals in BellSouth's network, witness Gallagher contends that collocation on that scale would be financially impossible for FDN. BellSouth witness Williams confirms that as of May 23, 2001, there were 12,037 remote terminals in BellSouth's Florida network. Witness Gallagher also contends that it would be prohibitively time-consuming to collocate a DSLAM in every remote terminal(RT). He states that "the process in my estimation would require well

more than one year before FDN could start to provide service, and perhaps much longer."

Another alternative proposed by BellSouth for providing DSL service to consumers served by a DLC loop is utilizing an available "home run" copper loop. Witness Williams explains that FDN could perform an electronic Loop Make-Up and locate an available home-run copper loop from the customer's NID all the way to FDN's central office collocation space. FDN would then reserve this loop and place an order for that home-run copper loop. BellSouth would then do a loop change to move FDN to an all-copper loop.

FDN witness Gallagher responds that in many BellSouth service areas, no copper facilities are available for DSL. In addition, he states that many DLCs are deployed where copper loops are longer than 18,000 feet. At that distance they are not capable of carrying DSL transmission. He contends that "[e]ven where home-run copper loops are DSL-capable, the quality of the DSL transmissions would be inferior to DLC loops and therefore would not be competitive in the consumer market."

BellSouth witness Ruscilli contends that FDN is not impaired by the fact that BellSouth does not provide packet switching functionality or the DSLAM as a UNE because FDN can purchase, install, and utilize these elements just as easily and cost-effectively as BellSouth. In addition, witness Ruscilli argues that in determining whether to create a new broadband UNE, we must consider the effects unbundling will have on investment and innovation in advanced services. He states that an important part of the FCC's reasoning in not unbundling advanced services equipment was to avoid stifling competition and to encourage innovation. He argues that ALECs can choose to install ATM switches and DSLAMs just as BellSouth has done, and they would not be impaired by implementing this strategy.

Furthermore, witness Ruscilli contends that requiring the unbundling of advanced services equipment would have a "chilling effect" on BellSouth's incentives to invest in such equipment. He states that just as ALECs would have no incentive to invest in advanced services equipment, an ILEC's incentive to invest in such equipment would be stifled if its competitors can take advantage of

the equipment's use without incurring any of the risk. We agree.

We do not believe that a general unbundling requirement for all of BellSouth's network based upon the four-part test contained in Rule 51.319 is appropriate. Rather, this rule contemplates a case-by-case analysis of whether these conditions are met at specific remote terminals. We agree with BellSouth witness Ruscilli, who states that "[r]equiring the statewide unbundling of packet switching if an ALEC can find one remote terminal to which this exception applies would impermissibly ignore the FCC's intent by allowing the limited exception to swallow the general rule."

There is insufficient evidence in the record to make a determination regarding each of the specific remote terminals deployed in BellSouth's network, but the testimony does show that BellSouth does allow for the collocation of DSLAMs in remote terminals. Thus, we do not believe the four-part test contained in Rule 51.319 has been met. Therefore, the record does not support unbundling packet switching pursuant to Rule 51.319. We further note that while there is no evidence in the record to support a finding that FDN can obtain the ability to provide the desired functionalities through third parties, there was evidence regarding several proposed alternative methods of providing DSL to consumers served by DLC loops when an ALEC is the voice provider.

FDN witness Gallagher contends that "early entry and early name recognition are crucial to success in markets for new technologies and new services." He states that with each day FDN falls further behind BellSouth in the DSL market. While certain advantages accrue to the provider who is first to market, the record nevertheless reflects that the initial cost of installing a DSLAM in a remote terminal is similar for FDN and BellSouth.

The FCC explains that two fundamental goals of the Act are to open the local exchange and exchange access markets to competition, and to promote innovation and investment by all participants in the telecommunications marketplace. *UNE Remand Order* at ¶103. BellSouth witness Ruscilli contends that the FCC has acknowledged that there is "burgeoning competition" to provide advanced services, and that this exists without unbundling ILEC advanced services equipment. He asserts that the "existence of this competition alone precludes a finding of impairment." In support

of his position, witness Ruscilli cites to paragraph 316 of the *UNE Remand Order* in which the FCC explained that it declined to unbundle packet switching due to its concern that it "not stifle burgeoning competition in the advanced service market." BellSouth argues that creating a broadband UNE would "have a chilling effect on BellSouth's incentives to invest in the technologies upon which advanced services depend." BellSouth contends that "an ILEC's incentive to invest in new and innovative equipment will be stifled if its competitors, who can just as easily invest in the equipment, can take advantage of the equipment's use without incurring any of the risk."

We share the concern that, in the nascent xDSL market, unbundling could have a detrimental impact on facilities-based investment and innovation. While unbundling DSLAMs at remote terminals could indirectly promote competition in the local exchange market, this might discourage facilities-based competition and innovation. Such an unbundling requirement may impede innovation and deployment of new technologies, not only for ILECs, but for the competitors as well. Thus, we believe it is prudent to carefully weigh the potential effect of unbundling a broadband UNE, and we also believe that the effects of the creation of a broadband UNE have not been adequately explored in this proceeding.

Upon consideration of the evidence and arguments presented, we find BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling. We have serious concerns that requiring BellSouth to unbundle its DSLAMs in remote terminals would have a chilling effect on broadband deployment. Furthermore, we do not believe that FDN has demonstrated that it would be impaired without access to a broadband UNE, because it does have the ability to collocate DSLAMs. While FDN has raised the expense of such collocation as a concern, the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN. As such, FDN has not demonstrated that it is any more burdensome for FDN to collocate DSLAMs in BellSouth's remote terminals than it is for BellSouth. Since the record does not reflect that FDN faces a greater burden than does BellSouth, we do not find that FDN is impaired in this regard. For these reasons, we find it is not appropriate at this time to require BellSouth to create a broadband UNE.

We emphasize that the best remedy in this situation would have been a business solution whereby the parties would negotiate the terms of the provision of the DSL service, instead of a regulatory solution. By not requiring a broadband UNE, the possibility of a business solution still exists.

Conclusion

Accordingly, we decline to require BellSouth to create a broadband UNE at this time for the purposes of the new FDN/BellSouth interconnection agreement.

V. RESALE

The final issue before us is whether BellSouth should be required to offer its DSL service at resale discounts. FDN witness Gallagher contends that "BellSouth and its affiliates are required to offer, on a discounted wholesale basis, all of their retail telecommunications services, including xDSL and other high-speed data services, pursuant to the resale obligations applicable to incumbent local exchange carriers under Section 251(c)(4) of the Federal Act." He states that while not a substitute for UNE access, the Act does require BellSouth to offer access to these services through resale.

Section 251(c)(4)(A) of the Act states that ILECs have "the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." BellSouth witness Ruscilli argues that BellSouth is not obligated to make its Internet access offering available at the resale discount because it is an enhanced, nonregulated, nontelecommunications service. He explains:

> If BellSouth markets DSL to residential and business end users, then the service is clearly a retail offering, and the wholesale discount applies. However, if the DSL service is offered to Internet Service Providers as an input component to the ISP service offering, it is not a retail offering, and the resale requirements of the Act do not apply. BellSouth's Fast Access Internet service falls into the latter category. Fast Access is not a

> telecommunication service. It is an enhanced, nonregulated, nontelecommunication Internet access service that uses BellSouth's wholesale DSL telecommunication service as one of its components.

Witness Ruscilli contends that BellSouth does not offer a tariffed retail DSL service, and has no obligation to make available its wholesale DSL service at the resale discount. In support of his position, witness Ruscilli cites the FCC's *Second Advanced Services Order* in CC Docket No. 98-147[5]. The *Second Advanced Services Order* states:

> Based on the record before us and the fact specific evaluation set out above, we conclude that while an incumbent LEC DSL offering to residential and business end-users is clearly a retail offering designed for and sold to the ultimate end-user, an incumbent LEC offering of DSL services to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering. Accordingly, we find that DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4). We conclude, however, that section 251(c)(4) does not apply where the incumbent LEC offers DSL services as an input component to Internet Service Providers who combine the DSL service with their own Internet service. (footnote omitted)

Order at ¶19. Witness Ruscilli states that the United States Court of Appeals for the District of Columbia Circuit recently issued a decision that confirms the FCC's ruling.[6] In its decision, the court considered ASCENT's objections to the above mentioned language, and found that the FCC's Order was in all respects reasonable.

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[5] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, Order No. FCC 99-330; 14 FCC Rcd 19237 (1999).

[6] Association of Communications Enterprises v. FCC, 253 F.3d 29 (D.C. Cir. 2001). ("ASCENT II")

FDN responds that to qualify for this exclusion, ILEC offerings must be exclusively wholesale offerings. FDN contends that BellSouth's offering is not so narrowly tailored, and thus is not exempt from resale obligations. FDN witness Gallagher contends that BellSouth does sell retail DSL through an ISP that it owns and controls. He maintains that "the BellSouth group of companies, taken together, is the largest retail DSL provider in Florida." He explains:

> BellSouth's ISP obtains DSL from BellSouth's local exchange company. BellSouth promotes and sells its telephony and DSL service using the same advertisements, customer service and sales agents, and Internet sites, including [BellSouth Telecommunications' website]. Revenues from DSL sales and telecommunications services are reported together and accrue for the benefit of the same BellSouth shareholders. If BellSouth were permitted to avoid its Section 251 obligations by selling all of its telecommunications service on a wholesale basis to other affiliates, it would render the unbundling and resale obligations of the Federal Act meaningless. Therefore, retail sales of telecommunications services by any BellSouth affiliate should be attributed to the local exchange carrier operation for the purposes of Section 251.

In support of this position, witness Gallagher cites a January 9, 2001, decision by the Unites States Court of Appeals for the District of Columbia Circuit (*ASCENT*)[7], in which he states that the court held that ILECs may not "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate." According to witness Gallagher, the court held that retail sales of telecommunications services by ILEC affiliates are still subject to the ILEC's resale obligations. He explains that although the court's decision in *ASCENT* involved a regulation pertaining to SBC specifically, the logic of the decision should apply to BellSouth as well.

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[7] Association of Communications Enterprises v. FCC, 235 F.3d 662,(D.C. Cir. 2001) ("ASCENT")

BellSouth witness Ruscilli contends that the *ASCENT* decision does not support FDN's position in this issue. He argues that the *ASCENT* decision deals with regulatory relief granted by the FCC in the Ameritech/SBC merger, regarding the resale of advanced services if offered through a separate affiliate. He states that this ruling does not require BellSouth to offer advanced services at resale. In addition, witness Ruscilli argues that BellSouth does not have a separate affiliate for the sale of advanced services. In its brief, BellSouth explains that BellSouth's FastAccess Internet Service is sold by BellSouth Telecommunications, Inc. as a non-regulated Internet access service offering, that utilizes BellSouth's wholesale DSL service as a component.

FDN witness Gallagher argues that "BellSouth cannot refuse to separate its [DSL] telecommunications service from its enhanced services for the purpose of denying resale." He contends that "FCC unbundling rules require BellSouth to offer its telecommunications services separately from any enhanced services, even if it only sells them as a bundled product." In its brief, FDN refers to FCC Memorandum Opinion and Order in CC Docket No. 98-79,[8] stating that the "FCC has expressly held that DSL transmission is an interstate telecommunications service that does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II." FDN also cites the recent D.C. Circuit Court's *WorldCom* decision,[9] to argue that as long as a carrier "qualifies as a LEC by providing either 'telephone exchange service' or 'exchange access,' then it must resell and unbundle all of its telecommunications offerings, including DSL." FDN witness Gallagher states that FDN does not seek to resell BellSouth's Fast Access Internet service, but rather only the DSL telecommunications transport component of that service.

Section 251(c)(4)(A) of the Act states that ILECs have the duty to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." When determining if a particular service is subject to the resale obligations of the Act, we must consider primarily two things: (1) whether the service is

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[8] GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, Memorandum Opinion and Order, Order No. FCC 98-292; 13 FCC Rcd 22466 (1998).

[9] WorldCom, Inc. v. FCC, 246 F.3d 690 (D.C. Cir. 2001).

a telecommunications service, and (2) whether the service is offered at retail.

BellSouth contends that its FastAccess Internet Service is an "enhanced, nonregulated, nontelecommunication Internet access service" and exempt from the Act's resale provisions. We agree. While BellSouth does in fact sell this service on a retail basis, we believe that BellSouth's FastAccess Internet Service is an enhanced, information service that is not subject to the resale requirements contained in Section 251 of the Act.

However, FDN does not request that we require BellSouth to offer its FastAccess Internet Service at the resale discount; rather, FDN seeks to resell only the DSL component of that service. In its brief FDN argues that BellSouth has provided no legal basis for its claim that "bundled," "enhanced" services are exempt from the resale obligation. FDN contends this is because there is no legal basis for BellSouth's claim. On the contrary, FDN asserts that "[f]or the last 20 years, FCC bundling rules have required facilities-based common carriers to offer telecommunications services separately from any enhanced services, even if it only offers them at retail as a bundled product." (footnote omitted)

We agree that the FCC has long required ILECs offering enhanced services to offer the basic service components to other carriers on an unbundled basis; however, we do not believe this requirement reaches the level of unbundling that FDN seeks. In its Third Computer Inquiry (*Computer III*)[10], the FCC stated:

> [W]e maintain the existing basic and enhanced service categories and impose CEI and Open Network Architecture requirements as the principal conditions on the provision of unseparated enhanced services by AT&T and the BOCs. The CEI standards, which will be in effect on an interim basis pending our approval of a carrier's Open Network Architecture Plan, require a carrier's enhanced services operations to take under tariff the basic services it uses in offering unseparated enhanced services. Such

[10] In the Matters of: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services an Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, 104 FCC 2d 958 (1986)

> basic services must be available to other enhanced services providers and users under the same tariffs on an unbundled and functionally equal basis.

Computer III at ¶ 4. Further, the FCC stated:

> [W]e consider Open Network Architecture to be the overall design of a carrier's basic network facilities and services to permit all users of the basic network, including the enhanced service operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and "equal access" basis. A carrier providing enhanced services through Open Network Architecture must unbundle key components of its basic services and offer them to the public under tariff, regardless of whether its enhanced services utilize the unbundled components.

Computer III at ¶113.

We believe the record shows that BellSouth complies with these obligations when providing its own FastAccess Internet Service. In its brief, BellSouth explains that its "FastAccess Internet Service is a combination of a federally-tariffed wholesale DSL service and e-mail, Internet, and other enhanced services (which were analogized to the water that flows through the DSL pipe during the hearings)." While BellSouth offers its DSL service to ISPs at the tariffed wholesale rate, witness Ruscilli argues that BellSouth does not offer a tariffed retail DSL service.

We believe that BellSouth offers its DSL service as a wholesale tariffed product available to other enhanced service providers pursuant to the unbundling requirements of *Computer III*. As a wholesale product that is only offered to enhanced service providers, we do not believe BellSouth's DSL service is subject to the resale obligations contained in Section 251(c)(4). As stated by the FCC in its *Second Advanced Services Order*, "an incumbent LEC offering of DSL services to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering." Order at ¶19. We note that the *Second Advanced Services Order* was recently affirmed

by the D.C. Circuit Court of Appeals in *ASCENT II*. However, in the *ASCENT II* decision the Court stated that

> If in the future an ILEC's offering designed for and sold to ISPs is shown actually to be taken by end-users to a substantial degree, then the Commission might need to modify its regulation to bring its treatment of that offering into alignment with its interpretation of "at retail," but that is a case for another day.

