



July 19, 2001

Ms. Blanca Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

via Overnight Mail

Re: Docket No. 960786-TL -- Consideration of BellSouth Telecommunications, Inc.'s entry into InterLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996

Dear Ms. Bayó,

Please find enclosed for filing in the above docket an original and fifteen (15) copies of the prefiled rebuttal testimony of Florida Digital Network, Inc., witness Michael Gallagher. Also enclosed is a diskette containing a Microsoft Word for Windows 2000 file of this testimony.

If you have any questions regarding the Petition, please call me at 407-835-0460.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Feil".

Matthew Feil
Florida Digital Network
General Counsel

C: Mike Sloan (Swidler Berlin)

L O C A L

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of BellSouth Telecommuni-)
cations Inc.'s entry into interLATA services pursuant)
to Section 271 of the Federal Telecommunications)
Act of 1996)
_____)

Docket No. 960786-TL

REBUTTAL TESTIMONY OF

MICHAEL P. GALLAGHER

FILED ON BEHALF OF

FLORIDA DIGITAL NETWORK, INC.

July 20, 2001

1 **Q. Please state your name and address.**

2 A. My name is Michael P. Gallagher. My business address is 390 North
3 Orange Avenue, Suite 390, Orlando, Florida, 32801.

4 **Q. Who do you work for?**

5 A. I am Chief Executive Officer of Florida Digital Network, Inc. ("FDN").

6 **Q. What are your responsibilities as CEO of FDN?**

7 A. As CEO of FDN, I am ultimately responsible to the shareholders for all
8 aspects of FDN's operations and performance. On a management level,
9 FDN's President & Chief Operating Officer, Chief Financial Officer and
10 General Counsel report directly to me; FDN's Engineering & Operations,
11 Customer Service, and Sales Vice Presidents report to the President & COO,
12 who is also in charge of FDN's Marketing and IS functions. I am involved in
13 the day-to-day business dealings of the company and the decision-making on
14 everything from marketing and sales strategies, product development,
15 network architecture and deployment, financing, human resources, customer
16 care, regulatory changes, etc.

17 **Q. Please describe your education and your work experience in the**
18 **telecommunications sector.**

19 A. I received a B.S. Degree in Mathematics with a minor in Physics from
20 Rollins College.

21 Prior to co-founding FDN in 1998, I served as Regional Vice
22 President for Brooks Fiber Communications where I had overall
23 responsibility for operations, engineering, finance and sales in the State of

1 Texas. Brooks Fiber Communications merged into WorldCom on January
2 31, 1998. Prior to holding the VP position at Brooks, I was president of
3 Metro Access Networks (MAN), a second-generation CLEC in Texas
4 founded in 1993. At MAN, I developed all business strategies, designed
5 network architecture, secured contracts with the company's original customer
6 base, and had overall responsibility for operations and performance. MAN
7 merged into Brooks Fiber in March 1997. Prior to MAN, I worked for
8 Intermedia Communications and Williams Telecommunications Group
9 (WilTel) as sales representative securing contracts with large commercial
10 customers.

11 **Q. Have you previously testified in a regulatory proceeding before a**
12 **state utility commission, the FCC or a hearing officer?**

13 A. No.

14 **Q. What is the purpose of your rebuttal testimony in this proceeding?**

15 A. I intend to rebut BellSouth claims regarding ALEC market share and
16 claims that BellSouth has fulfilled the resale requirement of the Section 271
17 competitive checklist. These issues have been identified as Issues 1(c) and
18 15, respectively, in this proceeding.

19 In summary, aside from the reasons offered by the other CLEC parties
20 in this proceeding, FDN maintains the Commission should not recommend
21 that BellSouth complies with Section 271 requirements for authority to

1 provide in-region inter LATA services because competition has not taken
2 irreversible hold in Florida and because BellSouth has not, as required,
3 fulfilled its resale obligations under Sections 251(c)(4) of the
4 Telecommunications Act of 1996 (the "Act"). FDN believes BellSouth has
5 overstated facilities-based business line competition in Florida, and FDN
6 asserts BellSouth fails to meet its resale obligation by refusing to offer its
7 high-speed data service for resale over UNE loops that CLECs use for voice
8 service. I will also explain in my testimony why BellSouth's failure to meet
9 this resale obligation is so critically important to competition in Florida.

