BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 010098-TP

In the Matter of

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.
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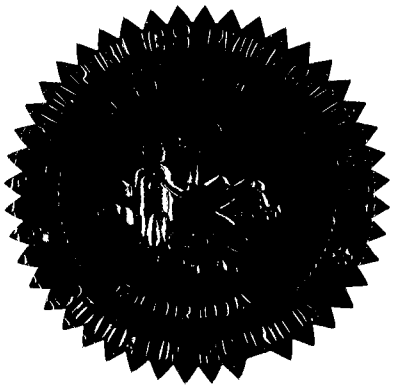

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VOLUME 1

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PROCEEDINGS:	HEARING
BEFORE:	COMMISSIONER J. TERRY DEASON COMMISSIONER LILA A. JABER COMMISSIONER MICHAEL A. PALECKI
DATE:	Wednesday, August 15, 2001
TIME:	Commenced at 9:35 a.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	TRICIA DeMARTE Official FPSC Reporter (850) 413-6736

APPEARANCES:

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

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

FELICIA BANKS and JASON FUDGE, FPSC Division of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, appearing on behalf of the Commission Staff.

I N D E X

MISCELLANEOUS

WITNESSES

EXHIBITS

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P R O C E E D I N G S

COMMISSIONER DEASON: Call the hearing to order. Counsel, could I have the notice read, please.

MS. BANKS: Pursuant to notice issued July 26th, 2001, this time and place has been set for a hearing in Docket Number 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.

COMMISSIONER DEASON: Thank you. Take appearances.

MS. WHITE: Nancy White and Patrick Turner for BellSouth Telecommunications.

MR. FEIL: Matthew Feil for Florida Digital Network.

MR. SLOAN: Michael Sloan with Swidler, Berlin, Shereff & Friedman for Florida Digital Network.

MS. BANKS: Felicia Banks and Jason Fudge on behalf of PSC Staff.

COMMISSIONER DEASON: Preliminary matters.

MS. BANKS: Yes, Commissioner Deason, there are just a couple things that Staff just want to note. Although parties have indicated that they are not anticipating using any confidential information during the hearing, Staff would like to note that on August 14th, 2001, BellSouth filed a notice of intent to request specified confidential classification of

BellSouth's response to FDN's Interrogatory Number 57.

And the one other thing that Staff wanted to note for the record is that on August 14th, FDN filed a notice of withdrawal of Issues 3B and 10 in this docket.

COMMISSIONER DEASON: Very well. I want to take this opportunity to commend the parties, especially in light of yesterday, for your efforts in trying to work together to solve your differences and to bring to the Commission those matters which are -- obviously cannot be resolved and to allow the Commission to focus on those issues. I'm going to keep this case as a poster child for the concept of eliminating issues and focussing on the important issues. I think this is a prime example of that, so congratulations.

MR. SLOAN: Thank you.

COMMISSIONER DEASON: Okay. Any other preliminary matters?

MS. BANKS: That's all that Staff is aware of at this time.

COMMISSIONER DEASON: Very well. Do the parties have any preliminary matters?

MR. FEIL: Commissioners, I just wanted to mention two things. First is, although I indicated at the prehearing conference I'd file a motion for official notice of various orders of the FCC and other state commissions, Ms. Banks informed me that the Commission is sort of moving away from the

necessity of that. I have provided everybody with a list of orders that we're aware of to date that we may be referring to. And, again, I'll provide them copies of the orders if the parties ask for it, provide them a copy of the list I'm referring to, if they ask for it as well.

The second thing was, as Ms. Banks pointed out, we withdrew Issues 3B and 10. As a result, Mr. Kephart was told -- Mr. Kephart is a BellSouth witness -- he was told that he did not need to be here today, so I just wanted to note that for your prehearing order.

COMMISSIONER DEASON: Very well. We have set aside time for opening statements, five minutes for each side. And, Mr. Feil, this is basically your petition for arbitration, I'll let you proceed first.

MR. FEIL: Thank you. Commissioner, FDN's petition as amended included ten-plus issues. Working with BellSouth, we've resolved some of those issues, and we simply withdrew others. There's only one issue left in this proceeding. It's identified as Issue Number 1 in your prehearing order. We tried to resolve this issue, too, actually, but unfortunately weren't able to do so. That one issue is vitally important to competition in the state of Florida. The issue is relatively simple, but it resonates in a tremendous way. And the issue is this: Whether or not FDN must have an opportunity to compete in the DSL market. There is no competition for DSL in

BellSouth's territory in Florida. There will be evidence in this case that over 99 percent of those with DSL in BellSouth's territory receive it through BellSouth. The reason is because BellSouth rejects that it has any obligation under the Federal Telecom Act or Chapter 364 to provide resale DSL or UNE products so CLECs can provide DSL service.

I'm sure you've heard this story before, what DSL is. DSL is a technology that permits high-speed access to the Internet and other services over what's called the high-frequency portion of a copper loop. DSL transmission over the high-frequency portion of the loop occurs such that you can have DSL over the same line that you have plain old telephone service, or POT service, on the low-frequency portion of the loop. DSL demand is growing, and carriers are interested in providing that DSL service and packaging it with other telecommunications services.