ASCENT II at p.32.

Although there has been some discussion regarding the first *ASCENT* decision by the D.C. Circuit Court of Appeals, we do not believe this decision has any impact on the issue presently before us. FDN witness Gallagher contends that in *ASCENT*, the D.C. Circuit Court found ILECs may not "sideslip §251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate." We agree that the D.C. Circuit Court found that Section 251 resale requirements extend to ILEC affiliates; however, BellSouth does not offer its DSL service through a separate affiliate. Even if BellSouth was to offer this service through a separate affiliate, the DSL service in question is a wholesale product that would still not be subject to the resale obligations contained in Section 251.

Conclusion

We find that BellSouth's DSL service is a federally tariffed wholesale product that is not offered on a retail basis. Since it is not offered on a retail basis, BellSouth's DSL service is not subject to the resale obligations contained in Section 251(c)(4)(A). Therefore, we find that BellSouth shall not be required to offer either its FastAccess Internet Service or its DSL service to FDN for resale in the new BellSouth/FDN interconnection agreement.

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decisions are consistent with the terms of Section 251, the

provisions of the FCC rules, applicable court orders and provisions of Chapter 364, Florida Statutes.

The parties shall be required to submit a signed agreement that complies with our decisions in this docket for approval within 30 days of issuance of this Order. This docket shall remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that the parties shall submit a signed agreement that complies with our decisions in this docket for approval within 30 days of issuance of this Order. It is further

ORDERED that this docket shall remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 5th day of June, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: /Kay Flynn/
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) ~~days of the issuance of this order~~ in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-02-1453-FOF-TP ISSUED: October 21, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
MICHAEL A. PALECKI

ORDER DENYING MOTIONS FOR RECONSIDERATION, CROSS-MOTION FOR RECONSIDERATION AND MOTION TO STRIKE

BY THE COMMISSION:

CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August

15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. ~~BellSouth filed a Motion to Strike Cross-motion for~~ Reconsideration, or in the Alternative, Response to FDN's Cross-motion on July 5, 2002.

We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3,2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.

This Order addresses FDN's and BellSouth's Motions for Reconsideration, as well as the Cross-Motion for Reconsideration and Motion to Strike.

JURISDICTION

We have jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252 (e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we should utilize discretion in the exercise of such authority. In addition, Section

120.80(13)(d), Florida Statutes, authorizes us to employ procedures necessary to implement the Act.

We retain jurisdiction of our post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code.

FDN'S MOTION FOR RECONSIDERATION

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

We believe that FDN has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, we believe that FDN's Motion should be denied.

FDN contends that the Order does not appear to explicitly address FDN's entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation. FDN states that the anticompetitive effects of BellSouth's alleged tying practice are the same whether the customer is presently a BellSouth customer, whom FDN cannot capture, or is presently a FDN customer, whom FDN will lose because of BellSouth's anticompetitive practice. FDN states that the Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, FDN argues that the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain voice and DSL-based services from the provider(s) of their choice

unless the consumers exercised rights at just one specific point in time, prior to porting to an ALEC voice provider. Consequently, FDN suggests that the Commission meant to adopt an across-the-board rule requiring BellSouth to provide FastAccess service to all qualified customers served by ALECs over BellSouth loops.

BellSouth responds that the Order states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." Order at 11. BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Rather, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. We agree.

Although FDN argues that we overlooked a material aspect of the anticompetitive allegation, it fails to demonstrate that a point of fact or law has been overlooked. In our decision, we determined in part that BellSouth's practice of disconnecting its FastAccess Service unreasonably penalizes customers who desire to have access to voice service from FDN and DSL from BellSouth. Order at 11. Further, we determined that this practice creates a barrier to competition in the local telecommunications market. Id. Consequently, we found that BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

We believe that we were clear in our decision requiring BellSouth to continue to provide FastAccess Service to those BellSouth customers who choose to switch their voice provider. Id. The Order clearly demonstrates that we considered the arguments raised by FDN. Thus, FDN's Motion is mere reargument, which is inappropriate for a motion for reconsideration. Thus, FDN's motion is denied.

BELLSOUTH'S MOTION FOR RECONSIDERATION

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.

2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). We have applied this same standard in addressing BellSouth's motion.

We believe that BellSouth has failed to demonstrate that we made a mistake of fact or law in rendering our decision. Therefore, we deny BellSouth's Motion for reconsideration regarding this issue.

In its Motion, BellSouth states that we have improperly converted an arbitration under the Act into a state law complaint case. BellSouth argues that its FastAccess Internet Service is a nonregulated nontelecommuications DSL-based service. Thus, BellSouth concludes that it is not a service over which this Commission has jurisdiction. FDN responds that nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252 of the Act. We agree. Section 251(d)(3) of the Act provides that the FCC shall not preclude:

> the enforcement of any regulation, order, or policy of a state commission that:
>
> > (A) establishes access and interconnection obligations of local carriers;
> > (B) is consistent with the requirements of this Section [251];
> > (C) does not substantially prevent implementation of requirements of this section and the purposes of this part.

Order at 10. Further, we believe that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission's purpose in promoting competition is to ensure "the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Order at 9.

BellSouth contends that the FCC determined that BellSouth's practice of not providing its federally-tariffed, wholesale ADSL telecommunications service on UNE loops is not discriminatory and therefore does not violate Section 202(a) of the Act. BellSouth states that the purpose of Section 706 of the Act is to encourage

the deployment of advanced services and that the Commission's decision does not seek to promote advanced services but to promote competition in the voice market. FDN responds that while it is true that one of the factors which prompted the Commission's decision was to promote competition in the local voice market, the Commission's Order supports deployment and adoption of advanced services as promoted by Section 706 of the Act, by removing significant barriers that limit consumer choice in the local voice market. We agree. As stated in the Order, we determined that Congress has clearly directed state commissions, as well as the FCC, to encourage deployment of advanced telecommunications capability by using, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure." Order at 9.

BellSouth maintains that it is efficient for BellSouth to provide its FastAccess DSL service when it is providing the basic telephone service. FDN responds that if a customer cannot obtain cable modem service and BellSouth is the sole provider of DSL, BellSouth is put in a position of competitive advantage over ALECs. As stated in our Order, the Florida statutes provide that we must encourage competition in the local exchange market. Specifically, as set forth in Section 364.01(4)(g), Florida Statutes, the Commission shall "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . . " Order at 9. As addressed in the Order, we found that BellSouth's practice of disconnecting its FastAccess service when a customer changes to another voice provider is a barrier to entry into the local exchange market. Order at 4,8.

Furthermore, although BellSouth indicates that the D.C. Circuit Court of Appeals vacated the FCC's *Line Sharing Order* because the FCC failed to consider the competition in the market for DSL service, we do not believe that the same rationale in that decision is applicable here because that decision did not address competitive issues arising under state law in which a specific finding was made that the disconnection of the service was a barrier to local competition. Thus, we do not believe BellSouth has identified a mistake of fact or law by the Commission's lack of reliance on that decision.

BellSouth also requests that the Commission clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over a new loop that it installs to serve the end user's premises. FDN responds that BellSouth's provisioning proposal would be harmful and undermine the Commission's intent. Further, FDN asserts that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant. Although the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service to FDN was not addressed in the Commission's Order, we believe that FDN's position is in line with the tenor of our decision. While the Order is silent on provisioning, we believe our decision envisioned that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers.

We indicated in our Order that our finding regarding FastAccess Internet Service should not be construed as an attempt to exercise jurisdiction over DSL service but as an exercise to promote competition in the local voice market. Order at 11. To the extent that BellSouth has requested that our decision be clarified in regards to the provisioning of its FastAccess Internet Service, we observe that the provisioning of BellSouth's FastAccess Internet Service was not specifically addressed by our decision. However, we contemplated that BellSouth would provide its FastAccess Internet Service in a manner so that the customer's service would not be altered. We note however, that there may be momentary disruptions in service when a customer changes to FDN's voice service. While we decline to impose how the FastAccess should be provisioned, we believe that the provision of the FastAccess should not impose an additional charge to the customer.

BellSouth asserts that for it to provision its FastAccess Internet Service over a UNE loop would be a violation of its FCC tariff. Although we acknowledge BellSouth's FCC tariff, we believe that we are not solely constrained by an FCC tariff. As indicated in our order, under Section 251(d) of the Act, we can impose additional requirements as long as they are not inconsistent with FCC rules, or Orders, or Federal statutes. We believe that BellSouth has failed to make a showing that our decision is contrary to any controlling law. Further, at the hearing, BellSouth's witness Williams testified that although it would be

costly, it would be feasible to track UNE loops. To the extent that these technical limitations can be overcome, we infer that it would be technically feasible to provision FastAccess on an FDN UNE loop.

In summary, although BellSouth has asserted that we overlooked a number of material facts, BellSouth has not identified a point of fact or law which was overlooked or which the we failed to consider in rendering our decision. Therefore, the motion for reconsideration shall be denied. However, we envisioned that BellSouth's migration of its FastAccess Internet Service to an FDN customer would be seamless. Consequently, we clarify that BellSouth's migration of its FastAccess Internet Service to an FDN customer shall be a seamless transition for a customer changing voice service from BellSouth to FDN in a manner that does not create an additional barrier to entry into the local voice market.

BELLSOUTH'S MOTION TO STRIKE

In its Motion, BellSouth seeks to strike FDN's Cross-Motion for Reconsideration because it believes it is an untimely motion for reconsideration. Rule 25-22.060(1)(b), Florida Administrative Code, provides for cross-motions for reconsideration. While Rule 25-22.060(1)(a), Florida Administrative Code, does limit certain types of motions for reconsideration, the limitation urged by BellSouth is not one of them.[1] Nor could it be reasonably implied, because the limitations enumerated in the rule restrict reconsideration of orders whose remedies have been exhausted or orders that are not ripe for review. More importantly, we have held that "[o]ur rules specifically provide for Cross-Motions for Reconsideration and the rules do not limit either the content or the subject matter of the cross motion." Order No. 15199, issued October 7, 1985, in Dockets Nos. 830489-TI and 830537-TL. Based on the foregoing, we find that BellSouth's Motion to Strike is denied.

[1]Rule 25-22.060(1)(a), Florida Administrative Code, prohibits motions for reconsideration of orders disposing of a motion for reconsideration and motions for reconsideration of PAA Orders.

FDN'S CROSS-MOTION FOR RECONSIDERATION

FDN believes that it faces a greater burden than BellSouth in the self-provisioning of DSL loops, because it faces higher costs, does not have the same access to capital, and would be unlikely to obtain transport back to the central office. FDN asserts that BellSouth has an advantage because it buys DSLAMs in bulk. However, witness Gallagher only testifies that when "you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly cheap." FDN presented no evidence that BellSouth purchases DSLAMs in bulk or that BellSouth receives a discount on its purchase of DSLAMs. In fact late-filed Exhibits 12 and 13 indicate that the purchase prices for FDN and BellSouth are relatively the same.[2]

FDN also contends that the Commission overlooked evidence that even if the cost for DSLAMs were the same, FDN is impaired because as a smaller company it does not have the same access to capital as BellSouth. However, the only testimony presented was witness Gallagher's assertion that he does not have the same captive market and that he could not raise the money to collocate FDN's own DSLAM because "[t]he rates of return aren't there."

BellSouth responds that there is no evidence that BellSouth buys DSLAMS in bulk, nor is there support that BellSouth receives a bulk discount on DSLAMs or line cards. BellSouth contends that FDN's assertion that the Commission overlooked the FCC's guidance to consider the economies of scale in performing an impairment analysis is not correct. BellSouth states that FDN has failed to meet the impair standard and that the evidence shows that BellSouth has not deployed line cards in Florida that are capable of providing the broadband service FDN seeks to provide.

We believe that FDN has failed to show any evidence that we overlooked or failed to consider. We considered the arguments presented by FDN and found that "BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling." Order at 17. In so doing, we

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[2]BellSouth late-filed exhibit 12 shows that BellSouth can purchase an 8-port DSLAM for $6,095, while FDN late-filed exhibit 13 shows that FDN can obtain an 8-port DSLAM for $6,900.

also found that "the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN." Id.

FDN also claims that we overlooked evidence that even if FDN were able to collocate a DSLAM it likely would not be able to obtain transport back to the central office. However, there was also evidence that BellSouth offers UNE subloops between the remote terminal and the central office, and that BellSouth would sell these UNE subloops at the rates established by us. Upon consideration of this competing evidence, we found that "there was evidence regarding several proposed alternatives of providing DSL to consumers served by DLC loops when an ALEC is the voice provider." Order at 16.

Finally, FDN asserts that we did not address FDN's ability to collocate xDSL line cards when BellSouth begins to deploy NGDLC in Florida. There was testimony that approximately seven percent of BellSouth's access lines were served by NGDLCs, but there was also testimony that combo cards were not used for BellSouth's xDSL service.

We did not overlook or fail to consider this issue, because the issue was not before us. While FDN does argue that it has met part three of the impair standard, it concludes by stating that "[t]herefore, the FCC's four-part test is satisfied, and BellSouth must be ordered to offer unbundled packet switching where it has deployed DLCs." However, FDN fails to point out that an ILEC is only required to "unbundle[] packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal." UNE Remand Order ¶313. Even if the impair analysis could be read to apply in cases where BellSouth has deployed combo cards instead of DSLAMs, the unbundling requirement is only designed to remedy an immediate harm. The harm alleged by FDN is prospective because "none of those NGDLCs and none of those NGDLC systems are capable of using combo cards that would also support data." Based on the foregoing, we believe that FDN has failed to identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order.

The parties shall be required to file their final interconnection agreement within 30 days after the issuance of this

Order conforming with Order No. PSC-02-0765-FOF-TP, in accordance with Order No. PSC-02-0884-PCO-TP, Order Granting Extension of Time to File Interconnection Agreement. Thereafter, this Docket should remain open pending approval by us of the filed agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunication's Inc.'s Motion to Strike is hereby denied. It is further

ORDERED that Florida Digital Network, Inc.'s Cross-Motion for Reconsideration is hereby denied.

ORDERED that the parties shall file an interconnection agreement as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open pending the approval of the interconnection agreement.

By ORDER of the Florida Public Service Commission this 21st Day of October, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-03-0395-FOF-TP ISSUED: March 21, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON

ORDER RESOLVING PARTIES' DISPUTED LANGUAGE

BY THE COMMISSION:

I. CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August 15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding. This docket was considered at the April 23, 2002,

Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. BellSouth filed a Motion to Strike Cross-Motion for Reconsideration, or in the Alternative, Response to FDN's Cross-Motion on July 5, 2002.

We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3, 2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement. On October 21, 2002, Order No. PSC-02-1453-FOF-TP was issued Denying Motions for Reconsideration, Cross-Motion for Reconsideration and Motion to Strike.

On November 20, 2002, BellSouth filed its executed interconnection agreement with FDN. (On February 5, 2003 BellSouth filed a replacement agreement that contains updated Florida rates for unbundled network elements.) Although the parties were able to reach agreement on most points, disagreements remained as to the specific language that should be incorporated into the agreement to reflect the Commission's decision as to BellSouth's obligation " . . .to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." On this same date, BellSouth also submitted its Position in Support of its Proposed Contract Language (BellSouth Position), in which it sets forth its proposed language where there is a dispute; similarly, FDN's proposed language is contained in its Motion to Approve Interconnection Agreement filed contemporaneously (FDN Motion to Approve). On December 2, 2002, FDN filed a Response to BellSouth's Position in Support of Proposed Contract Language (FDN Response).