10 **Q. Could you please briefly provide some background on FDN and**
11 **describe its operations?**

12 A. FDN is a facilities-based Florida CLEC. FDN is also an IXC, a data
13 services provider (both dial-up and dedicated), and, through an affiliate, FDN
14 offers ISP and other Internet services. FDN was founded in 1998 with the
15 mission of offering packaged services (local, long distance and Internet) to
16 small- and medium-sized businesses. FDN launched operations in Orlando in
17 April 1999 and expanded to Fort Lauderdale in May 1999 and to Jacksonville
18 in June 1999. A second round of expansion in West Palm Beach, Miami and
19 the Tampa Bay area was completed in the first quarter of 2000.

20 FDN owns and operates Class 5 Nortel DMS-500 central office
21 switches in Orlando, Tampa, Jacksonville, and Ft. Lauderdale. FDN's
22 switches are connected by fiber optic cable owned and operated by FDN to
23 nearby incumbent local exchange carrier (or "ILEC") tandem switches. FDN

1 leases collocation cages or has virtual collocation space in over 100 ILEC
2 wire centers. Remote switching equipment is installed at these collocation
3 sites and from these sites FDN accesses ILEC UNE loops. Connectivity from
4 the collocation sites to the central ILEC tandem switch is via T-1 circuits
5 leased from the ILEC. FDN relies upon its rights under the Act to obtain
6 “last mile” access to Florida consumers through the purchase of unbundled
7 network elements (UNEs) from ILECs such as BellSouth. FDN does not
8 utilize the UNE platform or UNE-P service delivery vehicle, nor does FDN
9 resell BellSouth local voice service.

10 FDN uses BellSouth’s TAG gateway for electronic ordering. Using
11 systems and software FDN developed on its own, FDN transmits virtually all
12 of its local service requests (“LSRs”) to Bell electronically with minimal
13 manual intervention.

14 The vast majority of FDN’s LSRs to BellSouth are for 2 wire voice
15 grade UNE loops. Based on information provided by BellSouth, FDN is the
16 largest procurer of UNE voice-grade loops from BellSouth in Florida. As
17 such, FDN has a significant interest in insuring BellSouth’s compliance with
18 legal and regulatory requirements and in insuring the viability of
19 telecommunications competition in the State of Florida.

20 **ISSUE 1(c) (Competing Providers’ Market Share)**

21 **Q. Please explain FDN’s position regarding Issue No. 1(c).**

22 A. FDN believes that BellSouth has overstated the number of facilities-based
23 business access lines served by CLECs. The number of viable facilities-

1 based CLECs has dwindled from the time of BellSouth's analysis and
2 continues to dwindle as the financial community withdraws support from the
3 communications sector and ILECs inhibit the pace of competition, the E911
4 database entries BellSouth relies on for facilities-based CLEC line count may
5 not be current, and other data and experience suggests a picture different
6 from what BellSouth presents.

7 Through the affidavit and supporting exhibits of Mr. Victor K.
8 Wakeling, BellSouth presents two estimating methodologies that BellSouth
9 maintains prove that CLECs serve 24.8% or 21.1% of business lines in
10 BellSouth's service area. BellSouth's estimates are simply at odds with
11 FDN's observation and experience in its years in the Florida market.

12 The vast majority of CLEC business lines tabulated in both
13 BellSouth's Method One and Method Two estimates are facilities-based lines
14 (514,814 in Method One and 397,589 in Method Two), and the cornerstone
15 of both BellSouth estimating methodologies relies on a tabulating CLEC
16 E911 database listings.

17 However, of the 45 facilities-based CLECs in Mr. Wakeling's
18 exhibits, more than 25% are out of business already, and a number of others
19 are experiencing financial difficulties and may not survive this year, let alone
20 long-term. The rate of CLEC failures exceeds the rate of CLEC births. Thus,
21 BellSouth's data is stale and getting staler. Further, tabulations from the
22 E911 database will be overstated unless the database is regularly updated to
23 remove CLEC customers disconnected for nonpayment or other reasons or

1 when CLECs go out of business. FDN believes that the database may not be
2 current.