So with that background in mind, I wanted to sort of put the hay down where the goats can eat it, as Commissioner Gunter used to say, and that's through an example. Let's say you have a customer, let's call it Shreve's Clothing Store. It's a BellSouth customer; he's got three lines. It's a small business. Two of the lines he uses basically for voice service. The third line he uses for fax, but he also has over that third line BellSouth DSL service. He wants to switch to FDN, and he may want to switch because he thinks he can get a

better rate from FDN or because he doesn't like big business, whatever the reason may be. Anyway, because Mr. Shreve or Shreve's Clothing Store has BellSouth DSL, he either can't make the switch, or he can make the switch but without DSL service.

There are three reasons for this. The first is, BellSouth will not permit the customer to buy BellSouth Fast Access Internet service unless the customer also purchases BellSouth voice service. The second is that BellSouth will not resell DSL service to FDN or any other CLEC. Third, BellSouth does not sell UNEs that permit Florida Digital Network to provide its own brand of DSL.

In short, competitive carriers like FDN are out of luck, and customers do not have a competitive choice. This is a problem now, and as demand for DSL increases and it moves into residential market, the problem will only get bigger. FDN submits BellSouth's refusal to make DSL service available to CLECs is anticompetitive, delays getting DSL to the largest number of customers quickly, and is contrary to state and federal law.

Let me talk about those three reasons that I mentioned. In a late 1999 order, the FCC in what's called its Line Sharing Order first established the high-frequency portion of the loop must be made available to requesting carriers. The carriers that pushed the FCC for this product, this line sharing product, were known as the DLECs, or data LECs. Under

line sharing service, the ILEC provides the voice service and the DLEC would provide the data service. But the DLECs who asked for the line sharing product had no voice product, had no voice service strategy. Their interest was only in the high-speed data portion of the product, and the DLECs, as you're aware, are rapidly disappearing. But there is nothing in the Line Sharing Order that prevents an FDN voice customer from purchasing DSL service from BellSouth.

As a common carrier, BellSouth should be obligated to provide that service, and the customer, Shreve's Clothing Store, in our example shouldn't have his DSL shut off simply because he converts to FDN voice service. Nothing in the Line Sharing Order forecloses FDN from reselling BellSouth DSL when FDN is a voice provider. So why as to the second reason does BellSouth refuse to resell DSL?

The Federal Act, Section 251(c)(4) obligates ILECs to resell telecom services that the carrier provides at retail. BellSouth will be arguing one or a combination of things. BellSouth combines -- number one -- one of the arguments that it will be raising is, BellSouth combines the DSL service with Internet access service and sells the DSL component only to itself or to ISPs; therefore, it's not a retail service.

The only thing BellSouth will be arguing, or may be arguing, is that a BellSouth affiliate is involved in the transaction somewhere, and therefore, BellSouth is not selling

DSL at retail. Either way, BellSouth is wrong. BellSouth shouldn't be able to avoid the resale obligation by combining a telecommunication service it provides at retail with another service any more so than by combining a voice service with features and arguing that that's not a telecommunication service at retail. It's still providing the service at retail.

Second, to the extent BellSouth argues that there's an affiliate involved, it shouldn't be able to avoid the resale obligation through involvement of an affiliate any more so than it should be permitted to avoid the LD, or long distance, prohibition through a separate affiliate. BellSouth should have to resell DSL service to FDN.

The final measure for curing this issue that FDN has proposed in this case is the use of UNEs to provide DSL. This issue is somewhat complicated, and it's explained at length in Mr. Gallagher's testimony. I wanted to give you a brief introduction to the issue. The classic model for network architecture is a copper loop from the customer premise to a central office, or CO. That's not BellSouth's network architecture in Florida. Their network consists of thousands of intervening remote terminals between the customer premises and the CO, and BellSouth has literally thousands of these remote terminals in Florida. You can think of them, more or less, as mini central offices where copper wire is terminated, aggregated, and transported over larger data pipes. And the

magnitude of the remote terminal architecture is such that while there are fewer than 200 central offices in BellSouth's territory in Florida, there are more than 12,000 remote terminals where the pipe between the remote terminal and the central office is fiber, not copper. The problem is that DSL only works over copper facilities. So in order for a carrier to provide DSL in the remote terminal architecture it has to place what's called a DSLAM, or digital subscriber line access multiplexer, in the remote terminal.

BellSouth itself has actively been placing DSLAMs in its remotes and has told FDN and CLECs that to provide DSL, the CLECs must do the same, collocate DSLAMs in the remote terminals. BellSouth knows full well that this is an impossibility for CLECs, and CLECs are thus impaired in providing the DSL service and FDN is impaired.

FDN estimates that it could cost hundreds of millions in nonrecurring and recurring costs and could take years to collocate in so many BellSouth remote terminals. BellSouth is not denying CLECs the right to collocate at the remote terminals. Testimony that they are offering -- there's testimony that will be introduced in the record that BellSouth is offering collocation at remote terminals on terms and conditions generally more favorable than those applicable to collocation at COs.

Now, how do we know that FDN is impaired? Well, you

are going to hear testimony in the record from Mr. Gallagher about cost and about impracticability. As a matter of fact, you will also hear testimony that no CLEC has collocated at so much as one BellSouth remote terminal a DSLAM, nor has any CLEC even applied to collocate at a DSLAM, and it's unlikely that any will.