This Order addresses which language, where the parties are in disagreement, shall be included in the final executed interconnection agreement filed by BellSouth and FDN.

We are vested with jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes.

II. ANALYSIS

In its Position in Support of its Proposed Contract Language, BellSouth identifies seven major areas where the parties disagree as to the wording that should be reflected in their agreement. For ease of reference, we follow the format in BellSouth's filing, discussing the views and arguments of BellSouth and FDN on each area, and then provide separate findings as to language for each of the seven areas. Language in dispute will be underlined.

A. Section 2.10.1

BellSouth language:

> In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides BellSouth® FastAccess® Internet Service ("FastAccess") to an end-user and FDN submits an authorized request to provide voice service to that end-user, BellSouth shall continue to provide FastAccess to the end-user who obtains voice service from FDN over UNE loops.

FDN language:

> In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides xDSL services (as defined in this

> Section 2.10) to an end user and FDN submits an authorized request to provide voice service to that end user, BellSouth shall continue to provide xDSL services to the end user.

There are two aspects in dispute here.

1. FastAccess service v. xDSL services

BellSouth believes that we only ordered it to continue providing FastAccess, its high-speed Internet access service, when a customer migrates his voice service to FDN. FDN notes that other independent Internet service providers, such as Earthlink or AOL, can subscribe to BellSouth's tariffed interstate ADSL transport offering and offer a high-speed Internet access service in competition with BellSouth. FDN notes that under BellSouth's interpretation of our order, if a BellSouth voice customer who, e.g., receives AOL's high-speed Internet Access service switches his voice service to FDN, BellSouth would be allowed to discontinue the provision of the interstate ADSL service, thus eliminating the customer's AOL high-speed Internet access service. FDN asserts that we did not intend BellSouth's restrictive reading, which it believes is arbitrary, capricious, and unsupported by the record in this proceeding.

Finding

In the FDN order, we concluded: "Pursuant to Sections 364.01(4)(b), (4)(d), (4)(g), and 364.10, Florida Statutes, as well as Sections 202 and 706 of the Act, we find that for the purpose of the new interconnection agreement, BellSouth shall continue to provide its FastAccess Internet Access Service to end users who obtain voice service from FDN over UNE loops." (emphasis added) FDN contends that BellSouth bases its interpretation on "occasional" uses of the term "FastAccess" in our order. We note that FDN cites to nowhere in the record where we raised similar concerns pertaining to other ISPs.

We believe that the occurrence of the term "FastAccess Internet Access Service" in the ordering statement unequivocally supports BellSouth's language. Therefore, we find that BellSouth's language shall be adopted as set forth.

2. UNE loops v. UNE-P

BellSouth interprets our order narrowly, as only requiring them to continue providing FastAccess over a FDN UNE loop, but not over a UNE-P, if FDN were to subscribe to one. BellSouth asserts that the issue in the arbitration only dealt with FastAccess on UNE loops and that there is no record evidence regarding UNE-P. Moreover, BellSouth notes that as a facilities-based provider, FDN purchases UNE loops from BellSouth.

FDN disputes BellSouth's view of our FDN order, initially noting that BellSouth's position is absurd because a UNE-P is a type of UNE loop. In its Response FDN states:

> Shortly after the Commission issued its award in the FDN arbitration, the Commission permitted Supra Telecom to incorporate the FDN arbitration award into its own interconnection agreement. The relief the Commission provided Supra, which was based on the FDN award and on the record from the FDN arbitration, expressly obligated BellSouth to continue providing its DSL service when an end-user converts its voice service to Supra utilizing a UNE-P line. It would make no sense at all for the Commission to sanction an inconsistent result here, as BellSouth requests.

Finding

We agree that in some sense a UNE-P is a form of loop, as argued by FDN. We also note that we concluded on reconsideration in Docket No. 001305-TP (Supra/BellSouth arbitration) that BellSouth was obligated to continue providing FastAccess when a customer converts his voice service to Supra using a UNE-P line. However, we believe the two proceedings are distinguishable. In the Supra docket, Supra, who currently is a UNE-P provider, expressly complained that BellSouth was disconnecting FastAccess when Supra migrated a FastAccess customer to UNE-P. In fact, the approved language in the Supra/BellSouth agreement implementing this provision is limited to UNE-P:

> 2.16.7 Where a BellSouth voice customer who is subscribing to BellSouth FastAccess internet

> service converts its voice service to Supra utilizing a UNE-P line, BellSouth will continue to provide Fast Access service to that end user.

In contrast, as noted by BellSouth, there is no mention in the FDN proceeding of continuing FastAccess in conjunction with UNE-P because FDN represented itself as not being a UNE-P provider; rather, they obtain UNE loops from BellSouth, not UNE-P.

We find that BellSouth's language, which references UNE loops, shall be adopted.

B. Section 2.10.1.2

BellSouth language: None

FDN language:

> For purposes of this subsection 2.10, BellSouth xDSL services include, but are not limited to, (i) the xDSL telecommunications services sold to information services providers on a wholesale basis and/or other customers pursuant to any BellSouth contract or tariff, and (ii) retail information services provided by BellSouth that utilize xDSL telecommunications provided by BellSouth.

We find that BellSouth's obligation to continue providing high-speed Internet access service is limited to its FastAccess information service.

C. BellSouth Section 2.10.1.5; FDN Section 2.10.1.5.1 and 2.10.1.5.2

BellSouth language:

> 2.10.1.5 BellSouth may not impose an additional charge to the end-user associated with the provision of FastAccess on a second loop. Notwithstanding the foregoing, the end-user shall not be entitled to any discounts on FastAccess associated with the purchase of

other BellSouth products, e.g., the Complete Choice discount.

FDN language:

2.10.1.5.1 BellSouth may not impose any additional charges on FDN, FDN's customers, or BellSouth's xDSL customer related to the implementation of this Section 2.10.

2.10.1.5.2 The contractual or tariffed rates, terms and conditions under which BellSouth xDSL services are provided will not make any distinction based upon the type, or volume of voice or any other services provided to the customer location.

In its Position BellSouth indicates that it currently provides a $4.95 Complete Choice discount to its retail voice customers who subscribe to both Complete Choice and FastAccess. It objects to FDN's proposed language because it presumably would require BellSouth to offer this discount to FDN's voice customers who subscribe to the stand-alone FastAccess service. BellSouth contends nothing in federal or state law mandates that it ". . .pass on a combined offering discount to customers who fail to meet the conditions for the combined offer." It notes that anomalous discrimination could occur. For example, a BellSouth FastAccess business customer who did not also subscribe to Complete Choice would pay $79.95 per month. However, under FDN's theory, a FDN FastAccess business customer, who also did not have BellSouth's Complete Choice, would instead pay $75.00. BellSouth observes that its proposed language is consistent with the comments of two of the Commissioners who participated in the agenda conference dealing with the parties' motions for reconsideration, where they stated that there may be justification for affording a BellSouth customer a discount when multiple services are provided in conjunction with FastAccess. Finally, BellSouth asserts that FDN's language effectively requires the stand-alone FastAccess offering to be identical to BellSouth's standard retail FastAccess service. However, the stand-alone product BellSouth proposes to offer will not have a back-up dial-up account, and will be billed only to a credit card.

FDN considers its proposed language to be non-discrimination provisions that are necessary in order to achieve the goal of our FDN arbitration order. FDN alleges that its §2.10.1.5.2 ". . .simply requires BellSouth to provide its xDSL service on a stand-alone basis without regard to other services that BellSouth may provide the end-user. FDN is particularly concerned about the impact of product "bundles" of voice and data services in which an excessive share of the "cost" of the bundled services is inappropriately imputed to the xDSL services that end-users acquire an [sic] individual basis." FDN further argues that we must reject BellSouth's proposed language in its §2.10.1.5, which disqualifies FDN voice customers who retain their FastAccess from receiving discounts associated with purchasing other BellSouth products. FDN states that BellSouth's linking of discounts on FastAccess to a customer's buying BellSouth voice products ". . .would constitute virtually the same type of tying arrangement that the Commission found unlawful in the first place."

Finding

As noted by BellSouth, this issue was debated by the presiding panel at the October 1, 2002, Agenda Conference. After much discussion, there was agreement that there could be legitimate justification for discounts for those customers that obtain all of their services from BellSouth, such as a package price.

Accordingly, we believe that there could be circumstances where a customer is entitled to a discount that need not be made available to a customer who subscribed only to FastAccess. As such, we find that BellSouth's proposed language shall be adopted, while excluding FDN's proposed language.

D. BellSouth Section 2.10.1.6; FDN Section 2.10.1.5.4

BellSouth language:

2.10.1.6 BellSouth shall bill the end user for FastAccess via a credit card. In the event the end user does not have a credit card or does not agree to any conditions associated with Standalone FastAccess, BellSouth shall be relieved of its obligations to continue to provide

FastAccess to end users who obtain voice service from FDN over UNE loops.

FDN language:

2.10.1.5.4 BellSouth will continue to provide end users receiving FDN voice service and BellSouth xDSL service the same billing options for xDSL service as before, or the parties will collaborate on the development of a billing system that will permit FDN to provide billing services to end-users that receive BellSouth xDSL services.

BellSouth states that it bills its end users for FastAccess either on their bill for BellSouth voice services or on a credit card, and notes that its billing systems currently can only generate a bill where the end user is a retail voice customer. Accordingly, since the FastAccess end user will be a FDN voice customer rather than a BellSouth voice customer, BellSouth opines that its only option is to bill such FastAccess customers to a credit card. Further, BellSouth asserts that if the customer declines to pay by credit card, BellSouth should no longer be obligated to provide FastAccess to the customer.

BellSouth also notes that in order to provision the FastAccess on a second loop, there may be occasions where BellSouth will need to re-wire the end user's jacks. Where this occurs, the customer will need to approve the re-wiring and provide BellSouth access to the premises. Here too, if the customer objects to the re-wiring or providing BellSouth access, BellSouth believes it should be relieved of its obligation to provide FastAccess.

FDN objects to BellSouth's proposed language in Section 2.10.1.6. In its Motion to Approve, FDN contends that BellSouth has provided no justification for why, when a FastAccess customer does not take his voice service from BellSouth, he must provide a credit card for billing. FDN believes that such a practice would inconvenience and annoy many customers. As an alternative, FDN proposes that FDN and BellSouth arrive at a mutually acceptable arrangement whereby FDN could bill customers for BellSouth-provisioned FastAccess. FDN asserts that "[i]t is not reasonable for BellSouth to incur the additional expense of provisioning xDSL

on an expensive stand alone loop but then claim that it is too expensive to send a paper bill to the customer for that service." Moreover, FDN believes that "BellSouth's alleged billing problems should not serve as an excuse relieving BellSouth of its obligation to provide ALEC voice end users xDSL service, thereby suppressing competition in the voice market."

Finding

Unfortunately, neither of our two prior orders in this proceeding nor the discussion at the reconsideration agenda conference provide unequivocal direction as to this implementation matter. We believe it is reasonable and is not discriminatory for BellSouth to request FDN FastAccess customers to be billed to a credit card, because this is an option available to BellSouth's own customers. However, we do not believe that BellSouth discontinuing a customer's FastAccess service merely because he declines to offer up a credit card for billing comports with the intent of our prior decisions. To the contrary, we believe it is incumbent upon the parties to remedy any billing problems. We agree with BellSouth that where a FastAccess customer does not provide access to his premises to perform any needed re-wiring, BellSouth should be relieved of its obligation to offer FastAccess. Because the parties have agreed that a FastAccess customer who migrates his voice service to FDN will have his FastAccess provisioned on a standalone loop, then it appears to us that situations like this may arise where it is technically infeasible for BellSouth to provide service. We believe that neither party's language is precisely on point, though FDN's comes closest.

We find that FDN's language should be modified to reflect that: (a) BellSouth may request that service be billed to a credit card but cannot discontinue service if this request is declined; (b) BellSouth may discontinue FastAccess service if access to the customer's premises to perform any necessary re-wiring is denied; and (c) where a customer declines credit card billing, it is incumbent on the parties to arrive at an alternative way to bill the customer. Accordingly, the following language shall be adopted for inclusion in the parties' agreement, while noting that the parties are free to negotiate alternative language that comports with this Order:

> 2.10.1.6 BellSouth may request that the end user's FastAccess service be billed to a credit card. If the end user does not provide a credit card number to BellSouth for billing purposes, the parties shall cooperatively determine an alternative means to bill the end user. If the end user refuses to allow BellSouth access to his premises where necessary to perform any re-wiring, BellSouth may discontinue the provision of FastAccess service to the end user.

We note further that if parties are unable to reach an agreement on an alternative means to billing the end user, parties may petition the Commission for relief as appropriate regarding the dispute.

E. BellSouth Section 2.10.2.5; no comparable FDN language

BellSouth language:

> <u>If the end user does not have FastAccess but has some other DSL service, BellSouth shall remove the DSL service associated USOC and process the FDN LSR for the UNE loop.</u>

As noted by BellSouth, this issue again pertains to whether we ordered BellSouth to continue providing its interstate tariffed DSL transport service, or its retail FastAccess Internet access service. As discussed above, we believe we were quite clear that our decision pertained solely to the provision of FastAccess Internet access service, not the interstate DLS transport offering.

Accordingly, we find that BellSouth's language shall be adopted.

F. BellSouth Section 2.10.2.6; FDN Section 2.10.2.4

BellSouth language:

> If the end user receives <u>FastAccess</u> service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligations under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall

> have three days to make the election as to which line FastAccess service will be provisioned on as set forth in 2.10.2.7 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current and future FastAccess services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's FDN services.
>
> FDN language:
>
> If the end user receives xDSL service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligation under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall have three days to make the election as to which line xDSL service will be provisioned on as set forth in 2.10.2.5 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current xDSL services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's services.

BellSouth states that its addition of "and future" is intended to indicate that it is permitted to discuss with the end user how his FastAccess service would be provisioned prospectively, including

> (e.g. if a new loop is to be used, how the rewiring would be performed); how it would be billed (e.g. if the customer currently has a multiservice discount, how the billing would change); and any other necessary information the customer would need in order to proceed with the transition to FDN voice services. (BellSouth Position, p. 10)

BellSouth argues that prohibiting it from discussing such matters with the end user could undermine the transition being a seamless one; moreover, failure by BellSouth to disclose such pertinent information could subject BellSouth to customer complaints. Similarly, BellSouth's insertion of the word "FDN" in the last sentence is designed to clarify that customer referrals to FDN should only pertain to FDN-provided services; BellSouth believes that inquiries about FastAccess, a BellSouth-provided service, should be handled by BellSouth, not FDN.

FDN contends that if BellSouth must contact FDN's voice customer, such contact should be restricted to ". . .discussing and validating *current* facilities and services." Fundamentally, it appears FDN is concerned that during such customer contacts BellSouth will demean the FastAccess service that will be received by the customer due to his switching to FDN's voice service. FDN believes such contacts are a "license for mischief."

Finding

It is unclear as to what FDN means by "current facilities and services," in that it has agreed to BellSouth's proposal to provision FastAccess for customers who migrate to FDN voice on a separate, stand-alone loop. It appears inevitable that a FastAccess customer will experience a change to his current service, because the line on which the FastAccess is to be provisioned will no longer also have voice capabilities. Contrary to FDN's view, we believe that BellSouth would be negligent if it failed to inform the customer of any potential change in his service. However, we note that BellSouth's use of the phrase "and future" does not render the sentence in which it appears completely clear and unambiguous to us; nevertheless, we accept BellSouth's representation that customer contacts will be for the limited purposes described in its Position. We acknowledge FDN's concerns and trust that BellSouth's customer contact when service is modified would be minimized and competitively neutral.