3 In addition, as I mentioned, FDN operates in all of Florida's largest
4 metropolitan statistical areas (MSAs), and BellSouth's estimate that CLECs
5 serve 24.8% or 21.1% of the business sector simply is inconsistent with
6 FDN's observation and experience in the marketplace.

7 To illustrate, FDN believes that a Florida market where facilities-
8 based CLECs targeting businesses should have well-established penetration
9 is the downtown Orlando market, densely populated with business customers,
10 and served through BellSouth's Magnolia central office (CO). However,
11 FDN has reason to believe that CLECs have little market share there. FDN
12 randomly sampled two percent of some 250,000 discrete telephone numbers
13 assigned years ago in large NXX blocks to BellSouth which are routed
14 through the Magnolia CO to determine the local routing number (LRN)
15 assigned to each. These telephone numbers are portable such that a customer
16 switching to a CLEC service can retain the number. The LRN for these
17 numbers will correspond to the local exchange company (BellSouth or
18 facility-based CLEC) currently providing local service to the number. FDN
19 found that 94% of the numbers tested were assigned BellSouth's LRN, while
20 only 6% were assigned to CLEC LRNs. Although this test does not account
21 for new numbers assigned to CLECs, FDN believes, based on its experience,
22 that more than 80% of its customers have ported numbers and less than 20%
23 have new numbers issued to FDN. Adjusting for that factor, and consistent

1 with FDN's own observation and experience in Orlando, CLECs serve
2 approximately 7.2% of the market, leaving BellSouth with the remaining
3 92.8%.

4 FDN believes similar analyses in other exchanges would have similar
5 results – that CLECs have less competitive market share than BellSouth
6 reports. Accordingly, FDN suggests the Commission critically evaluate
7 BellSouth's market share claims in light of this type of evaluation and CLEC
8 experience.

9 **ISSUE 15 (Resale Requirement)**

10 **Q. What is FDN's position regarding Issue No. 15?**

11 A. FDN has sought, and BellSouth has refused to provide, resale of high-
12 speed data service over UNE loops that FDN uses to provide voice service.
13 FDN maintains that BellSouth's refusal to do so violates Sections 251(c)(4)
14 and 252(d)(3) of the Act and, therefore, BellSouth does not meet Section 271
15 checklist item number 14, contained in Section 271 (c)(2)(B)(xiv) of the Act.

16 **Q. Why is BellSouth's failure to meet this resale obligation important to**
17 **FDN?**

18 A. To compete, FDN must have the ability to offer its customers a
19 combination of circuit-switched voice services, such as local dial tone, and
20 packet-switched high-speed data services, such as Digital Subscriber Line
21 (DSL) services. FDN is able to provide DSL to some end-users in Florida by
22 collocating its own DSL multiplexers (DSLAMs) in BellSouth's central
23 offices. However, FDN is precluded from providing high-speed data service

1 where BellSouth has deployed Digital Loop Carrier (DLC) facilities. The
2 severity of this limitation on competition is felt nowhere more than Florida,
3 as *more than 60%* of all BellSouth access lines in Florida pass through DLCs
4 according to BellSouth. In FDN's experience in its initial Florida markets,
5 FDN believes the percentage of DLCs approaches 70%. BellSouth does not
6 offer any resale products that would enable CLECs to provide high-speed
7 data service to consumers who are served by DLC loops where the CLEC is
8 the voice provider. It will be essential for FDN to offer high-speed data
9 services on an ubiquitous basis in Florida over the same customer loops that
10 it uses to provide its voice services. This issue is of paramount importance
11 for FDN to be able to launch a facilities-based competitive local voice option
12 for residential subscribers. Florida is lagging in facilities-based local voice
13 competition for residential subscribers at this time.