BellSouth will be arguing with regard to this UNE issue, unbundled network element issue, the FCC's UNE Remand Order. And in that order, the FCC addresses requirements for unbundling packet switching which includes the DSLAM. With regard to that, I would like the Commission to recognize two things. One, we believe that the UNE Remand Order is a product of a different time and a different understanding. The FCC was acting on an estimation of where it thought the industry was going. Given where the industry actually developed and the circumstances of this case, the UNE Remand Order actually supports FDN's position.

The second thing I would like for you to recognize with regard to the UNE issue is that the Federal Act and the rules set the criteria for this Commission to establish additional unbundled network elements. Those requirements are met in this case as evidenced by the testimony of Mr. Gallagher. Thank you.

COMMISSIONER DEASON: Thank you. BellSouth.

MR. TURNER: Thank you, Commissioner Deason. My name

is Patrick Turner; I represent BellSouth. There is a five-minute limit on the opening. I will do my best to respond to everything within five minutes. I think Mr. Feil went a little bit longer, and if I need it, I will ask for just a little bit longer. But I will do everything I can to do this as quickly as possible, so we can hear this through the witnesses.

COMMISSIONER DEASON: You can take more than five minutes. There's only one issue in this docket.

MR. TURNER: Thank you, sir. I'm going to address in order the three main points Mr. Feil raised. The first is whether BellSouth will permit its Fast Access Internet service over a UNE line that another carrier is using to provide voice service. Second, I'll talk about the resale arguments, and third, I'm going to talk about the DSLAM that you heard him mention.

First, it's true, BellSouth does not provide its Internet service, Fast Access Internet service, over a UNE loop that another carrier is using to provide voice service to the end user. And in its Third Report and Order on reconsideration in Docket 98-147 the FCC said, "Although the Line Sharing Order obligates incumbent LECs to make the high-speed frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide the voice service, it does not require that they, being incumbent LECs, provide xDSL

service when they, the ILEC, are no longer the voice provider." That's as clear as you can say it.

The second issue I'd like to address is resale. And in doing so, I want to distinguish between two separate products. One product is BellSouth Fast Access Internet service. That is an Internet service that we provide to retail end users. It is not a telecommunication service. It's an enhanced service or is a -- has been known in the past an information service, but it's an Internet service just like FDN.net's Internet service or any other Internet service that you can go out and buy. Because it is an information service and not a telecommunication service, it simply is not subject to the resale provisions of the Act. The Act only requires the resale of telecommunications services.

The second product that is out there is a federally tariffed DSL offering. That's not Internet service. That is the pipe, the big pipe that is used by the Internet service provider to put his Internet service through. If you think of DSL as a pipe, you would think of the Internet service as the water flowing through the pipe. BellSouth sells that pipe, but it does not sell that pipe to any end user. BellSouth sells the pipe to Internet services providers. And the Internet service providers in turn put their water through the pipe and sell that package to the end user.

Now, why is that important? Well, in June of this

year, the D.C. Circuit affirmed an FCC ruling that said this. The FCC ruling said, if you take that DSL pipe and you sell it directly to an end user, that's a retail offering, and you have to resell that, but if you take that pipe and you sell it to an ISP, that is not a retail offering. That is a wholesale offering, and that wholesale offering is not subject to resale. And the D.C. Circuit affirmed that decision. And that's what we're doing here. We don't sell the pipe to an end user, and tell the end user, you go out there and find somebody to throw water through the pipe for you. We sell the pipe to the ISP. They put their water through the pipe, and they give it to the end user. So that's why this is not subject to the resale. It's very clear under the recent court orders.

The third thing I want to address is the UNE argument that really boils down to a DSLAM. FDN is asking -- on Page 13 of Mr. Gallagher's testimony, he says he's asking for a broadband loop. And he explains the difference in that broadband loop he's asking for, and the DSL capable loops that BellSouth provides is that his broadband loop is going to include packet switching functionality. That's the additional thing they want as a UNE, packet switching functionality. And the FCC has ruled on that. More particularly, what they really want, we think we're going to show by testimony, and we're going to have some diagrams and walk through this to make it easier to understand, but as Mr. Feil said, what they really

need is, they need a DSLAM. In those remote terminals that are out there, they need a DSLAM in that remote terminal in order to provide this high-speed data service they want to provide. And you know what? When BellSouth wants to provide high-speed Internet service to the same customers served out of that same remote terminal, BellSouth has to put a DSLAM in there. As Mr. Feil said, BellSouth has been doing this in recent years. These DSLAMs, they're not equipment that's been sitting in the ground for the past 50 years. This is new stuff. We've been rolling this stuff out in the last three or four years, since the Act came out, since CLECs were there, since DLECs were there. And when we want to serve our data customers, we've got to put a DSLAM in that remote terminal just like we're saying they should put a DSLAM in the remote terminal.

So let's look at what you really have to look at. This issue is, and they acknowledge this, is are they impaired in their ability to provide this high-speed service if they don't have access to BellSouth's DSLAM? That's the issue. Now, the FCC has ruled on this. The FCC in its UNE Remand Order plainly and clearly stated a couple of things, and we'll get through this in the testimony. But the first thing it did is, it said a DSLAM -- we define a DSLAM to be a part of packet switching. And then they came back and said in the next couple of paragraphs, we decline to unbundle packet switching.