Accordingly, we find that BellSouth's language shall be adopted.

G. BellSouth Section 2.10.2.8; no comparable FDN language

BellSouth language:

> If a second facility is not available for either the Standalone Service or the newly ordered UNE loop, then BellSouth shall be relieved from its obligation to continue to provide FastAccess service, provided that the number of locations where facilities are not available does not exceed 10% of total UNE orders with FastAccess.

BellSouth again argues that providing its FastAccess service on a standalone basis is the only way it can satisfy our decision without violating various federal orders. It asserts that if it were to put BellSouth's high-speed Internet access service on a UNE loop,

> BellSouth would be providing its tariffed DSL service for itself in a way that is different from how it would be providing it for other ISPs. This would put BellSouth in violation of the FCC's orders in the Computer Inquiry III cases; in violation of the FCC's Open Network Architecture orders; and in violation of its own federally filed CEI plan.

Moreover, BellSouth contends that if it put FastAccess on FDN's UNE loops, other ISPs would argue that BellSouth was obligated to make its interstate DSL offering available to them on UNE loops, too. As a compromise, BellSouth offers that if it is unable to provision standalone FastAccess on more than 10% of UNE orders, it would ". . .have to figure out for itself some other way of meeting its obligation to continue to provide FastAccess." (Position, p.11)

FDN objects vehemently to BellSouth's proposal, stating that it is ". . .unsupportable and would eviscerate the Commission's Arbitration Order." FDN states that the record in this proceeding provides no basis for BellSouth being excused even a single time from complying with this Commission's decision, let alone 10% of the time.

Finding

We note that BellSouth argued on reconsideration that to put its FastAccess service on a UNE loop would be a violation of its

FCC tariff. In the Reconsideration Order, we determined that we were not constrained by a FCC tariff and that under Section 251(d) we can impose additional requirements as long as they are not inconsistent with FCC rules, orders, or federal statutes. We concluded that BellSouth had not shown that our decision was in conflict with any controlling law and thus dismissed BellSouth's argument.

Our decision states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." We have found no basis in our orders or deliberations in this proceeding to carve out an exception, whether it be for a single customer or 10% of FDN's UNE orders. Accordingly, BellSouth must comply with our specific decision.

We find that Section 2.10.2.8 shall not be included in the parties' agreement. However, if BellSouth believes that it is important and correct to continue to provide FastAccess over a separate facility and such facilities are not available and the parties can not reach an agreement about how the Fast Access would be provisioned, parties can file a petition seeking relief as appropriate.

Accordingly, the parties shall file the final interconnection agreement in accordance with the specific findings as set forth in this Order within 30 days from the issuance date of the Order resolving the disputed contract language.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the parties shall file the final interconnection in accordance with the specific findings as set forth in this Order. It is further

ORDERED that the parties shall file the final interconnection agreement within 30 days from the issuance date of this Order resolving the disputed contract language. It is further

ORDERED that this docket shall remain open in order that the parties may file a final interconnection agreement.

By ORDER of the Florida Public Service Commission this 21st day of March, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak

Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-03-0690-FOF-TP ISSUED: June 9, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON

ORDER APPROVING INTERCONNECTION AGREEMENT

BY THE COMMISSION:

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August 15, 2001. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

Both parties requested an extension of time to file an interconnection agreement. On July 3, 2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.

On November 20, 2002, BellSouth filed its executed interconnection agreement with FDN. On February 5, 2003, BellSouth filed a replacement agreement that contains updated Florida rates for unbundled network elements. Although the parties were able to reach agreement on most points, disagreements remained as to the specific language that should be incorporated into the agreement to reflect the Commission's decision as to BellSouth's obligation " . . .to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." On this same date, BellSouth also submitted its Position in Support of its Proposed Contract Language, in which it set forth its proposed language where there was a dispute; Similarly, FDN's proposed language was contained in its Motion to Approve Interconnection Agreement filed contemporaneously. On December 2, 2002, FDN filed a Response to BellSouth's Position in Support of Proposed Contract Language.

On March 21, 2003, we issued Order No. PSC-03-0395-FOF-TP, in which we resolved the issues pertaining to what language should be contained in the parties' agreement to memorialize the FastAccess-related decisions. The parties were directed to file a final interconnection agreement incorporating the Commission's decision within 30 days.

We are vested with jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes.

On April 17, 2003, BellSouth and FDN filed for approval of their final executed amendment to their Interconnection Agreement, pursuant to Order No. PSC-03-395-FOF-TP; the amendment is in Attachment A to this Order, and is incorporated by reference into this Order. We have reviewed the agreement and amendment, and find that they comply with our decisions in the aforementioned Order, as well as the Act.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the arbitrated interconnection agreement between Florida Digital Network, Inc. and BellSouth Telecommunications, Inc. is hereby approved. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 9th Day of June, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15)

days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

AMENDMENT
TO THE
AGREEMENT BETWEEN
FLORIDA DIGITAL NETWORK, INC.
AND
BELLSOUTH TELECOMMUNICATIONS, INC.
DATED FEBRUARY 5, 2003

Pursuant to this Amendment, (the "Amendment"), Florida Digital Network, Inc. ("FDN"), and BellSouth Telecommunications, Inc. ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated February 5, 2003 ("Agreement") to be effective on the date of the last signature executing the Amendment.

WHEREAS, BellSouth and FDN entered into the Agreement on February 5, 2003 and;

WHEREAS, The Florida Public Service Commission has issued it's order in Docket 010098-TP resolving the parties disputed language for the BellSouth/Florida Digital Network Interconnection Agreement;

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. The Parties agree to add a new Section 2.10 to Attachment 2 of the Agreement, titled Continued Provision of FastAccess to FDN End User. Section 2.10 is set forth in Exhibit 1 of this Amendment, attached hereto and incorporated herein by this reference.

2. This Amendment shall be deemed effective on the date of the last signature of both Parties ("Effective Date").

3. All of the other provisions of the Agreement, dated February 5, 2003 shall remain in full force and effect.

4. Either or both of the Parties is authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the data indicated below.

Florida Digital Network, Inc.	BellSouth Telecommunications, Inc.
By:	By:
Name: Michael J Gallagher	Name: Elizabeth R.A. Shiroishi
Title: CEO	Title: Director
Date: 4/15/03	Date: 4/16/03

Exhibit I

2.10 Continued Provision of FastAccess to FDN End Users

2.10.1. In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides BellSouth® FastAccess® Internet Service ("FastAccess") to an end-user and FDN submits an authorized request to provide voice service to that end-user, BellSouth shall continue to provide FastAccess to the end-user who obtains voice service from FDN over UNE loops.

2.10.1.1 BellSouth may not evade any of its obligations under this subsection 2.10 by offering or providing any of the services or component services under this subsection through any affiliate, including, but not limited to, BellSouth.net, Inc. or successor by corporate merger.

2.10.1.2 Regardless of how BellSouth provisions its FastAccess to an end-user, when an end-user switches to FDN voice service, BellSouth's FastAccess will not be terminated, suspended or interrupted, except as may be expressly provided for herein, and BellSouth's continuation of its FastAccess to the end-user switching to FDN voice service shall be a seamless or transparent transition for the end user such that there shall be no more than a momentary disruption of FastAccess and voice services.

2.10.1.3 Where BellSouth's FastAccess could be provisioned over the high-frequency portion of a loop coexistent with FDN circuit-switched voice services on the same loop, BellSouth may elect to maintain the BellSouth FastAccess on the same loop such that the FastAccess is not altered when the end-user switches to FDN's voice service.

2.10.1.4 BellSouth may satisfy its obligations under this Section 2.10 by providing FastAccess on a BellSouth owned and maintained loop, ("Standalone FastAccess"), that is separate and distinct from the line FDN uses for voice services. Where feasible, and where a loop is available for FDN voice services that satisfies all of the standards set forth in this Agreement, BellSouth may elect to maintain FastAccess on the extant loop and FDN voice services will be provisioned over a second loop.

2.10.1.5 BellSouth may not impose an additional charge to the end-user associated with the provision of FastAccess on a second loop. Notwithstanding the foregoing, the end-user shall not be entitled to any discounts on FastAccess associated with the purchase of other BellSouth products, e.g., the Complete Choice discount.

2.10.1.6 BellSouth may request that the End User's FastAccess service be billed to a credit card. If the End User does not provide a credit card number to BellSouth for billing purposes, the parties shall cooperatively determine an alternative means to bill the End User. If the End User refuses to allow BellSouth access to his premises where necessary to perform any re-wiring, BellSouth may discontinue the provision of FastAccess service to the End User.

2.10.1.7 If the Parties are unable to reach agreement on an alternative means to billing the end user, the Parties may petition the Commission for relief as appropriate regarding the dispute.

2.10.1.8 In implementing the Commission's Order in Docket No. 010098-TP, BellSouth shall not create any additional barriers to FDN's ability to compete in the local exchange services market.

2.10.1.9 Nothing in this Section 2.10 shall require BellSouth to continue providing FastAccess to an end-user who fails to pay all charges associated with FastAccess or otherwise fails to comply with the end-user's Service Agreement with BellSouth or the applicable Acceptable Use policies for FastAccess.

2.10.1.10 In the event BellSouth elects to comply with this Section 2.10 by providing FastAccess on an FDN UNE Loop, FDN shall make available to BellSouth at no charge the high frequency spectrum on such UNE Loop for purposes of providing the underlying DSL transport.

2.10.2 Provisioning

2.10.2.1 FDN and BellSouth shall each establish a single point of contact ("SPOC") for purposes of the provision of FastAccess pursuant to this Section 2.10.

2.10.2.2 When FDN submits an LSR for a UNE loop, and there is a DSL USOC on the end-user's service record, the LCSC will auto-clarify the order.

2.10.2.3 Upon receiving the auto-clarified order, FDN shall notify the BellSouth SPOC, and the BellSouth SPOC shall determine whether the end-user is a FastAccess customer.

2.10.2.4 FDN and BellSouth will develop processes to promptly correct problems with or disconnections of FastAccess service to FDN voice end users.

2.10.2.5 If the end user does not have FastAccess but has some other DSL service, BellSouth shall remove the DSL service associated USOC and process the FDN LSR for the UNE loop.

2.10.2.6 If the end user receives FastAccess service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligations under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall have three days to make the election as to which line FastAccess service will be provisioned on as set forth in 2.10.2.7 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current and future FastAccess services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's FDN services.

2.10.2.7 After election by BellSouth as to which line FastAccess will be provisioned on (either the existing loop, or on a second facility) FDN will submit a revised LSR for the

conversion of the voice service to a UNE loop. If BellSouth elects to move the FastAccess to a new Stanvisions loop, FDN will submit an LSR with a due date 14 calendar days from submission to allow BellSouth sufficient time to transition the FastAccess service to the second line. If BellSouth elects to keep the FastAccess service on the current facilities and provision FDN voice services on the same or separate facilities, FDN will submit a revised LSR for voice service on such facilities using standard processes and intervals, and allow the FastAccess service to remain on the current facilities.

2.10.2.8 If BellSouth believes that it is important and correct to continue to provide Fast Access over a separate facility and such facilities are not available and the parties cannot reach an agreement about how the Fast Access would be provisioned, the Parties can file a petition with the Commission seeking relief as appropriate.

2.10.2.9 FDN authorizes BellSouth to access the entire UNE loop for testing purposes.

2.10.2.10 FDN and BellSouth agree that after the initial 90 days (and every 90 days thereafter) of provisioning FastAccess service in accordance with this Section 2.10, FDN and BellSouth will meet to discuss and negotiate in good faith any means for improving and streamlining the provisioning process.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc. FILE No. _____

Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers

EMERGENCY REQUEST
FOR DECLARATORY RULING

BELLSOUTH TELECOMMUNICATIONS, INC.

By its Attorneys:

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Date: December 9, 2003

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc. FILE No. _____

Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth To Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers

EMERGENCY REQUEST
FOR DECLARATORY RULING

Introduction and Summary

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Commission issue an expedited declaratory ruling to provide relief from a series of state commission decisions that are directly contrary to the *Triennial Review Order*,[1] as well as other sources of federal law. Those rulings are currently forcing BellSouth to provide service in a manner that this Commission has expressly decided should not be required, and, equally important, discourages competitors from investing in broadband facilities. A prompt decision by this Commission is urgently needed to vindicate the Commission's national broadband and competition policies. An expedited decision is equally necessary to enforce Congress's express determination "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *petitions for mandamus and review pending, United States Telecom Ass'n v. FCC*, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir.).

The issue presented here arises because some state commissions – including those in Florida, Kentucky, Louisiana, and most recently Georgia – have begun telling BellSouth to whom it must provide its broadband services, at what price, and on what terms and conditions. In direct contravention of this Commission's unanimous judgment in the *Triennial Review Order*, these state commissions have required BellSouth to provide either its wholesale broadband transmission or its retail broadband Internet access service over UNE loops leased by CLECs (either on a stand-alone basis or as part of the UNE platform ("UNE-P")).[2] In some instances, moreover, the states have specified that BellSouth may not alter the price it charges for its broadband service in such circumstances and must meet other required terms and conditions (such as a "seamless" transition).

These decisions violate the *Triennial Review Order*, which expressly holds that ILECs need not provide data services on CLEC UNE voice lines, *see* 18 FCC Rcd at 17141, ¶ 270, and they are contrary to Congress's policy of maintaining a "vibrant and competitive" market for Internet services "unfettered by . . . State regulation." Moreover, state-level regulation of broadband Internet access services creates a patchwork of regulatory burdens that is fundamentally inconsistent with the Internet and will work to prevent the Commission's development of the single national framework necessary to preserve the "vibrant and competitive" market that presently exists for the Internet.

Indeed, the uncertainty and inconsistency that arise from state regulation of interstate information services will inevitably diminish facilities-based broadband competition. If CLECs can force an ILEC to continue offering broadband services to the

[2] BellSouth's retail broadband Internet access service is marketed as BellSouth FastAccess® ("FastAccess").

CLECs' voice customers, their incentive to develop independent broadband capabilities and to invest in new and innovative broadband facilities is decreased. By the same token, such forced sharing deprives ILECs of the benefit of their investment in DSL deployment. Accordingly, these state decisions undermine incentives for investment and innovation in broadband, in direct conflict with one of Congress's and this Commission's urgent policy priorities.

As a legal matter, these state decisions violate this Commission's rules and orders for at least three independent reasons:

First, as noted, in the recent *Triennial Review Order*, the Commission held that incumbents are not required to provide broadband services over the same UNE loops that CLECs use to provide voice services. *See* 18 FCC Rcd at 17141, ¶ 270. The Commission explained that, because voice CLECs can either provide voice and data services to their customers or engage in line splitting with other CLECs, incumbents should not be forced to provide broadband services to CLEC UNE voice customers. *See id.* Indeed, the Commission concluded, such obligations would be contrary to the core congressional policy of encouraging investment and innovation in broadband. *See id.* ¶ 261. The *Triennial Review Order* further establishes that, where, as here, the Commission has found "no impairment," state commission decisions imposing the same obligation rejected by the Commission will almost invariably be preempted under 47 U.S.C. § 251(d)(3). *See id.* at 17101, ¶ 195.