14 Although FDN is collocated in more than half of BellSouth's central
15 offices in the state of Florida, and is able to offer voice services to 100% of
16 accessible consumers served by these offices, FDN is unable to provide DSL
17 service to approximately 70% of these end-users because of the presence of
18 BellSouth DLCs.

19 **Q. What are DLCs?**

20 A. The DLC performs an analog to digital conversion that aggregates
21 telecommunications from the individual customer subloops to a shared
22 transmission facility bound for the central office. Deployment of DLCs and
23 successor technologies will ultimately save billions of dollars annually in

1 maintenance and switching costs. In the past, and still today throughout most
2 of the country, the vast majority of last mile loops consist of “home run”
3 copper facilities between the customer and the central office. However, in
4 the past quarter-century, as Florida’s population grew explosively, BellSouth
5 deployed a tremendous number of DLCs at remote terminals (RTs) in its
6 distribution network in Florida.

7 **Q. Why do BellSouth’s DLCs preclude FDN from offering DSL**
8 **service?**

9 A. DSL cannot be transmitted through a DLC unless it is first
10 multiplexed for digital transmission to the central office. Therefore, the
11 carrier must locate at the remote terminal a DSLAM, or, in the case of Next
12 Generation Digital Loop Carriers (“NGDLCs”), DSL-capable line cards that
13 perform DSLAM functionality. Mainly because of cost and space
14 considerations, FDN and other CLECs cannot collocate DSLAMs or line
15 cards at remote terminals. Therefore, BellSouth today is the only carrier in
16 Florida able to offer DSL service where its DLCs are deployed.

17 **Q. Can FDN sustain long-term viability if it is limited to providing**
18 **DSL only on non-DLC loops?**

19 A. It would be very difficult as demand for DSL increases. In most
20 Florida central offices, more so than in most of the rest of the nation, FDN
21 will not be able to succeed in the voice or data market if it is limited to
22 providing DSL service only to end-users who can be served from the central
23 office. As I stated previously, more than 60% of BellSouth’s Florida access

1 lines pass through DLCs and cannot be served from the central office. Of the
2 remaining 30-40% of the end-user base, many cannot receive central office
3 based DSL due to excessive loop lengths, the presence of bridged taps, load
4 coils or repeaters, or other factors. With such a high percentage of the DSL
5 market closed to central-office-only strategies, CLECs will not be able to
6 compete for customers without BellSouth at least fulfilling the resale
7 obligation addressed in this testimony. If BellSouth is the only carrier that
8 can provide DSL to a substantial percentage of consumers, it can leverage its
9 market power to suppress competition for voice services, as I have indicated
10 above. Therefore, an exclusive central office strategy will not only fail in the
11 DSL market, but it could also fail in the voice services market as well. My
12 point is well illustrated by the failure of many exclusive central-office based
13 CLEC strategies, even where the rate of DLCs is much lower than Florida.
14 Of the three major national DSL CLECs, NorthPoint has already dissolved in
15 bankruptcy and Covad and Rhythms are in serious financial peril.

16 **Q. Why it is important for FDN to be able to offer both voice and**
17 **data services?**

18 A. A large and growing number of residential and business customers are
19 seeking carriers that can satisfy all of their telecommunications needs,
20 including voice and high-speed data services. These customers want to be
21 able to obtain these services through a single point of contact and on a single
22 bill. If FDN is unable to offer high-speed data services, it will not only lose
23 opportunities in the data market, but it will also be unable to remain

1 competitive in the voice local exchange and interexchange markets in
2 Florida.

3 **Q. Is FDN's objective to provide high-speed data service in Florida**
4 **urgent?**

5 A. Absolutely. It is well established that early entry and early name
6 recognition are crucial to success in markets for new technologies and new
7 services. BellSouth understands this as well, as it is aggressively deploying
8 DSL in Florida today even as it denies competitors the resale and UNE DSL
9 products that CLECs need to compete. With each day that passes, FDN falls
10 further behind BellSouth in the high-speed data market, and the probability of
11 losing its existing and prospective voice customers grows. In Florida alone,
12 BellSouth by the end of April 2001 had 133,015 high-speed data subscribers
13 in the State of Florida, 43,291 of which were added in the first quarter 2001.
14 Florida customers represent nearly one-half of BellSouth's DSL lines region-
15 wide, and approximately one-half of its first quarter growth. Therefore,
16 FDN's efforts to obtain resale for a bundled DSL and voice offering are
17 extremely urgent and of utmost importance to FDN's short-term and long-
18 term viability in the state.