As Mr. Ruscilli points out throughout his testimony,

there are plenty of places in that UNE Remand Order where they say, we want to provide the full functionality of a loop except for DSLAMs. They made it very clear, a DSLAM is not a UNE. Now, after the FCC applied the very same impairment standard that FDN is asking this Commission to apply and determined that these DSLAMs are not UNEs. This Commission itself looked at the issue in two separate dockets, the ICG Telecom docket and the Intermedia docket. Those are both arbitration proceedings with BellSouth. And applying the exact same impairment standard the FCC applied, applying the exact same impairment standard that FDN wants you to apply today, this Commission has determined that that's not a UNE.

So very briefly, let's look and see what FDN would have to do and whether it meets the impairment standard. As I stated before, when BellSouth wants to provide DSL service, BellSouth has to go to the remote terminal that's serving its customers and determine whether it makes sense to put a DSLAM in that remote terminal. When it does so, if there are space limitation issues, BellSouth has to resolve those issues, has to expand the terminal. If there's not sufficient power to support a DSLAM, we have got to put power in. If there's temperature control issues or air-conditioning issues, we've got to resolve those issues. If FDN wants to put a DSLAM in the same remote terminal, first of all, it's got to buy a DSLAM. And you're going to hear testimony today from FDN's own

witness that says they can buy a DSLAM. You've got several vendors out there who will sell it to them. They're getting competitive bids on them. They can buy the DSLAM. The next thing they need is collocation space. And as Mr. Feil told you, we make that collocation space available. If we've got a DSLAM on a remote terminal, we do what the FCC says we've got to do. We expand that thing and let them put a DSLAM in there if there's not space. If there's space there, they put it in and there's no issue. But if there is not space, you're going to hear Mr. Williams testify, we'll add the space. And when we do, it's BellSouth that's going to add the space, it's BellSouth that's going to deal with the local zoning authorities, it's BellSouth that's going to take every step it would have to take if it put its own DSLAM in there. We're going to all rent the space and make available space for a DSLAM.

Now, once FDN gets the DSLAM in the remote terminal, what else does it need? Well, it needs to connect the DSLAM to its end user and to the central office. Well, you're going to hear from Mr. Williams that we provide UNEs that get them there. We provide subloop elements, a UNE that will go from the remote terminal to the end user premises, and we provide as UNEs a fiber facility that will go from the remote terminal back to the CO. The only thing that we're not giving as a UNE that's important in this docket is that DSLAM. And it's not a

UNE. The FCC says it's not a UNE, and they're not impaired in their ability to do it, because they can buy a DSLAM and we'll work with them and augment the space and let them put that DSLAM into the remote terminal. Before I end, I just want to reiterate the standard that applies here. It's the impairment standard. The standard is not whether it would be more convenient for FDN if it could use BellSouth's DSLAM than if it had to put its own DSLAM in, and the standard is not whether it would be easier for FDN to implement its business plan if it could use the BellSouth DSLAM equipment instead of putting in its own. The issue is, is FDN impaired from putting in its own DSLAM? And we think the evidence will clearly show they're not. Thank you for your attention.

COMMISSIONER DEASON: Thank you. I believe we're at the point to where we can swear in witnesses. Staff, you have a number of exhibits. Do you want those identified at this point?

MS. BANKS: Yes, Commissioner Deason. Staff has conferred with parties, and these are stipulated exhibits. Stip 1 is selected responses from FDN's first set of interrogatories to BellSouth, specifically Interrogatory Numbers 2 through 13 and 20 through 25.

COMMISSIONER DEASON: That will be identified as Exhibit 1.

(Exhibit 1 marked for identification.)

MS. BANKS: Stip 2 is selected responses from BellSouth's first set of interrogatories to FDN, specifically Interrogatory Numbers 1 through 8.

COMMISSIONER DEASON: That will be identified as Exhibit 2.

(Exhibit 2 marked for identification.)

MS. BANKS: Stipulated Exhibit 3 or Stip 3 would be -- is selected responses from Staff's second set of interrogatories to BellSouth, specifically Interrogatory Numbers 5 through 11.

COMMISSIONER DEASON: That will be Exhibit Number 3.

(Exhibit 3 marked for identification.)

MS. BANKS: Stip 4 is selected responses from Staff's second set of interrogatories to FDN, specifically Interrogatory Numbers 3 through 8.

COMMISSIONER DEASON: That will be Exhibit 4.

(Exhibit 4 marked for identification.)

MS. BANKS: And Stip 5 is selected responses from Staff's second set of interrogatories to BellSouth, specifically Interrogatory Numbers 52 through 70.

COMMISSIONER DEASON: And that will be Exhibit 5.

(Exhibit 5 marked for identification.)

MS. BANKS: And that's all that Staff has.

COMMISSIONER DEASON: And there's no objection to entering these exhibits into the record? Hearing no objection,

then Exhibits 1 through 5 are admitted.

(Exhibits 1 through 5 admitted into the record.)

COMMISSIONER DEASON: I'll ask all witnesses who are here to please stand and raise your right hand.

(Witnesses collectively sworn.)

COMMISSIONER DEASON: Thank you. Please be seated. Mr. Feil.

MR. FEIL: Florida Digital Network calls Michael Gallagher to the stand.

And, Commissioner, while Mr. Gallagher is working his way up, I wanted to sort of collectively ask the Commission and the parties for a preference question. A good deal of the testimony, the prefiled testimony, pertains to issues that have since been withdrawn. We could either leave it all as is in the record, or we can walk Mr. Gallagher and the other witnesses through it to get it withdrawn or whatever -- whatever the parties and the Commission prefers.

COMMISSIONER DEASON: BellSouth.