The *Triennial Review Order*, moreover, invited parties to file petitions for declaratory ruling to address such improper state decisions. *See id.* BellSouth files this

Petition in response to that explicit invitation, and urgently requests that the Commission take action to nullify these unlawful decisions.

Second, and independent of this Commission's holding in the *Triennial Review Order*, for decades this Commission's *Computer Inquiry* decisions have established that interstate information services should remain free of public-utility regulation. State commission decisions that purport to regulate BellSouth's FastAccess service – that is, its retail DSL-based Internet access service – crash head-on into that federal policy. FastAccess is an unregulated interstate "information service" over which the Commission has previously preempted state regulation. By purporting to tell BellSouth to whom it must offer this service – and, moreover, specifying conditions for price and other terms of service – state commissions violate those established prohibitions.

Third, federal law is clear that state agencies generally lack authority to regulate interstate telecommunications services; that is particularly the case as to services offered under a federal tariff filed with this Commission.[3] BellSouth's wholesale DSL transmission service is provided under such an interstate tariff, and thus it is subject to the exclusive jurisdiction of this Commission. State commission decisions that purport to interpret that tariff or that impose terms and conditions on that service either by itself or as a component of BellSouth's FastAccess service are thus unlawful.[4]

Accordingly, in response to this Petition, the Commission should declare that:

1. Under the *Triennial Review Order* and other Commission determinations, state commissions are preempted under 47 U.S.C. § 251(d)(3), as well as other

[3] *See infra* notes 26-28.

[4] *See* discussion *infra* pp. 26-30.

statutory provisions, from requiring that BellSouth provide DSL-based services to CLEC UNE voice customers.

2. This Commission's determinations that interstate information services should remain free of regulation preempt state commission attempts to require BellSouth to provide DSL-based Internet access to CLEC UNE voice customers.

3. This Commission's exclusive jurisdiction over interstate telecommunications preempts state commission decisions purporting to govern the terms under which BellSouth provides its federally tariffed wholesale DSL transmission either by itself or as a component of BellSouth's DSL-based Internet access service.

Given the vital importance of these issues to broadband competition and the Commission's policies, the Commission should resolve these issues with the greatest possible dispatch.

Background

This Petition involves a recurring issue as to which a Commission decision declaring the law is urgently needed to resolve uncertainty and to ensure uniform treatment of broadband Internet access services.

In BellSouth's region alone, six state commissions have addressed the question of whether BellSouth must continue to provide broadband Internet access service over UNE facilities. In accord with this Commission's judgments, the South Carolina and North

Carolina commissions have determined that it would be improper to impose any such requirements.[5]

By contrast, four other state commissions – those in Florida, Georgia, Louisiana, and Kentucky – have, in various, mutually inconsistent ways, ordered BellSouth to provide either its federally tariffed wholesale DSL transmission service and/or its retail FastAccess service[6] to CLEC voice customers. Other state commissions have similar issues pending before them. Thus, BellSouth is subject to inconsistent state determinations as to its interstate broadband services, and it is presently attempting to implement the unique requirements of each of these rulings.

Florida. The Florida Public Service Commission has conducted, and continues to conduct, several proceedings concerning the terms and conditions under which BellSouth offers its wholesale and retail broadband services.

In its Final Order on Arbitration, *Petition by Florida Digital Network, Inc. for Arbitration*, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (Fla. Pub. Serv. Comm'n June 5, 2002) ("*FDN Final Order*") (Attachment 3), the Florida commission ordered BellSouth to *continue* to provide FastAccess to existing customers that subsequently choose another company to provide their voice service over UNE loops. Although the Florida commission conceded that, under this Commission's *Computer*

[5] *See* Order on Arbitration, *Petition of IDS Telcom, LLC for Arbitration*, Docket No. 2001-19-C, Order No. 2001-286, at 28 (S.C. Pub. Serv. Comm'n Apr. 3, 2001) (Attachment 1 hereto) (dismissing as "without merit" the claim that a decision not to provide DSL service over a CLEC's loop "is somehow anticompetitive"); Order and Advisory Opinion Regarding Section 271 Requirements, *Application of BellSouth Telecommunications, Inc. To Provide In-Region, InterLATA Service*, Docket No. P-55, Sub 1022, at 204 (N.C. Utils. Comm'n July 9, 2002) (Attachment 2).

[6] FastAccess is the trade name that BellSouth uses for its retail high-speed DSL Internet access service.

Inquiry orders, it lacked authority to regulate FastAccess, it nevertheless found that it had authority to order this relief because, the Florida commission believed, its decision regulated only local voice service. The Florida commission ultimately detailed multiple terms and conditions implementing its regulation of FastAccess.[7]

The Florida commission imposed similar obligations on BellSouth in the course of the BellSouth-Supra Telecommunications ("Supra") arbitration.[8] BellSouth's challenges to both the Florida Digital Network ("FDN") and Supra decisions are pending in the United States District Court for the Northern District of Florida (Nos. 4:02-CV-325-SM & 4:03-CV-212-RH/WCS).

Additionally, the Florida commission has before it a pending case, Docket No. 020507-TP, involving a complaint filed by the Florida Competitive Carriers Association ("FCCA"). That complaint seeks, in part, to extend the Florida commission's prior rulings to require BellSouth to provide FastAccess to customers that were not receiving

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[7] In particular, the Florida commission specified that: (1) the ruling is limited to FastAccess service and does not apply to xDSL services such as the underlying broadband transmission; (2) any pricing discounts available to customers that purchase the bundle of services including Complete Choice® and FastAccess need not be made available to customers who receive FastAccess only; (3) aside from those exceptions, BellSouth may not generally charge different rates to stand-alone FastAccess customers than it does to BellSouth voice customers; (4) BellSouth can request payment via credit card but, if a customer refuses, it is incumbent on the parties to find an alternative method of payment; (5) BellSouth can discontinue FastAccess service if access to premises is denied to perform rewiring; (6) BellSouth is permitted to contact CLEC customers to ensure that FastAccess service is continued; (7) BellSouth may provide FastAccess service on a separate line if the transition is "seamless"; and (8) BellSouth is not relieved from its obligation to continue to provide FastAccess service if a second facility is not available. *See* Order Resolving Parties' Disputed Language, *Petition by Florida Digital Network, Inc. for Arbitration*, Docket No. 010098-TP, Order No. PSC-03-0395-FOF-TP (Fla. Pub. Serv. Comm'n Mar. 21, 2003) (Attachment 5).

[8] Order on Procedural Motions and Motions for Reconsideration, *Petition by BellSouth Telecommunications, Inc. for Arbitration*, Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP (Fla. Pub. Serv. Comm'n July 1, 2002) (Attachment 7).

such service when they obtained voice service from a CLEC, but subsequently requested it. The FCCA complaint also seeks to extend the application of the FDN and Supra rulings to all competitive carriers. The Florida commission has held a hearing on this complaint, but has not yet resolved it.

Kentucky. In the context of a section 252 arbitration proceeding between BellSouth and Cinergy Communications Company, the Kentucky Public Service Commission voted 2-1, over the dissent of its chairman, to order BellSouth to provide its wholesale federally tariffed DSL transmission service to Internet service providers ("ISPs") on CLEC UNE voice lines. The Kentucky commission did not, however, require BellSouth to provide its retail FastAccess service over the UNE-P or UNE-L. Copies of the relevant orders of the Kentucky commission are Attachments 8 to 10 hereto. BellSouth has sought federal court review of the Kentucky decision. *See BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, No. 03-23-JMH (E.D. Ky.).

Louisiana. On April 4, 2003, the Louisiana Public Service Commission issued *Clarification Order R-26173-A*,[9] requiring BellSouth to continue to provide its wholesale DSL service and its retail FastAccess service to customers that elect to change their voice service to a competitive carrier utilizing the UNE-P. BellSouth has sought review of the Louisiana commission's decision in federal court, where briefing is underway. *See BellSouth Telecomms., Inc. v. Louisiana Pub. Serv. Comm'n*, No. 03CV372-D-M2 (M.D. La.).

[9] Clarification Order R-26173-A, *BellSouth's Provision of ADSL Service to End-Users over CLEC Loops*, Docket R-26173 (La. Pub. Serv. Comm'n Apr. 4, 2003) ("*Clarification Order R-26173-A*") (Attachment 12).

Georgia. On April 29, 2002, MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively, "WorldCom") filed a complaint before the Georgia Public Service Commission, demanding that the Georgia commission order BellSouth to discontinue its policy of refusing to provide FastAccess service to WorldCom voice customers over the high-frequency portion of their voice lines and to permit WorldCom to provide UNE-P voice service over the same lines BellSouth uses to provide FastAccess service.

On October 21, 2003, the Georgia commission voted 3-2 that BellSouth's policy of offering FastAccess only on BellSouth voice lines was contrary to its interconnection agreement with WorldCom (because it was allegedly discriminatory), as well as in violation of a provision of Georgia law prohibiting anticompetitive practices.[10]

Pending Section 252 Cases. In addition to these decisions, ITC^DeltaCom has filed a petition for arbitration under section 252 of certain unresolved interconnection disputes before the state commissions in Alabama, Tennessee, and Mississippi requesting arbitration of the following issue: "Should BellSouth continue providing the end user ADSL service where ITC^DeltaCom provides UNE-P local service to that same end user on the same line?" Attachment 14 at 17; Attachment 15 at 18; Attachment 16 at 17.

The controversy over this issue is not limited to the BellSouth region. To BellSouth's knowledge, state commissions in Ohio, Michigan, and Illinois have addressed and, to date, rejected requirements akin to those at issue here.[11] Related issues

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[10] *See* Order on Complaint, *Petition of MCImetro Access Transmission Services, LLC et al. for Arbitration*, Docket No. 11901-U (Ga. Pub. Serv. Comm'n Nov. 19, 2003) (Attachment 13).

[11] *See* Arbitration Award, *Petition of MCImetro Access Transmission Services, LLC for Arbitration*, Case No. 01-1319-TP-ARB (Ohio Pub. Utils. Comm'n Nov. 7,

are presently pending before the Maryland Public Service Commission.[12] The issue may well be presented elsewhere as well.

Thus, although this Commission has previously determined, as part of its established federal framework, that BellSouth is not required to provide broadband services to CLEC UNE customers, BellSouth is presently undertaking the costly and burdensome efforts of attempting to comply with these multiple and inconsistent state requirements for provisioning its broadband services.

Analysis

I. STATE COMMISSION DECISIONS REQUIRING BELLSOUTH TO PROVIDE BROADBAND TRANSMISSION AND/OR BROADBAND INTERNET ACCESS ARE CONTRARY TO, AND PREEMPTED BY, THE DECISIONS OF THIS COMMISSION.

This Commission established in the *Triennial Review Order* that states may not impose unbundling obligations that this Commission has considered and rejected. In the same *Triennial Review Order*, the Commission expressly rejected the same obligation that is at issue here and that has been imposed by four state commissions in BellSouth's region. Accordingly, this Commission should expeditiously declare those state commission decisions to be contrary to federal law and preempted.

a. This Commission established a clear preemption rule in the *Triennial Review Order*. It held that, where the Commission has determined that an ILEC need not

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2002) (Attachment 17); Order Denying Rehearing, *Ameritech Michigan's Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996*, Case No. U-12320, at 6 (Mich. Pub. Serv. Comm'n Mar. 29, 2002) (Attachment 18); Phase I Interim Order on Investigation, *Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. 01-0662, at 226 (Ill. Commerce Comm'n Feb. 6, 2003) (Attachment 19).

[12] *See* Complaint of CloseCall America, Inc., Docket No. 8927 (Md. Pub. Serv. Comm'n filed May 2, 2002).

make available a certain facility or functionality on an unbundled basis, that determination of federal law will almost invariably preclude a state commission from reaching a contrary judgment under state or federal law.

The Commission stated that a state agency has no authority to order unbundling of a network element that the Commission has determined "must not be unbundled, in any market, pursuant to federal law." *Triennial Review Order*, 18 FCC Rcd at 17096, ¶ 187. "[S]etting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers." *Id.*

A state commission may not avoid this result by purporting to act under state, rather than federal, law. State commissions are "precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in [the *Triennial Review Order*]." *Id* at 17099-100, ¶ 192 & n.612 (citing, *inter alia, Geier v. American Honda Motor Co* , 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause)). Thus, the Telecommunications Act of 1996 ("1996 Act") specifically "prevent[s] states from taking actions under state law that conflict with [the FCC's] framework and create disincentives for investment." *Id.* at 17101, ¶ 196; *see also id.* at 17100, ¶ 193 ("We disagree with those commenters that maintain that, because we have permitted states to add UNEs to our national list in the past, we cannot limit their ability to continue to do so.").

In sum, "[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus

has found that unbundling that element would conflict with the limits in [47 U.S.C §] 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such [a] decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C)." *Id* at 17101, ¶ 195.

The Commission expressly invited aggrieved parties to file petitions for declaratory ruling such as this one where state commission determinations are contrary to these principles. *See id.*

b. This analysis applies directly here. In the same *Triennial Review Order* in which the Commission established these preemption principles, the Commission addressed the *same issue* that these state commissions have faced in the proceedings discussed above – whether ILECs such as BellSouth should be forced to continue providing DSL-based services on CLEC UNE lines – and it unequivocally determined that ILECs such as BellSouth need not provide DSL transmission (and thus DSL-based Internet access as well) on UNE loops leased to CLECs.

CompTel raised this issue in the *Triennial Review* proceeding. In its comments in that proceeding, CompTel requested that the Commission mandate that ILECs continue to provide DSL-based services over UNE loops that CLECs use for voice service. CompTel argued there that the Commission should require ILECs to offer access to just the "low-frequency portion of the loop" – the portion used for voice service – as a UNE so that the ILECs would be required to continue providing broadband data services over the high-frequency portion of the loop. CompTel argued that this new UNE was necessary to address ILECs' alleged "tying" of voice and data services by refusing to

provide their data services except to their own voice customers. CompTel stated that, "[f]or years, the ILECs have tied their local voice services with their xDSL products. As a result, a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice service from a competing carrier often is rejected by the ILEC."[13]

The Commission rejected CompTel's argument. After expressly noting that many incumbents refuse to provide DSL on CLEC UNE lines, *Triennial Review Order*, 18 FCC Rcd at 17134, ¶ 259, the Commission stated:

> We disagree with CompTel that we should separately unbundle the low frequency portion of the loop, which is the portion of the copper local loop used to transmit voice signals. *We conclude that unbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer xDSL service.*

Id. at 17141, ¶ 270 (emphasis added; footnote omitted). The Commission thus made it absolutely clear that, "[i]n the event that the customer ceases purchasing voice service from the incumbent LEC, either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service." *Id.* at 17140-41, ¶ 269. This has been a consistent Commission policy since the 1999 *Line Sharing Order*.[14] *See Triennial Review Order*, 18 FCC Rcd at 17140, ¶ 269 n.798 (readopting finding contained in the *Line Sharing Order* that, if a customer switches

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[13] Comments of the Competitive Telecommunications Association, CC Docket Nos. 01-338 *et al.*, at 43 (FCC filed Apr. 5, 2002).

[14] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*"), *vacated and remanded, United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

voice service from an incumbent LEC to a competitive LEC, "the competitive LEC must purchase the entire loop to continue providing that customer with xDSL service").[15]

The Commission has thus held as a matter of national policy that the low-frequency part of the loop is not a UNE, or, put differently, that ILECs have no obligation to continue to provide DSL services to CLEC UNE voice customers.[16] Because, as discussed above, the *Triennial Review Order* establishes that state commissions cannot countermand such refusals to require a specific unbundling arrangement, that determination is dispositive here.