19 **Q. Does FDN's inability to offer voice and high-speed data on the**
20 **same telephone line impair its ability to offer local exchange voice**
21 **services in Florida?**

22 A. Yes. First, as I mentioned, FDN's inability to offer high-speed data to
23 most customers impairs its ability to sell voice services to customers looking

1 for a bundled service offering from a single carrier. Second, FDN is impaired
2 in its ability to sell local exchange voice services by BellSouth's unnecessary
3 and anticompetitive practice of leveraging its control of the DSL market in
4 Florida to injure competitors in the voice market. To illustrate, if a
5 prospective FDN customer today is obtaining both voice and data services
6 over one line from BellSouth, that customer is not able to migrate local
7 exchange voice service to FDN's facilities-based voice service without
8 having BellSouth disconnect the data service, even though BellSouth easily
9 has the capability to continue to provide data service on the line. Because
10 FDN is unable in most cases to offer DSL service to the customer on the
11 same telephone line, the customer is likely to lose interest in obtaining voice
12 telephone services from FDN, even when FDN is able to offer superior
13 pricing and service. BellSouth's ability to manipulate its market power to
14 injure competitors will only increase as competitive DSL providers continue
15 to disappear.

16 **Q. How does the lack of competitive DSL providers affect Florida**
17 **consumers?**

18 A. In markets where only one or only a few providers are available, these
19 providers have fewer incentives to provide quality service or competitive
20 rates to their customers. As BellSouth has solidified its growing control over
21 the DSL market in Florida, it recently raised its retail DSL prices in the state
22 and discontinued some of its competitive promotions. If competitors are

1 denied meaningful access to BellSouth's last mile connections to end-users,
2 price increases could be expected to continue.

3 **Q. Must BellSouth offer wholesale high-speed data service to FDN**
4 **for resale pursuant to Section 251(c)(4) of the Telecommunications Act**
5 **of 1996?**

6 A. Yes. BellSouth and its affiliates are required to offer, on a discounted
7 wholesale basis, all of their retail telecommunications services, including
8 xDSL and other high-speed data services, pursuant to the resale obligations
9 applicable to incumbent local exchange carriers under Section 251(c)(4) of
10 the Act. While resale is not the only means of access, the Act does require
11 BellSouth to offer it, and BellSouth should be required to provide FDN such
12 access.

13 **Q. Does BellSouth offer for resale its high-speed data services today**
14 **under the terms of Section 251(c)(4)?**

15 A. No. BellSouth's only wholesale high-speed data service in Florida is
16 its voluntary, market-rate offer to Internet Service Providers (ISPs).
17 BellSouth offers this service only for telephone lines on which BellSouth is
18 the local exchange carrier. Since BellSouth considers the service to be
19 voluntary, there is no guarantee that it will continue to be made available at
20 rates, terms and conditions that would allow a competitor to compete with
21 BellSouth's retail service.

1 **Q. If a resold DSL product were available pursuant to Section**
2 **251(c)(4), could BellSouth refuse to resell DSL to CLECs for use on lines**
3 **where it is not the local exchange carrier?**

4 A. No. An ILEC cannot impose unreasonable or discriminatory
5 limitations on resale services provided under Section 251(c)(4).

6 **Q. What retail products does BellSouth offer to provide high-speed**
7 **data service?**

8 A. To the best of my knowledge, BellSouth's consumer high-speed data
9 service is sold as BellSouth Fast Access Internet Service. FDN seeks to be
10 able to resell the telecommunications portion of this service, which,
11 depending on BellSouth's deployment, could be provided either over DSL,
12 fiber-fed DLC, or all-fiber loops. (I refer to the telecommunications portion
13 of this service as BellSouth's retail DSL service, but for the purposes of this
14 testimony I intend to include with this term any technology BellSouth uses to
15 provide consumer high-speed data services.) BellSouth offers other higher-
16 capacity high-speed data services, such as T-1 service, but these services are
17 not a subject of my testimony in this case.