MS. WHITE: It would probably be easier just to leave it all in and just have the Commission take -- deal with the testimony on Issue 1 when it comes to the recommendation and the order.

MS. BANKS: Staff would agree with Ms. White. Leaving it all in --

COMMISSIONER DEASON: I wonder if the court reporter

agrees with that.

MS. WHITE: Maybe not.

COMMISSIONER DEASON: Is this a problem for the court reporter? We're going to put all the testimony in. Some of it is really not necessary, but --

THE COURT REPORTER: No problem.

COMMISSIONER DEASON: No problem, okay. The court reporter agrees, then I agree.

MR. FEIL: All right. Thank you.

MICHAEL P. GALLAGHER

was called as a witness on behalf of Florida Digital Network, Inc., and, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FEIL:

Q Mr. Gallagher, you have been sworn, have you not?

A Yes. Yes, I have.

Q Okay. Are you the -- well, could you state your name and address for the record, please.

A Michael Gallagher, Florida Digital Network, 390 North Orange Avenue, Orlando, Florida.

Q Are you the same Michael P. Gallagher who prefiled direct and rebuttal testimony in this proceeding?

A Yes, I am.

Q Do you have any changes, additions, or corrections to any of your prefiled testimony?

A No.
Q Well, in your deposition, did you not correct one math error --
A Yes, that's correct, I did.
Q -- on Page 37 of your testimony?
A Yes.
Q Do you have that in front of you?
A Yes.
Q If you could, point us out to the page and line.
A Yes. The math error should be that -- instead of 29.95, it should be $29 even.
Q And on what line was that?
A Eleven and 12.
Q You said 29.95 should be $20?
A Yes, $20 even.
Q Twenty dollars.
A It should be 49 minus 20.95 equals 29 even.
Q All right. And that same number, $29, goes on Line 11 and Line 12?
A Yes.
Q Did you have any other corrections or updates or anything else regarding your prefiled testimony, either direct or rebuttal?
A No.
Q You had attached to your prefiled direct and rebuttal

testimony several exhibits, only, by my account, one of which pertains to an outstanding issue, and that is exhibit labeled MPG-1; is that correct?

A That's correct.

MR. FEIL: Commissioners, I would ask that you identify MPG-1 or give it the next assigned exhibit number, which I believe is 6.

COMMISSIONER DEASON: That will be 6, yes.

(Exhibit 6 marked for identification.)

MR. FEIL: Commissioners, at least with regard to the exhibits, we probably could easily throw out the excess on those, so --

COMMISSIONER DEASON: I agree.

MR. FEIL: All right. With that, Commissioner, I would ask that Mr. Gallagher's prefiled direct and prefiled rebuttal testimony be inserted into the record as though read.

COMMISSIONER DEASON: Without objection, I show then that the prefiled direct and rebuttal testimony of Witness Gallagher is inserted into the record.

Q. Please state your name and address.

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

Q. Who do you work for?

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

Q. What are your responsibilities as CEO of FDN?

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

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

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

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

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

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

A. No.

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

A. I will address the interconnection agreement issues FDN could not resolve with BellSouth and which FDN raised in its Arbitration Petition.

Q. Please briefly describe FDN's operations.

A. FDN is a facilities-based Florida CLEC. FDN is also an IXC, a data services provider (both dial-up and dedicated), and, through an affiliate, FDN offers ISP and other Internet services. FDN was founded in 1998 with the mission of offering packaged services (local, long distance and Internet) to

small- and medium-sized businesses. FDN launched operations in Orlando in April 1999 and expanded to Fort Lauderdale in May 1999 and to Jacksonville in June 1999. A second round of expansion in West Palm Beach, Miami and the Tampa Bay area was completed in the first quarter of 2000.

FDN owns and operates Class 5 Nortel DMS-500 central office switches in Orlando, Tampa, Jacksonville, and Ft. Lauderdale. FDN's switches are connected by fiber optic cable owned and operated by FDN to nearby incumbent local exchange carrier (or "ILEC") tandem switches. FDN leases collocation cages or has virtual collocation space in over 100 ILEC wire centers. Remote switching equipment is installed at these collocation sites and from these sites FDN accesses ILEC UNE loops. Connectivity from the collocation sites to the central ILEC tandem switch is via T-1 circuits leased from the ILEC. FDN relies upon its rights under the federal Telecommunications Act of 1996 (the "Act") to obtain "last mile" access to Florida consumers through the purchase of unbundled network elements (UNEs) from ILECs such as BellSouth.

FDN uses BellSouth's TAG gateway for electronic ordering. Using systems and software FDN developed on its own, FDN transmits virtually all of its local service requests ("LSRs") to Bell electronically with minimal manual intervention. The vast majority of FDN's LSRs to BellSouth are for 2 wire voice grade UNE loops. Based on information from BellSouth, FDN believes that FDN is by far the largest procurer of UNE voice-grade loops in Florida and that FDN has installed more UNE loops than all other CLECs in

Florida combined. Through relief sought in this proceeding, FDN intends to expand its use of BellSouth UNEs for the provision of competitive local voice and data services to both business and residential users in the State of Florida.

ISSUE 1.