Although the state commission decisions discussed above use different terminology, they require BellSouth to continue to provide DSL-based services to CLEC UNE voice customers. *See, e.g.*, Order, *Petition of Cinergy Communications Co. for Arbitration*, Case No. 2001-432, at 4 (Ky. Pub. Serv. Comm'n Oct. 15, 2002) (Attachment 9) ("BellSouth may not refuse to provide DSL pursuant to a request from an [ISP] who serves, or who wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P."); *Clarification Order*

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[15] *See also* Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, 9100-01, ¶ 157 & n.562 (2002); Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18517-18, ¶ 330 (2000), *appeal dismissed, AT&T Corp. v. FCC*, No. 00-1295 (D.C. Cir. Mar. 1, 2001); Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, 17 FCC Rcd 17595, 17683, ¶ 164 (2002); Memorandum Opinion and Order, *Application by BellSouth Corporation, et al., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828, 25922, ¶ 178 (2002).

[16] BellSouth does not object to continuing to provide FastAccess on CLEC resold voice lines. Its current policy is to continue to offer service in that context, where BellSouth continues to control the relevant facility.

R-26173-A at 16 ("BellSouth is to continue to provide its wholesale and retail DSL service to customers who choose to switch voice providers to a [CLEC] utilizing the Unbundled Network Element Platform.").[17] That is precisely what the Commission has concluded that ILECs should *not* be required to do.

Preemption is all the more warranted here because the Commission's decision not to require this particular arrangement was grounded in the core policies that preclude unbundling where impairment does not exist: the need to preserve incentives to engage in facilities-based competition. As the Commission explained in the *Triennial Review Order*, in determining whether to mandate unbundling, it must balance the "market barriers faced by new entrants," as well as the "societal costs" of sharing, with the goal of "ensur[ing] that investment in telecommunications infrastructure will generate substantial, long-term benefits for all consumers." 18 FCC Rcd at 16984-85, ¶ 5. Part of that task involves the recognition that "excessive" sharing requirements "tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology." *Id.* at 16984, ¶ 3.

In this context, the Commission concluded that the right incentives to invest in and deploy new technologies – to engage in facilities-based competition – are created

[17] The Florida commission's *FDN* decision permits BellSouth to provide service on a stand-alone loop in some circumstances. Such a decision is equally contrary to the Commission's rationale, which applies by its terms to any obligation on the part of ILECs to provide DSL service to a CLEC voice-service customer – whether by entering into an arrangement to "share" a line with a CLEC or by offering DSL service over a stand-alone loop. The Commission recognized that, once a CLEC has access to the loop, there is no obstacle to its providing *both* voice and DSL (data) service – either independently or in conjunction with another provider. *See Triennial Review Order*, 18 FCC Rcd at 17135, ¶ 261, 17141, ¶ 270. Under these circumstances, requiring the ILEC to continue to provide one kind of service in conjunction with a CLEC providing the other would impair the pro-competitive, consumer-welfare-enhancing incentive for competitors to develop voice-and-data arrangements that compete in *both* respects with the incumbent. *Id.*

when a CLEC cannot rely on the ILEC to provide data (or voice) services to CLEC UNE customers. Instead, CLECs should be encouraged to exploit both the voice and data capabilities of a UNE loop. The Commission explained that "readopting [its] line sharing rules on a permanent basis would likely discourage innovative [line-splitting] arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. We find that such results would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." *Id.* at 17135, ¶ 261.

The same analysis applies here, where CLECs, instead of relying on ILEC data services, can engage in innovative line-splitting arrangements to provide voice and data services and thus create "greater product differentiation" between ILEC and CLEC offerings. Indeed, Covad has recently announced broad agreements with AT&T and MCI to do just that. Covad's agreement with MCI provides MCI "with access to Covad's nationwide network, which covers more than 1,800 central offices serving more than 40 million homes and businesses in 35 states."[18] AT&T's deal with Covad similarly anticipates a "nationwide rollout of DSL service that can be packaged as part of an AT&T local and long-distance communications bundle. . . . The new offer, which utilizes a nationwide data network provided by Covad Communications, enables consumers to bundle AT&T's DSL service with other AT&T local and long-distance services."[19]

It is such voluntary agreements that this Commission's *Triennial Review Order* is designed to encourage. By contrast, the types of regulatory mandates here are contrary to

[18] *Wireline*, Comm. Daily, Sept. 3, 2003, at 5.

[19] *AT&T Launches Bundled DSL Services in Four New States*, Espicom Bus. Intelligence (Sept. 12, 2003).

the express judgment of the Commission. These state commission broadband decisions undermine the federal incentives for CLECs to provision their own broadband services or engage in innovative line splitting arrangements in direct conflict with the Commission's established federal framework. They are thus preempted. *See Triennial Review Order*, 18 FCC Rcd at 17101, ¶ 196 ("We find that our federal framework . . . offers the certainty and stability necessary to enable parties to make investment decisions. . . . [W]e find that the limitations embodied in section 251(d)(3)(B) and (C) will prevent states from taking actions under state law that conflict with our framework and create disincentives for investment.").

II. STATE PUBLIC SERVICE COMMISSIONS LACK AUTHORITY TO REGULATE BROADBAND INTERNET ACCESS SERVICES.

A. This Commission Has Established As Federal Policy That Interstate Information Services Should Be Unregulated.

This Commission's long-established policy is that interstate information services must remain *unregulated* The origins of this federal "hands off" policy with respect to information services can be traced back at least 30 years through the Commission's several *Computer Inquiry* proceedings. Beginning with its landmark *Computer I* decision in 1971, the Commission has consistently determined that what was then known as "data processing" was a highly competitive industry not in need of regulation. The Commission therefore resolved *not* to regulate "data processing services as such." Final Decision and Order, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267, 268, ¶ 4 (1971) ("*Computer I*").

Computer I led to some confusion as to when computer-processing activity should be deemed "data processing" rather than communications. To resolve this issue, in its 1980 *Computer II* decision, the Commission deregulated the provision of *all* computer-enhanced services (as well as the computers themselves and other customer premises equipment, or "CPE"). *See* Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 428, ¶ 114, 447, ¶ 160 (1980) ("*Computer II*"). There thus arose a fundamental distinction between "basic" services subject to regulation and deregulated "enhanced" services (known as "information services" under the 1996 Act[20]). *See* 77 F.C.C.2d at 428, ¶ 114 ("we are left with two categories of services – basic and enhanced"). The Commission made very clear its determination that the market for enhanced services must remain unregulated to create maximum consumer benefit. It explained that "***the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.***" *Id.* at 387, ¶ 7 (emphasis added).

Furthermore, the FCC said, "[e]xperience gained from the competitive evolution of varied market applications of computer technology offered since the *First Computer Inquiry* compels us to conclude that the *regulation of enhanced services is simply unwarranted.*" *Id.* at 433, ¶ 128 (emphasis added). This was so because, among other things, the enhanced services market was already "truly competitive." *Id.* at 428,

[20] *See* First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21955-56, ¶ 102 (1996) ("all of the services . . . previously considered to be 'enhanced services' are 'information services'").

¶¶ 113-114, 430, ¶ 119, 433, ¶ 128. Moreover, "[i]nherent in the offering of enhanced services is the ability of service providers to custom tailor their offerings to the particularized needs of their individual customers," so that "to subject enhanced services to a common carrier scheme of regulation . . . would negate the dynamics of computer technology in this area." *Id.* at 431-32, ¶ 123.

Although declining to regulate enhanced services itself, the Commission retained jurisdiction over such services, preempting any attempts by state or local authorities to impose inconsistent regulations of their own. *E.g.*, *id.* at 432, ¶ 125 ("[W]e find that the enhanced services under consideration in this proceeding . . . fall within the subject matter jurisdiction of this Commission."); Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512, 541, ¶ 83 n.34 (1981) ("In this proceeding we have to date preempted the states . . . . States, therefore, may not impose common carrier tariff regulation on a carrier's provision of enhanced services.").

Thus, there can be no serious dispute that the Commission has precluded state regulation of interstate information services. As the Commission has stated, a "major goal [that the Commission] sought to achieve in the *Computer II* decisions was to prevent uncertainty regarding the provision of competitive CPE and enhanced services which could arise if there were a threat that *regulation by this or other agencies* might inhibit unregulated providers or create impediments to innovation by carriers and others." Report and Order, *Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies*, 95 F.C.C.2d 1117, 1126, ¶ 18 (1983) (emphasis added).

The D.C. Circuit upheld the Commission's exercise of preemptive authority. The court explained that, "[f]or the federal program of deregulation to work, *state regulation of . . enhanced services has to be circumscribed.*" *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982) (emphasis added); *see also id.* at 214 (preemption of state regulation is "justified . . . because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE"). Accordingly, that court held, "state regulatory power must yield to the federal." *Id.* at 216.

Subsequent Commission orders likewise recognized that state regulation of interstate information services would interfere with federal policies. For instance, in its initial *Computer III* decision, the FCC reaffirmed its preemption of state regulation of enhanced services. *See* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 1127, ¶ 347 (1986) ("*Computer III*") ("we do not alter our conclusion in *Computer II* that such [enhanced] services must remain free of state and federal regulation"). Although the Ninth Circuit questioned that policy as to purely intrastate service,[21] there is no doubt that the FCC may lawfully preempt state commission decisions as to interstate (and jurisdictionally mixed) information services that undermine or impede the federal policy that "the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network." 77 F.C.C.2d. at 387, ¶ 7.

[21] *See California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990).

B. The Commission and the Federal Courts Have Previously Preempted State Commission Decisions That Undermined Federal Policy As to Enhanced Services.

The Commission has previously exercised its authority expressly to preempt state commission decisions that are incompatible with the federal policy of deregulation of enhanced/information services. In particular, in the *Memory Call Order*,[22] the Commission preempted the Georgia commission's attempt to regulate an enhanced service (voice mail) because it "displace[d]" the "federal public interest determination" as to treatment of enhanced services. 7 FCC Rcd at 1623, ¶ 20.

The Commission first determined that the Georgia commission's decision regulated interstate uses of voice mail, *see id* at 1621, ¶ 12, and that it was not practical to offer separate interstate and intrastate voice mail, *see id.* at 1621-22, ¶¶ 13-16. The Commission then decided that the state regulation (which "froze" BellSouth's ability to offer voice mail) was preempted because it "thwart[ed] achievement of the federal public interest objective[]" of allowing "BOCs to make use of their substantial telecommunications resources to provide interstate enhanced services to the public." *Id.* at 1623, ¶¶ 20, 22.

Applying a similar analysis, a federal district court in Minnesota recently concluded that a state commission lacks authority to regulate information services. In *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, No. 03-5287, 2003 U.S. Dist. LEXIS 18451 (D. Minn. Oct. 16, 2003), the Minnesota district court enjoined the Minnesota Public Utilities Commission from regulating an information service, ruling

[22] Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 (1992) ("*Memory Call Order*").

that federal law preempted such state regulation. As the Commission is aware, at issue in *Vonage* was an Internet-based technology used to provide voice communications via a high-speed Internet connection (*i.e* , "IP telephony"). *See id* at *3.[23]

Citing this Commission's *Computer Inquiry* decisions, as well as the 1996 Act (which codifies the distinction between regulated telecommunications services and unregulated enhanced/information services), the court ruled that the Minnesota commission had no authority to impose requirements on this information service. The court held that, to the extent that Minnesota regulations had the effect of regulating information services, they were "in conflict with federal law and must be pre-empted." *Id.* at *25, *27. "[IP telephony] services necessarily are information services, and *state regulation over [such] services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated.*" *Id.* at *27 (emphasis added). In addition, the court held that Congress had expressed an "intent to occupy the field of regulation of information services," *id.* at *27-*28, such that the Minnesota commission's order was preempted as an "obstacle to the 'accomplishment and execution of the full objectives of Congress,'" *id.* at *29 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)).

[23] BellSouth does not cite this decision in support of the proposition that IP telephony is in fact an information service, an issue that is not relevant here and as to which BellSouth does not take a position in this filing. Rather, this decision is important because it demonstrates that, for services that do qualify as information services, state commission jurisdiction is preempted.

C. The Commission's Orders Compel the Conclusion That State Commission Decisions Purporting To Require That BellSouth Offer FastAccess to Particular Customers on Particular Terms and Conditions Are Preempted.

This Commission's prior decisions compel the conclusion that state commission orders (such as those in Florida, Louisiana, and Georgia) that attempt to dictate the terms and conditions of BellSouth's broadband Internet access services are preempted.

As an initial matter, FastAccess is an information service under 47 U.S.C. § 153(20). This Commission has determined that "Internet access services" are generally "appropriately classed as information, rather than telecommunications, services," and has tentatively reached that same conclusion with respect to BOCs.[24] Moreover, the recent Ninth Circuit decision confirms that cable-based Internet access services are information services; it merely suggests (wrongly, in BellSouth's view) that these Internet access services may also include a telecommunications service.[25] To the extent that is true in the wireline context, that telecommunications service is the wholesale DSL transmission service that BellSouth separately makes available under federal tariff, and which BellSouth does not claim is covered by this Commission's preemption of state regulation of enhanced/information services.

Moreover, these state decisions are not limited to intrastate communications. As this Commission has held, Internet communications are predominately interstate. *See* Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for*

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[24] Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11536, ¶ 73 (1998); *see* Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3030, ¶ 20 (2002).

[25] *See Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

ISP-Bound Traffic, 16 FCC Rcd 9151, 9175, ¶ 52 (2001) ("ISP traffic is properly classified as interstate, and it falls under the Commission's section 201 jurisdiction.") (footnote omitted), *remanded*, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003); Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22476, ¶ 19 (1998) ("*GTE Tariff Order*") (concluding that Internet access is interstate because "the communications at issue here do not terminate at the ISP's local server . . . but continue to the ultimate destination or destinations, very often at a distant Internet website"). As with voice mail, BellSouth does not market, and no consumer would buy, a separate, wholly intrastate Internet access product.

Finally, state commission decisions that purport to require BellSouth to provide service to consumers that BellSouth would not choose to serve and, moreover, to set the terms under which BellSouth offers that service thwart the Commission's policy that "the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network." *Computer II*, 77 F.C.C.2d. at 387, ¶ 7. Instead of having market forces determine whether BellSouth will choose to offer FastAccess to a particular customer, states are purporting to tell BellSouth to whom it must offer its services (*i.e.*, CLEC UNE voice customers) and on what terms (*e g* , with only a minimal disruption, at the same rate as BellSouth voice customers, etc.). Those are the very forms of public-utility regulation that this Commission and the states impose on telecommunications services, but that, under this Commission's decisions (as well as court decisions such as *Vonage*), are unlawful as to information services. As in *Memory Call*, this Commission should

clear away any possible confusion on this issue and declare that obligations to provide DSL-based Internet access to any particular customers or on any particular terms are unlawful and preempted.

Indeed, the states' lack of authority to impose such regulations on interstate information services such as FastAccess is so plain that, in the decisions to date, they have not even contested that proposition. The Florida commission, for instance, has conceded that BellSouth's FastAccess service is not subject to regulation. Citing this Commission's *Computer II* decision, the state commission expressly "*agree[d]*" with BellSouth that it is an "enhanced, *nonregulated*, nontelecommunications Internet access service." *FDN Final Order* at 8 & n.3 (emphases added; internal quotation marks omitted). The Florida commission thus tried to justify its decision on the ground that it was *not* in fact regulating FastAccess. It stated that its decision "should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service," and in fact was simply exercising authority over the local voice market. *Id.* at 8, 11.