18 **Q. On what basis has BellSouth refused to offer resold DSL service**
19 **under Section 251(c)(4)?**

20 A. BellSouth claims that its DSL services are exempt from the resale
21 obligations of Section 251(c)(4) of the Telecommunications Act, which
22 applies to retail telecommunications services. As I understand its position,
23 BellSouth maintains that its local exchange carrier entity does not sell retail

1 DSL, but instead sells DSL only to Internet Service Providers (ISPs). This
2 position is based upon the FCC's 1999 decision that sales of DSL to ISPs are
3 wholesale services that are exempt from resale obligations under Section
4 251(c)(4).¹ However, the BellSouth group of companies, taken together, is
5 the largest retail DSL provider in Florida. BellSouth does sell retail DSL
6 through an ISP that it owns and controls. BellSouth's ISP obtains DSL from
7 BellSouth's local exchange company. BellSouth promotes and sells its
8 telephone and DSL services using the same advertisements, customer service
9 and sales agents, and Internet sites, including www.BellSouth.com.
10 Revenues from DSL sales and telecommunications services are reported
11 together and accrue for the benefit of the same BellSouth shareholders. If
12 BellSouth were permitted to avoid its Section 251 obligations by selling all of
13 its telecommunications service on a wholesale basis to other affiliates, it
14 would render the unbundling and resale obligations of the Federal Act
15 meaningless. Therefore, retail sales of telecommunications services by any
16 BellSouth affiliate should be attributed to the local exchange carrier operation
17 for the purposes of Section 251.

18 **Q. Have any courts interpreted an ILEC's resale obligations where**
19 **retail services are sold by an affiliate of the ILEC rather than by the**
20 **ILEC itself?**

1 Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147, Second Report and Order, FCC 99-330 (rel. November 9, 1999) ("UNE Remand Order").

1 A. Yes. In *ASCENT v. FCC*,² decided in January 2001, the United
2 States Court of Appeals for the District of Columbia held that retail sales of
3 advanced telecommunications services by ILEC affiliates are subject to the
4 resale obligations of the Act. The court found that an ILEC may not “sideslip
5 § 251(c)’s requirements by simply offering telecommunications services
6 through a wholly owned affiliate.” Although the case involved a regulation
7 pertaining only to SBC, the logic of the decision applies equally to BellSouth.
8 Therefore, the FCC’s ISP exemption cannot be read to exempt BellSouth
9 from its obligation to resell the retail telecommunications service that is
10 provided by any BellSouth affiliate.

11 On June 26, 2001, the United States Court of Appeals for the District
12 of Columbia denied a petition for review of the FCC’s Advanced Services
13 Second Report and Order that defined ILEC sales of high-speed data service
14 to Internet Service Providers as a wholesale offering that is not subject to the
15 resale obligation of Section 251(c)(4).³ However, this decision, and the
16 BellSouth argument I mentioned earlier, are inapplicable to the issue here,
17 where BellSouth sells its own retail DSL through a BellSouth-owned ISP
18 affiliate, because BellSouth’s ISP affiliate is treated as part of BellSouth’s
19 ILEC operation for the purposes of Section 251, and not as a separate

² *Association of Communications Enterprises v. FCC*, 235 F.3d 662, (D.C. Cir. January 9, 2001)(“*ASCENT I*”).

³ *Assn. of Comm. Enterprises v. FCC*, Docket No. 00-1144 slip op. (D.C. Cir. June 26, 2001) (*ASCENT II*), denying petition for review of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Second Report and Order (November 9, 1999). Despite identical names, this decision is not related to *Assn. of Comm. Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001).

1 affiliate.⁴ The recent D.C. Appeals Court decision, in other words, in no way
2 addresses instances in which an ILEC provides retail high-speed data service
3 through its own ISP affiliate.