I. INTRODUCTION

Q. What is the purpose of FDN's high-speed data proposal?

A. FDN seeks the ability to offer its customers a combination of circuit-switched voice services, such as local dial tone, and packet-switched high-speed data services, such as Digital Subscriber Line (DSL) services. FDN is able to provide DSL to some end-users in Florida by collocating its own DSL multiplexers (DSLAMs) in BellSouth's central offices. However, FDN is precluded from providing high-speed data service where BellSouth has deployed Digital Loop Carrier (DLC) facilities. Except in the territory served by SBC Communications, Inc., CLECs are generally precluded from offering DSL service where DLCs are deployed. The severity of this limitation on competition is felt nowhere more than Florida, as *more than 60%* of all BellSouth access lines in Florida pass through DLCs according to BellSouth. In FDN's experience in its initial Florida markets, FDN believes the percentage of DLCs approaches 70%. BellSouth does not offer any resale or UNE products that would enable CLECs to provide high-speed data service to consumers who are served by DLC loops where the CLEC is the voice provider. The purpose of my testimony is to offer the factual basis required

for the Florida Commission to order BellSouth to offer UNE and resale products, in accordance with applicable law, that will be essential for FDN to offer high-speed data services on an ubiquitous basis in Florida over the same customer loops that it uses to provide its voice services. This issue is of paramount importance for FDN to be able to launch a facilities-based competitive local voice option for residential subscribers. Florida is almost completely without facilities based local voice competition for residential subscribers at this time.

Q. What is DSL?

A. DSL is a technology initially developed to enable high-speed data transmission over traditional copper loop facilities. DSL modems placed on each end of a copper loop transmit information at rates far exceeding those typically achieved by traditional "dial-up" modems, allowing consumers to utilize the growing number of bandwidth intensive applications and to maximize efficiencies and productivity. To provide a viable DSL transmission service, the loop between the customer and the DSLAM must typically be shorter than 18,000 feet, free of bridged tap, load coils and repeaters, and free from interference caused by nearby fiber-based telecommunications.

Q. Is FDN able to offer high-speed data services in conjunction with its voice service on a ubiquitous basis in Florida?

A. No. FDN is collocated in more than half of BellSouth's central offices in the state of Florida, and is able to offer voice services to 100% of

the consumers served by these offices. However, FDN is unable to provide DSL service to approximately 70% of these end-users because of the presence of BellSouth DLCs.

Q. What are DLCs?

A. The DLC performs an analog to digital conversion that aggregates telecommunications from the individual customer subloops to a shared transmission facility bound for the central office. Deployment of DLCs and successor technologies will ultimately save billions of dollars annually in maintenance and switching costs. In the past, and still today throughout most of the country, the vast majority of last mile loops consist of "home run" copper facilities between the customer and the central office. However, in the past quarter-century, as Florida's population grew explosively, BellSouth deployed a tremendous number of DLCs at remote terminals (RTs) in its distribution network. Attached hereto as Exhibit __ (MPG-1) is a diagram comparing traditional copper network architecture with DLC deployment.

Q. Why do BellSouth's DLCs preclude FDN from offering DSL service?

A. DSL cannot be transmitted through a DLC unless it is first multiplexed for digital transmission to the central office. Therefore, the carrier must locate at the remote terminal a DSLAM, or, in the case of Next Generation Digital Loop Carriers ("NGDLCs"), DSL-capable line cards that perform DSLAM functionality. For reasons I will explain below, unlike BellSouth, FDN and other CLECs cannot collocate DSLAMs or line cards at

remote terminals. Therefore, BellSouth today is the only carrier in Florida able to offer DSL service where its DLCs are deployed.

Q. Why can CLECs provide high-speed data service over DLC loops in the territory served by SBC?

A. SBC offers a wholesale UNE-priced broadband loop product that includes transmission from the customer to the remote terminal, DSLAM functionality at the RT, and transmission to the central office, where CLECs pick up the traffic from SBC's packet switch. Verizon is developing a similar product. As I will explain in more detail below, FDN seeks a similar UNE from BellSouth, tailored to the technical specifications of BellSouth's Florida network.

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

A. It would be very difficult as demand for DSL increases. In most Florida central offices, more so than in most of the rest of the nation, FDN will not be able to succeed in the voice or data market if it is limited to providing DSL service only to end-users who can be served from the central office. As I stated previously, more than 60% of BellSouth's Florida access lines pass through DLCs and cannot be served from the central office. Of the remaining 30-40% of the end-user base, many cannot receive central office based DSL due to excessive loop lengths, the presence of bridged taps, load coils or repeaters, or other factors. With such a high percentage of the DSL market closed to central-office-only strategies, CLECs will not be able to

compete. Furthermore, if BellSouth is the only carrier that can provide DSL to a substantial percentage of consumers, it can leverage its market power to suppress competition for voice services, as I have indicated above. Therefore, an exclusive central office strategy will not only fail in the DSL market, but it could also fail in the voice services market as well. My point is well illustrated by the failure of many exclusive central-office based CLEC strategies, even where the rate of DLCs is much lower than Florida. Of the three major national DSL CLECs, NorthPoint has already dissolved in bankruptcy and Covad and Rhythms are in serious financial peril and could be bankrupt during the course of this year.