That is a transparent dodge. Under any rational understanding, a state commission decision that requires BellSouth to continue offering a service regulates that service. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421-22 (5th Cir. 1999) (Commission rules preventing the disconnection of intrastate service for failure to pay toll charges was a "regulation" of the intrastate service because "it dictate[d] the circumstances under which local service must be maintained'). The state commissions' attempt to characterize this regulation as something else does not change the result.

III. STATE COMMISSIONS LACK AUTHORITY TO REGULATE INTERSTATE COMMUNICATIONS.

Separate and apart from these other barriers to state regulation, state commission decisions of the sort at issue here are unlawful because this Commission has exclusive authority to regulate interstate telecommunications.[26] Multiple court cases confirm that authority.[27]

Of particular relevance here, the Commission has concluded that wholesale DSL transmission service, when used for Internet access, is jurisdictionally interstate under the 10% rule applicable to such special access services. *See GTE Tariff Order*, 13 FCC Rcd at 22476, ¶ 19. The Commission thus concluded that DSL transmission for Internet access is an interstate "special access service . . . warranting *federal* regulation" and, in particular, federal tariffing. *Id.* at 22480, ¶ 25 (emphasis added). Indeed, because the Commission determined that DSL transmission service is subject to federal, not state, jurisdiction under the 10% rule, it was unnecessary for the Commission to consider arguments whether state regulation was preempted on any other ground: "In light of our

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[26] *See* 47 U.S.C. § 151 (creating FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio"); Third Report and Order, *MTS and WATS Market Structure*, 93 F.C.C.2d 241, 261, ¶ 58 (1983) ("the state[] would not acquire jurisdiction to regulate . . . interstate access even if [the FCC] were abolished"), *aff'd in relevant part, remanded in part, NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); Memorandum Opinion and Order, *Petitions of MCI Telecomms. & GTE Sprint*, 1 FCC Rcd 270, 275, ¶ 23 (1986) (stressing the Commission's "exclusive jurisdiction over interstate communications").

[27] *See Crockett Tel. Co. v FCC*, 963 F.2d 1564, 1566 (D.C. Cir. 1992) (Commission has "exclusive jurisdiction to regulate interstate common carrier services"); *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930) ("neither these interstate rates nor the division of the revenue arising from interstate rates [is] a matter for the determination [of the state]"); *NARUC v. FCC*, 737 F.2d 1095, 1111 (D.C. Cir. 1984) (limitation on state authority over interstate services "is essential to the appropriate recognition of the competent governmental authority in each field of regulation") (internal quotation marks omitted); *New England Tel. & Tel. Co. v. AT&T*, 623 F. Supp. 1231, 1234 (D. Me. 1985) ("It is well settled that the FCC has exclusive jurisdiction over . . . interstate service.").

finding that GTE's ADSL service is subject to *federal jurisdiction* under the Commission's mixed use facilities rule and properly tariffed as an interstate service, we need not reach the question of whether the inseverability doctrine applies." *Id.* at 22481, ¶ 28 (emphasis added).

This Commission's determination that it has jurisdiction over DSL transmission services as used for Internet access and that these services should be subject to federal tariffing creates a barrier to state decisions that seek to impose terms and conditions either on (1) wholesale tariffed DSL services (as in Kentucky) or (2) as to BellSouth's retail DSL-based Internet access service, as to which wholesale DSL transmission is an input. *See* 47 C.F.R. § 64.901(b)(1) (requiring BOCs to apply to themselves the same terms and conditions for the transmission component of an information service as they make available to other carriers under tariff).

As federal courts have repeatedly held, state commissions have no authority to regulate the terms and conditions of services offered under a federal tariff; indeed, if they did, that would undermine the uniformity that a federal tariff is intended to create.[28] If

[28] *See Public Serv. Co. v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998) ("[T]he Supreme Court has ruled that where the FERC has lawfully determined a rate, allocation, or other matter, a state commission cannot take action that contradicts that federal determination. And even without explicit federal approval of a rate, the Court has treated a rate reflected in a FERC tariff as setting a rate level binding on a state commission in regulating the costs of the purchasing utility.") (citing *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-74 (1988)); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-66 (1986); *see also Ivy Broad. Co. v. AT&T Co.*, 391 F.2d 486, 491 (2d Cir. 1968) ("The published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements."); *Appalachian Power Co. v. Public Serv. Comm'n*, 812 F.2d 898, 904 (4th Cir. 1987) ("states are powerless to exert authority that potentially conflicts with FERC determinations regarding rates or agreements affecting rates"); *Duke Energy Trading & Mktg, L.L.C. v. Davis*, 267 F.3d 1042, 1056 (9th Cir. 2001) (terms and conditions in federally approved rate schedules and tariffs "preempt conflicting regulations adopted by

BellSouth must provide its federally tariffed service under one set of conditions in Kentucky (where the state commission has required that BellSouth provide it over CLEC UNE lines) and a different set of terms in South Carolina (where the state commission has refused to impose such an obligation), there will be no single federally tariffed service, but rather a multitude of different services depending on the judgment of different state commissions. That is unlawful. As the Second Circuit has explained, "[t]he published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements."[29] Accordingly, the relevant rule is that, as Judge Posner has explained, state law cannot be used to vary a federally tariffed service: "Federal law does not merely create a right; it occupies the whole field, displacing state law."[30] For these reasons, two federal courts have held this year that state commissions are prohibited from regulating federally tariffed, federally regulated, interstate special access services.[31]

Likewise, some state commissions have affirmatively acknowledged that they lack authority to regulate federally tariffed services because that would entail an unlawful

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the States"), *cert. denied*, 535 U.S. 1112 (2002); *Entergy La., Inc. v. Louisiana Pub. Serv. Comm'n*, 123 S. Ct. 2050, 2053, 2056 (2003).

[29] *Ivy Broad. Co.*, 391 F.2d at 491.

[30] *Cahnmann v. Sprint Corp* , 133 F.3d 484, 488-89 (7th Cir. 1998); *see AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) (filed tariff determines terms and conditions as well as rates, and neither may be altered).

[31] *See Qwest Corp. v. Scott*, No. 02-3563, 2003 WL 79054, at *10 (D. Minn. Jan. 8, 2003) (state regulation was expressly preempted because this Commission had "determined that mixed-use special access is to be classified as interstate unless it contains 10% or less interstate traffic"); *Illinois Bell Tel. Co. v. Globalcom, Inc.*, No. 03 C 0127, 2003 WL 21031964, at *2 (N.D. Ill. May 6, 2003) (holding that state commission lacked jurisdiction to invalidate federal tariff's early termination charge because the special access service at issue was "*assigned to the FCC's jurisdiction under federal tariffs*") (emphasis added).

modification of the terms and conditions of a federal tariff. The Massachusetts Department of Telecommunications and Energy, for instance, rejected a CLEC request to regulate interstate special access performance because, as it explained, "[i]n order for [it] to regulate the quality of federally tariffed special access services, [it] would need a delegation of authority from the FCC."[32] The Massachusetts commission further explained that it could not grant a request to regulate interstate special access "because to do so would be inconsistent with the FCC's exclusive jurisdiction over the quality of service of federally tariffed special access services. The Department concludes that it is pre-empted from investigating and regulating quality of service for federally tariffed special access services."[33] Similarly, the New York Public Service Commission decided to seek a delegation of authority from this Commission because it lacked independent authority to regulate interstate special access.[34]

This same analysis applies in the present case as well. Because DSL, a form of interstate special access, is subject to the exclusive authority of this Commission, it cannot be regulated by the states.

Indeed, state commission decisions that require BellSouth to provide DSL over CLEC UNE loops are unlawful for the additional reason that they not only add a term or condition to BellSouth's federally tariffed service, but also affirmatively contradict

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[32] Order on AT&T Motion to Expand Investigation, *Investigation by the Department of Telecommunications and Energy on Its Own Motion Pursuant to G.L. c. 159, §§ 12 & 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, D.T.E. 01-34, 2001 Mass. PUC LEXIS 94, at *16 (Mass. D.T.E. Aug. 9, 2001).

[33] *Id.* at *18-*19.

[34] *See* New York Pub. Serv. Comm'n Press Release, *PSC Strengthens Verizon's Service Quality Standards for "Special Services"* (May 23, 2001) (describing letter requesting FCC delegation of authority).

BellSouth's filed tariff. BellSouth's DSL tariff specifies that the "designated end-user premises location" must be "served" by an "existing, in-service, Telephone Company provided exchange line facility." BellSouth Tariff F.C.C. No. 1, § 7.2.17(A). "Telephone Company" is a defined term in the tariff and it refers to BellSouth.[35] When a CLEC provides voice service to a customer using an unbundled loop, that customer is not being served by a "BellSouth-provided" exchange line facility. Indeed, this Commission has specifically determined that, when a CLEC leases a loop, it, *not* the incumbent carrier, controls that facility, and has the exclusive right to use it. *See* 47 C.F.R. § 51.309; First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 15635, ¶ 268 (1996) ("[A] telecommunications carrier purchasing access to an unbundled network facility is entitled to *exclusive* use of that facility.") (emphasis added) (subsequent history omitted). BellSouth cannot be "providing" a facility that it does not control and that another party has the exclusive right to use.

IV. THE COMMISSION HAS BROAD POWER TO ISSUE THE REQUESTED DECLARATORY RULING.

This Commission is authorized to issue declaratory rulings under section 1.2 of its General Rules of Practice and Procedure: "The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2. While it is not necessary for a petitioner to show a "case or controversy in the judicial

[35] *See* BellSouth Tariff F.C.C. No. 1, § 1.1 (Dec. 16, 1996).

sense" in order to obtain declaratory relief from the Commission,[36] there must be a showing of a "genuine controversy or uncertainty [that] requires clarification."[37] The Commission has "broad and discretionary powers" to issue declaratory relief.[38]

The purpose of declaratory rulings is to give guidance to affected persons in areas where uncertainty or confusion exists.[39] The Commission has previously held that declaratory relief was especially appropriate to address uncertainty and confusion caused by a communications company having to comply with state regulatory decisions that were contrary to prior FCC decisions. *See Telerent*, 45 F.C.C.2d at 214, ¶ 22, 220, ¶ 38 ("We would be remiss in the discharge of our broad statutory responsibilities to remain passive in the face of the policy and regulatory confusion which permeates the entire field of interconnection as a result of these State actions."; "No State regulation can oust this Commission from its clear jurisdiction over interstate communications and the regulation of the terms and conditions governing such communication . . . .").

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[36] Memorandum Opinion and Order, *Establishment of Interstate Toll Settlements and Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Commission*, 93 F.C.C.2d 1287, 1290, ¶ 9 (1983) (internal quotation marks omitted).

[37] Memorandum Opinion and Order, *BellSouth's Petition for Declaratory Ruling or, Alternatively, Request for Limited Waiver of the CPE Rules to Provide Line Building Out (LBO) Functionality as a Component of Regulated Network Interface Connectors on Customer Premises*, 6 FCC Rcd 3336, 3342-43, ¶ 27 (1991).

[38] Memorandum Opinion and Order, *Telerent Leasing Corp. et al. Petition for Declaratory Rulings on Questions of Federal Preemption on Regulation of Interconnection of Subscriber-furnished Equipment to the Nationwide Switched Public Telephone Network*, 45 F.C.C.2d 204, 213, ¶ 21 (1974) ("*Telerent*").

[39] *See* Memorandum Opinion and Order, *Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, of the Commission's Rules and Regulations*, 92 F.C.C.2d 864, 879, ¶ 43 (1983).

Thus, this Commission has every right and reason to preempt any state commission determination that attempts to regulate the rates, terms, or conditions of any ILEC-provided broadband Internet access service.

Conclusion

For all of the reasons discussed herein, BellSouth urgently requests that the Commission issue a declaratory ruling specifying that (1) state commission decisions requiring ILECs to provide broadband Internet access to CLEC UNE voice customers are contrary to the *Triennial Review Order* and thus preempted; (2) state commission decisions requiring the provision of broadband Internet access to CLEC UNE voice customers impose regulation on interstate information services in contravention of this Commission's orders; and (3) state commission decisions specifying the terms and conditions under which ILECs provide federally tariffed broadband transmission either on its own or as part of a broadband information service intrude on this Commission's exclusive authority over interstate telecommunications and are thus preempted.

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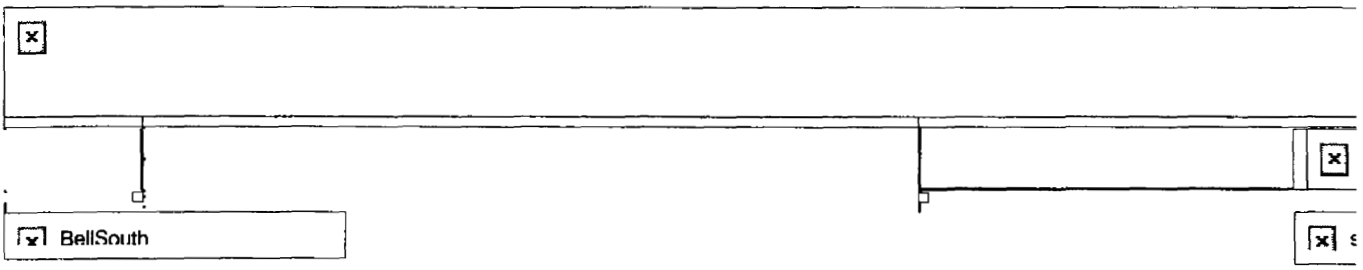

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BellSouth Achieves DSL Subscriber Target For 2002, Completes Year With More Than 1,000,000 DSL Customers

BellSouth Adds 97,000 DSL customers in the fourth quarter

For Immediate Release:

January 24, 2003

ATLANTA, January 24, 2003 - BellSouth Corp. (NYSE: BLS) today announced that it has increased its DSL customer base to 1,021,000 DSL subscribers, including both retail and wholesale customers. BellSouth added 97,000 DSL customers in the fourth quarter. During 2002, BellSouth added approximately 400,000 total customers, representing a growth rate of 64 percent.

"BellSouth's continued commitment to delivering superior value and an industry-leading customer experience is responsible for our tremendous growth with this service. In addition, a variety of available service options has contributed to the solid demand from residential, business and wholesale customers alike," said Michael Bowling, vice president of DSL Marketing for BellSouth. "Not only did we expand our suite of products in 2002 for residential customers, we also added an entire new line of FastAccess Business DSL products and services to meet business customers' needs. While we're proud of customers' recognition through J.D. Power and Associates Awards for both consumer and business, we're similarly pleased that so many customers place their confidence in BellSouth for Internet and broadband services."

Focus and Strong Commitment Result in Continued Growth
BellSouth's continued DSL growth can be attributed to many factors, most significantly its market penetration strategy, comprehensive marketing and promotions, superior customer service and new value-added services. Customers are also more aware of the benefits of high-speed Internet access and stronger demand exists for DSL services that allow them to realize the benefits that broadband provides.

In 2002, BellSouth deeply penetrated markets where DSL was available to customers. DSL services are available in approximately 73 percent of BellSouth's market. BellSouth utilized targeted marketing promotions to encourage more subscribers in the available areas to upgrade from dial-up Internet access to BellSouth® FastAccess® DSL. BellSouth's efforts resulted in continued solid growth in BellSouth's DSL subscriber base, which increased 64 percent in Q3 2002 over Q2 2002 alone.