4 **Q. Have any State commissions found that the “ISP exemption”**
5 **created by the FCC’s Second Report and Order is not relevant to an**
6 **ILEC’s obligation to resell the high-speed data it provides through its**
7 **own ISP?**

8 A. Yes. On June 27, 2001, the Indiana Utility Regulatory Commission
9 (IURC) ruled that Ameritech must offer for resale a wholesale discount on
10 the DSL service it provides through its own ISP affiliate. The IURC found
11 that if the FCC’s ISP exemption in the Second Report “were the only
12 authority guiding the Commission’s decision, Ameritech’s position might
13 prevail.” However, the IURC held that the DC Circuit’s January 9, 2001,
14 *ASCENT I* decision required that sales of DSL by an ILEC ISP were not
15 eligible for the exemption under the Second Report, as the retail services of
16 all ILEC affiliates were to be considered collectively as products of the ILEC.
17 The Commission held that “the Second Report . . . do[es] not change that
18 fact,” and that “notwithstanding the definition of “at retail” found in the
19 Second Report,” Ameritech could not avoid its DSL resale obligations “by
20 setting up a wholly owned affiliate to offer those services.” Ameritech was
21 therefore required to make available a resale high-speed data service offering
22 in the manner requested by FDN in this proceeding.

4 *Assn. of Comm. Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001) (“*ASCENT I*”).

1 If the Second Report had no bearing on the decision to require
2 Ameritech to resell its high-speed data service in Indiana, the D.C. Circuit’s
3 affirmation of the Second Report likewise has no bearing on BellSouth’s
4 obligation to resell its high-speed data services in Florida.

5 **Q. Have any states taken steps to require an ILEC to make available
6 for resale the retail DSL products of separate ISP affiliates?**

7 A. Yes. On May 7, 2001, the Connecticut Department of Utility Control
8 (DPUC) issued a draft decision that would require the state’s largest
9 incumbent, Southern New England Telephone Company (SNET), to resell
10 any telecommunications service, including DSL, that is sold by its ISP
11 affiliate and any other affiliates. The draft decision rejected arguments by
12 SNET that are virtually identical to those offered by BellSouth. As the DPUC
13 noted, “[t]he ASCENT [I] Decision clearly holds that ‘an ILEC [may not be
14 permitted] to avoid § 251(c) obligations as applied to advanced services by
15 setting up a wholly owned affiliate to offer those services.’ [SNET’s]
16 repeated claim that this holding has no application to the services it offers
17 ignores that decision’s plain language.”⁵

18 **Q. Is FDN’s position that BellSouth must resell both the
19 telecommunications and enhanced services that are sold together by
20 BellSouth’s ISP?**

21 A. No. Section 251 applies only to telecommunications services, and
22 that is all that FDN is seeking to resell. However, BellSouth cannot refuse to

⁵ Petition of DSLnet Communications, LLC Regarding Section 251(c) Obligations of the Southern New England Telephone Company, Docket 01-01-17, Draft Decision at 9 (Conn. D.P.U.C. May 7, 2001) (internal citations omitted).

1 separate its telecommunications service from its enhanced services for the
2 purpose of denying resale. FCC bundling rules require BellSouth to offer its
3 telecommunications services separately from any enhanced services, even if
4 it only sells them as a bundled product.⁶

5 **Q. Does that conclude your rebuttal testimony?**

6 A. Yes.

7

8

6 Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket 96-61; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets, CC Docket 98-183, Report and Order, FCC 01-98 (rel. March 30, 2001), at ¶ 39.

**CERTIFICATE OF SERVICE
DOCKET NO 960786-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Airborne Express (if marked *) or by U.S. mail this 19th day of July, 2001 to the following:

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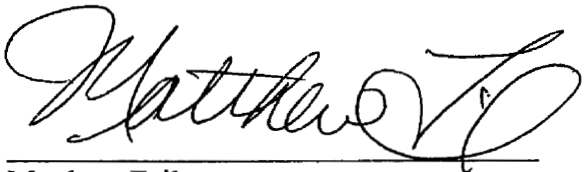
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