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

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

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

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

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

A. Yes. First, as I mentioned, FDN's inability to offer high-speed data to most customers impairs its ability to sell voice services to customers looking for a bundled service offering from a single carrier. Second, FDN is impaired in its ability to sell local exchange voice services by BellSouth's unnecessary and anticompetitive practice of leveraging its control of the DSL market in Florida to injure competitors in the voice market. To illustrate, if a

prospective FDN customer today is obtaining both voice and data services from BellSouth, they are not able to migrate their local exchange voice service to FDN's facilities-based voice service without having BellSouth disconnect their data service, even though BellSouth easily has the capability to continue to provide data service on the line. Because FDN is unable in most cases to offer DSL service to the customer on the same telephone line, the customer is likely to lose interest in obtaining voice telephone services from FDN, even when FDN is able to offer superior pricing and service. BellSouth's ability to manipulate its market power to injure competitors will only increase as competitive DSL providers continue to disappear.

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

A. In markets where only one or only a few providers are available, these providers have fewer incentives to provide quality service or competitive rates to their customers. As BellSouth has solidified its growing control over the DSL market in Florida, it recently raised its retail DSL prices in the state and discontinued some of its competitive promotions. If competitors are denied meaningful access to BellSouth's last mile connections to end-users, price increases could be expected to continue.

Q. In this arbitration, is FDN requesting the same relief sought by MCI WorldCom in Docket No. 000649-TP that BellSouth be required to provide xDSL service to FDN customers?

A. No. FDN is not in this arbitration seeking to require BellSouth to provide retail xDSL or ISP *services* to consumers who are also FDN customers. Instead, FDN proposes to purchase wholesale access to BellSouth's unbundled network elements pursuant to Section 251 of the Act. BellSouth would not be required to have end-user relationships, such as billing or customer service, with FDN's customers. Nor would BellSouth be required to connect the customers from the central office to an ISP's point of presence, or to provide Internet service itself; instead, as with other UNEs, FDN would access the loop via its collocated facilities in BellSouth's central offices. Therefore, the decision in the MCI WorldCom arbitration in Docket No. 000649-TP regarding BellSouth's obligation to provide xDSL service is not relevant in this arbitration.

II. BELLSOUTH SHOULD BE REQUIRED TO OFFER UNBUNDLED BROADBAND LOOPS AS A UNE

Q. To enable FDN to provide bundled voice and high-speed data service products where DLCs are deployed, does FDN require access to facilities that are different from the UNEs offered in other BellSouth Florida interconnection agreements?

A. Yes. At the time that the current national list of UNEs was established in the FCC's *UNE Remand Order* in 1999, the FCC formalized as UNEs only the network elements needed for local exchange and DSL service in an ILEC network in which the predominant last mile connections are home

run copper loops. BellSouth's existing network in Florida is very different from the FCC's conceived model, with more far more fiber and DLCs. Due to the differences between BellSouth's DLC-dominated Florida network and other ILECs' copper-based distribution systems, it is necessary to establish additional UNEs and/or apply the FCC's standard to unbundle packet switching in order to ensure that CLECs can provide ubiquitous xDSL service in Florida using UNEs.

Q. Can the Florida Commission establish new UNEs?

A. Yes. Section 251(d)(3) of the Act explicitly authorizes state commissions to establish additional unbundling obligations. When the FCC established the basic list of UNEs that must be unbundled by all ILECs, the FCC emphasized that "section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list."[1] The *Line Sharing Order,* which sought to promote unbundled CLEC access to DSL, further encouraged state commissions "to impose additional, pro-competitive requirements consistent with the national framework established in this order."[2]

Q. What new UNEs are necessary to enable FDN to offer high-speed data services in BellSouth's territory in Florida?

A. Where BellSouth has deployed Digital Loop Carrier facilities, FDN requires access to unbundled DSL-capable transmission facilities between the

1 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd. 3696, ¶ 154 (1999) ("*UNE Remand Order*").
2 Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Third Report and Order, 14 FCC Rcd. 20912, at ¶ 159 (1999) ("*Line Sharing Order*").

customer's Network Interface Device and the BellSouth distribution frame in its central offices, including all attached electronics that perform DSL multiplexing and splitting functionalities. I will describe these facilities as "broadband loops." FDN seeks the ability to obtain both whole loops for a combined voice and data service and the high-frequency portion thereof for data-only service.

Q. How does this facility differ from the DSL-capable loop that is classified as a UNE under the UNE Remand Order?

A. Under my description, broadband loops include the packet switching and splitter functionalities that are performed by BellSouth's equipment located at a remote terminal. The traditional UNE loop does not include the DSLAM.

Q. Why would the network elements necessary to provide high-speed data service over DLC loops be different from the definition of a non-DLC loop?

A. As I stated above, FDN is not able to offer xDSL service over DLC loops using only the existing UNEs. In the *UNE Remand Order*, the FCC determined that CLECs could place their own DSLAMs in ILEC central offices on the same terms and conditions that the ILEC located its own DSLAM, and that they were therefore not impaired by a lack of unbundled access to ILEC DSLAMs in the central office. As I will explain in more detail below, CLECs are not able to self-provision or otherwise obtain DSLAM functionality at ILEC remote terminals on an equivalent basis.

Even in rare cases where such provisioning may be technically feasible, the option is financially impossible for FDN and other CLECs. Therefore, as I will explain below, CLECs would be impaired if DSLAM functionality is not included as part of the broadband loop UNE.

Q. Is there a regulatory precedent for requiring incumbents to provide a platform of UNEs that comprise DSL transmission over loops with fiber feeder at prices based on forward-looking, economic cost?