Various service improvements enhanced ease-of-use for BellSouth's retail DSL customers and the continued success of BellSouth's retail self-install initiative for its residential customers were additional critical factors in BellSouth's ability to reach its objective. Broadband is no longer for the technological elite. BellSouth has created an easy process where customers can install the service themselves and be surfing at high-speed in less the five days after ordering service in most cases. Approximately 95 percent of residential customers select the self-install option. In 2002, BellSouth also extended this offer to business customers, which saves them money over professional installation. In addition to the self-install option, system and ordering improvements helped speed installation times overall.

BellSouth FastAccess DSL customers continue to recognize BellSouth's award-winning customer service. BellSouth received the highest honors in customer

satisfaction in the 2002 J.D. Power and Associates Residential Internet Customer Satisfaction Study for High Speed ISPs in a tie with two other providers. BellSouth was also awarded the highest ranking for business broadband data service providers in the J.D. Power and Associates Major Providers of Business Telecommunications Study℠. As part of BellSouth's continued effort to further improve customer service, the company introduced automated customer support for BellSouth FastAccess DSL in 2002. Through the support site, http://www.support.fastaccess.com/, customers can search for commonly asked questions or use the click-to-chat feature and connect directly with technical support for quick answers to their questions.

BellSouth also deployed even more value-added services such as BellSouth FastAccess HomeNetworking Service and enhancements to the BellSouth Internet Services Home Page, which serves as a feature-rich portal for BellSouth's dial-up and DSL-based Internet customers. BellSouth FastAccess HomeNetworking Service enables users to network multiple PCs, through either wired or wireless networks, using one DSL connection. The customer portal, located at http://www.home.bellsouth.net/, provides rich content, online games, up-to-the-minute news, streaming audio and Internet radio as well as high-quality streaming ABC News videos, movie trailers, music videos and more. In 2002, BellSouth also launched its Hispanic customer portal, which is available at http://www.miportal.bellsouth.net/.

Consumers and small businesses interested in BellSouth FastAccess DSL service can get more information online at http://www.fastaccess.com/ or by calling 1-888-321-ADSL. ISPs, CLECs and other wholesalers interested in reselling BellSouth wholesale DSL service, should contact their BellSouth account executive. For more information on our CLEC programs, visit http://www.interconnection.bellsouth.com/. Businesses are invited to visit www.bellsouth.com/business.

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About BellSouth Corporation

BellSouth Corporation is a Fortune 100 communications services company headquartered in Atlanta, Georgia, serving more than 45 million customers in the United States and 14 other countries.

Consistently recognized for customer satisfaction, BellSouth provides a full

array of broadband data solutions to large, medium and small businesses. In the residential market, BellSouth offers DSL high-speed Internet access, advanced voice features and other services. BellSouth also offers long distance service throughout its markets, serving both business and residential customers. The company's BellSouth AnswersSM package combines local and long distance service with an array of calling features; wireless data, voice and e-mail services; and high-speed DSL or dial-up Internet service. BellSouth also provides online and directory advertising services through BellSouth® RealPages.comSM and The Real Yellow Pages®.

BellSouth owns 40 percent of Cingular Wireless, the nation's second largest wireless company, which provides innovative data and voice services.

NOTE: For more information about BellSouth, visit the BellSouth Web page at http://www.bellsouth.com/.

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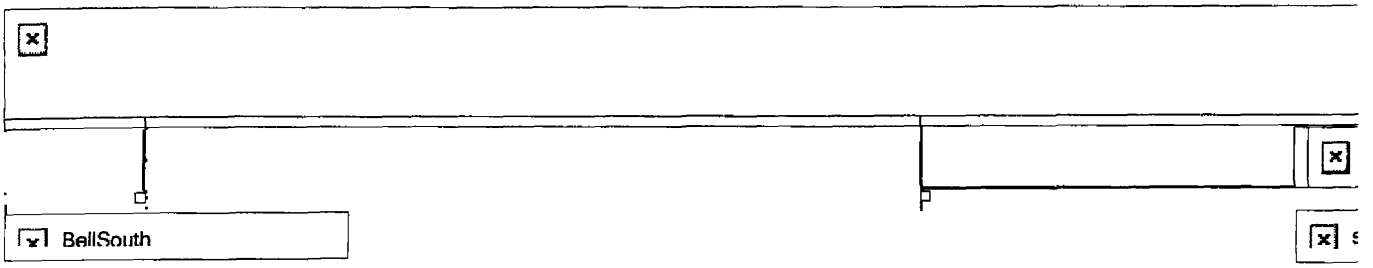

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BellSouth Reports Fourth Quarter Earnings

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- 4 million long distance customers
- 1.5 million high-speed Internet customers
- 642,000 Cingular Wireless net additional customers
- 345,000 Latin America net additional customers

For Immediate Release

January 22, 2004

ATLANTA - BellSouth Corporation (NYSE: BLS) reported earnings per share (EPS) of 43 cents in the fourth quarter of 2003, including special charges

totaling 8 cents (see below). This compared to reported EPS of 31 cents in the fourth quarter of 2002, which included special charges totaling 14 cents (see below).

For the fourth quarter, consolidated revenues increased 0.9 percent to $5.7 billion compared to the same quarter of the previous year. Net income was $787 million compared to $574 million in the same quarter a year ago.

In accordance with Generally Accepted Accounting Principles (GAAP), BellSouth's reported consolidated revenues and consolidated operating expenses do not include the company's 40 percent share of Cingular Wireless. Normalized results include BellSouth's 40 percent proportionate share of Cingular's revenues and expenses.

Normalized EPS of 51 cents increased 13.3 percent in the fourth quarter of 2003 compared to 45 cents in the same quarter a year ago. Normalized revenues were $7.3 billion, an increase of 4.1 percent versus the fourth quarter of 2002. Normalized net income was $949 million, compared to $846 million in the same quarter a year ago.

Full Year Results

For the full year of 2003, BellSouth reported EPS of $2.11. This compared to 71 cents in 2002, which included special charges totaling $1.32 outlined in the attached financial statements. For the full year, consolidated revenues increased 0.9 percent to $22.6 billion. Reported net income was $3.9 billion compared to $1.3 billion the previous year. Normalized EPS was $2.07 compared to $2.03 in 2002. Including Cingular, revenues were up slightly versus 2002 at $28.7 billion. Normalized net income was $3.8 billion for the year, up slightly compared to 2002.

Operating free cash flow (defined as cash flow from operations less capital expenditures) totaled $5.3 billion for the full year. Capital expenditures for 2003 were $3.2 billion, a reduction of 15.5 percent compared to 2002. Total debt at December 31, 2003 was $15.0 billion, a reduction of $2.4 billion since the first of the year.

In November, BellSouth's Board of Directors declared an 8.7 percent increase in the quarterly common stock dividend, payable February 2, 2004. Over the last seven quarters, the company has increased its quarterly dividend 31.6 percent to 25 cents per common share.

Communications Group

In 2003, BellSouth Long Distance and DSL high-speed Internet service revenue growth offset access line declines holding Communications Group revenues nearly flat at $18.4 billion compared to 2002. In the fourth quarter, revenues increased 2.1 percent to $4.6 billion compared to $4.5 billion in the same quarter the previous year. Operating margin for the quarter improved to 25.7 percent compared to 24.6 percent in the same quarter last year.

In the fourth quarter, BellSouth AnswersSM packages increased to more than 3 million, which represents a 24 percent penetration of primary access lines. Answers combines customers' local, long distance, Internet and wireless services all on one bill. BellSouthÒ Unlimited AnswersSM contributed to the growth in package customers with subscribers exceeding 1 million at the end of fourth quarter. Unlimited Answers allows customers to call anywhere in the United States anytime for a flat monthly fee.

BellSouth added approximately 3 million long distance customers during 2003, for a total of 3.96 million customers and almost 30 percent penetration of its mass-market customers by year-end. During the fourth quarter, about 40 percent of new customers included international long distance in their calling plans. This was due in part to the October introduction of BellSouth's International Advantage Plan, which offers residential customers competitive flat rates at any time of day to many countries including Canada and Mexico.

BellSouth added 126,000 net DSL customers in the fourth quarter of 2003, compared to 97,000 customer additions in the fourth quarter of 2002, bringing its end of year total subscribers to 1.46 million. BellSouthÒ FastAccess® DSL Lite contributed to this increase. BellSouth's Internet access portfolio offers customers an easy migration path from dial-up Internet access to two different tiers of high-speed Internet access with the option to add features like home networking and parental controls. Lead by DSL, data revenues of $1.1 billion grew 4.0 percent in the fourth quarter of 2003 compared to the same quarter of 2002.

Total access lines of 23.7 million at December 31 declined 3.6 percent compared to a year earlier, impacted by the economy, competition and technology substitution. Residence and business access lines served by BellSouth competitors under UNE-P (unbundled network elements-platform) increased by 199,000 in the fourth quarter.

Domestic Wireless / Cingular

Cingular Wireless added 642,000 net cellular/PCS customers in the fourth quarter. Cingular's focus on calling plans tailored to local markets and co-branding and bundling programs with its parent companies were significant contributors to growth at Cingular, which ended the quarter with more than 24 million cellular/PCS customers.

As disclosed in Cingular's press release, the company changed its presentation of Universal Service Fund (USF) payments and receipts to a gross basis. Reflecting this change, BellSouth's share of Cingular's revenues was $1.6 billion, a gain of 5.7 percent compared to the same quarter a year ago. Segment operating income was $131 million for the quarter compared to $284 million in 2002. Fourth quarter operating margins were impacted by significantly higher gross customer additions, extensive customer retention programs, increased advertising and costs associated with launching wireless local number portability. For the full year of 2003, segment operating income totaled $915 million compared to $1.1 billion in 2002.

Cingular continues to upgrade network efficiency and capability through movement of its subscriber base to GSM/GPRS and deployment of EDGE. By the end of 2003, the company's GSM/GPRS network was available to 93 percent of its potential customers and with approximately 57 percent of subscriber minutes traveling on this upgraded network.

Latin America Group

Growth in customers, revenues and margins continued in the Latin America wireless group during the fourth quarter of 2003. Wireless customers increased 345,000 on a consolidated basis. Year-over-year, customers increased 1.5 million, or 18.6 percent. BellSouth's Latin America group served 9.7 million customers at year-end.

Consolidated Latin America revenues increased 30.9 percent to $636 million in the fourth quarter of 2003 compared to the same three months of the previous year. Strong customer growth in Venezuela, Argentina, Chile and Colombia drove the increase in segment revenues. Focusing on growing revenues, improving operating margins and targeting capital deployments contributed to positive operating free cash flow in 2003. Segment net income was $62 million in the fourth quarter and $161 million for the full year.

During the fourth quarter, BellSouth entered into a debt purchase agreement with senior secured creditors of BCP, a wireless company in Sao Paulo, Brazil. As a result of the agreement, BellSouth sold its entire interest in BCP and recognized a total net loss associated with the sale of $161 million.

Advertising & Publishing

Advertising & Publishing revenues were $522 million in the fourth quarter of 2003, a decrease of 6.1 percent compared to the same quarter a year ago, resulting in part from reduced spending on advertising and continued competition. Segment net income of $147 million was 24.6 percent higher than the fourth quarter of 2002, primarily as the result of improvement in uncollectibles expense. Full year operating revenues declined 5.0 percent and net income improved 10.1 percent.

Special Items

In the fourth quarter of 2003, the difference between reported (GAAP) EPS of 43 cents and normalized EPS of 51 cents is the result of three special items:

Foreign currency transaction gains	1 cent	Gain
Pension settlement / severance costs	1 cent	Charge
Sale of Brazil SP	9 cents	Charge
Effect of Rounding	1 cent	
Total of special items	8 cents	Charge

Foreign currency transaction gains - Primarily associated with the

remeasurement of U.S. dollar-denominated liabilities in Latin America.

Pension settlement / severance costs - This charge represents the net severance related costs recorded in the fourth quarter associated with workforce reductions, offset by pension settlement gains associated with workforce reductions.

Sale of Brazil SP - Loss on sale of Brazil SP.

In the fourth quarter of 2002, special charges totaled 14 cents per share, after rounding, for: asset impairments (11 cents); workforce reduction (3 cents); disposition of Listel (3 cents); foreign currency transaction losses (1 cent) and an adjustment of 4 cents to Advertising & Publishing results to reflect the 2003 accounting change.

About BellSouth Corporation
BellSouth Corporation is a Fortune 100 communications services company headquartered in Atlanta, Georgia. BellSouth and its affiliates serve more than 45 million local, long distance, Internet and wireless customers in the United States and 13 other countries.

Consistently recognized for customer satisfaction, BellSouth provides complete communications solutions to the residential and business markets. In the residential market, BellSouth offers DSL high-speed Internet access and long distance, advanced voice features and other services. The company's BellSouth AnswersSM package combines local and long distance service with an array of calling features; wireless data, voice and e-mail services; and high-speed DSL or dial-up Internet service and Cingular Wireless. In the business market, BellSouth serves small, medium and large businesses providing secure, reliable local and long distance voice and data networking solutions. BellSouth also provides online and directory advertising services through BellSouth® RealPages.comSM and The Real Yellow Pages®.

BellSouth owns 40 percent of Cingular Wireless, the nation's second largest wireless company, which provides innovative wireless voice and data services.

Further information about BellSouth's fourth quarter earnings can be accessed at http://www.bellsouth.com/investor. The press release, financial statements and BLS Investor News summarizing highlights of the quarter are available on the BellSouth Investor Relations web site starting today at 8 a.m. Eastern Time.

BellSouth will host a conference call with investors today at 10 a.m. Eastern Time (ET). Participating will be BellSouth CFO, Ron Dykes and Investor Relations Vice President, Nancy Davis. Dial-in information for the conference call is:
Domestic: 888-370-1863
International: 706-634-1735

A replay of the call will be available beginning at approximately 1 p.m. (ET) today, through January 29, 2004. The replay can be accessed by dialing:

Domestic: 800-642-1687 - Reservation number: 4367951
International: 706-645-9291 - Reservation number: 4367951

The conference call will also be web cast live beginning at 10:00 a.m. (ET) on our website at http://www.bellsouth.com/investor. A replay of the call will be available on the website through January 29, 2004.

In addition to historical information, this document may contain forward-looking statements regarding events and financial trends. Factors that could affect future results and could cause actual results to differ materially from those expressed or implied in the forward-looking statements include: (i) a change in economic conditions in domestic or international markets where we operate or have material investments which would affect demand for our services; (ii) currency devaluations and continued economic weakness in certain international markets in which we operate or have material investments; (iii) the intensity of competitive activity and its resulting impact on pricing strategies and new product offerings; (iv) higher than anticipated cash requirements for investments, new business initiatives and acquisitions; (v) unfavorable regulatory actions and (vi) those factors contained in the Company's periodic reports filed with the SEC. The forward-looking information in this document is given as of this date only, and, BellSouth assumes no duty to update this information.

This document may also contain certain non-GAAP financial measures. The most directly comparable GAAP financial measures, and a full reconciliation of non-GAAP to GAAP financial information, are attached hereto and provided on the Company's investor relations web site, http://www.bellsouth.com/investor.

NOTE: For more information about BellSouth, visit the BellSouth Web page at http://www.bellsouth.com/.

A list of BellSouth Media Relations Contacts is available in the Corporate Information Center.

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