A. Yes. In a proceeding relating to the SBC-Ameritech merger, the FCC required SBC to offer to CLECs a "Broadband Offering," which the FCC described as a "combination of network elements provided as a wholesale arrangement."[3] The Broadband Offering must be offered, alone and in combination with a voice offering, at rates, terms, and conditions that are just, reasonable, and nondiscriminatory and priced in accordance with the TELRIC methodology applicable to unbundled network elements.[4] SBC's Broadband Service, which is available in SBC's thirteen-state region today, is functionally equivalent to the broadband loop requested by FDN in this arbitration. Therefore, FDN is seeking from BellSouth what SBC already offers to CLECs in its thirteen-state region.

Q. Have any regulators classified broadband loops as a UNE?

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3 Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket No. 98-141, ASD File No. 99-49, Second Memorandum Opinion and Order, FCC 00-336 (rel. September 8, 2000) ("*Project Pronto Order*"), at ¶ 30.

4 *Project Pronto Order* at ¶ 6 (footnote omitted).

A. Yes. The FCC described the offering as a combination of network elements and required that it be priced according to the TELRIC cost methodology used to price UNEs.[5] The Illinois Commerce Commission recently created the broadband loop with packet switching functionality as a new UNE.[6] Numerous other state commissions are now considering the issue. Although the issue is also pending in an FCC proceeding, the FCC has indicated that it expects that issues related to access to DLC loops will be addressed in state arbitration proceedings.

Q. Have any ILECs other than SBC made plans to offer a similar combination of network elements to provide wholesale DSL capability?

A. Yes. Verizon has developed a draft proposal for a product that is functionally equivalent of SBC's Broadband Offering and the broadband UNE loop proposed by FDN in this case, called its Packet Access at Remote Terminal Service (PARTS).

Q. Is CLEC access to DLC-served customers less urgent in BellSouth territory than in SBC and Verizon's regions?

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5 The FCC did not formally classify the offering as a UNE because it has reserved that issue to a pending generic case that will be applicable to all ILECs. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147, CC Docket 96-98, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket 96-98*, FCC 00-297, at ¶¶ 81-83, 103-12, 119-28 (rel. Aug. 10, 2000).

6 *See* Arbitration Decision on Rehearing, *In the Matter of Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, et al.*, Illinois Commerce Commission, Docket Nos. 00-0312 and 00-0313 (Illinois Commerce Commission, Feb. 15, 2001) ("*Illinois Pronto Arbitration Order*"); see also *In the Matter of Illinois Bell Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Services*, Illinois Commerce Commission, Docket No. 00-0393, Order (Ill. Commerce Commission Mar. 14, 2001.

A. Absolutely not. In fact, this issue is more urgent in Florida because of BellSouth's massive deployment of DLCs in the state. SBC offered its broadband service in conjunction with its rollout of DSL-capable DLC loops, and Verizon has stated that it has not yet provided DSL over DLC loops. By contrast, BellSouth has already provisioned a tremendous number of DSL lines over DLC loops in Florida. In the absence of a broadband loop UNE, a higher percentage of Florida end-users are deprived of competitive choice of DSL and voice providers than would be occurring in SBC and Verizon territory.

Q. What standard must the Florida Commission employ in deciding whether to create any new UNEs?

A. FCC Rule 51.317 prescribes the legal standard to be used by state commissions when creating new UNEs.[7] When prospective UNEs implicate specified proprietary rights of the ILECs, a state must find that access to that element is "necessary." When no proprietary rights are implicated, the state need only find that CLECs would be "impaired" without access to the element. Under FCC rules, a network element is considered to be proprietary only if the ILEC demonstrates that it has invested resources to develop proprietary information or functionalities that are protected by patent, copyright or trade secret law.[8] The discrete elements such as line sharing, packet switching, and fiber functionality that comprise the unbundled access that are sought here have been previously deemed non-proprietary by the

7 47 C.F.R. § 51.317.

8 *See* 47 C.F.R. § 51.317(a).

FCC.[9] Therefore, in this arbitration, none of FDN's proposals would implicate BellSouth's proprietary rights. For these reasons, the Florida Commission should use the "impair" standard to determine whether any new UNEs should be created.

Q. How is the "impair" standard used by state commissions to create new UNEs?

A. When evaluating whether to unbundle a network element under the "impair" standard, federal regulations require unbundling if lack of access to the network element impairs a carrier's ability to provide the services it seeks to offer. "A requesting carrier's ability to provide service is 'impaired' if, taking into consideration the availability of alternative elements outside the ILEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer."[10] The FCC rules establish that the "totality of circumstances" must be considered to determine whether an alternative to the ILEC's network is available in such a manner that a requesting carrier can *realistically* be expected to actually provide services using the alternative.[11] When determining whether to require additional unbundling, FCC Rule 51.317(b) requires that the Commission consider the cost, timeliness, quality, ubiquity, and impact on network operations that may be associated with any

9 *See UNE Remand Order* at ¶ 180 & 305; *Line Sharing Order* at ¶ 28.

10 47 C.F.R. § 51.317(b).

11 *UNE Remand Order* at ¶ 62.

alternatives to unbundling. In addition, other factors such as promotion of the rapid introduction of competition; facilities-based competition, investment, and innovation; or certainty to requesting carriers regarding the availability of the element may also be considered by the Commission.[12]

Q. If broadband loops were not available as a UNE, are there any viable alternatives available to FDN to provide high-speed data service where BellSouth has deployed DLCs?

A. No. If viable alternatives were available, FDN would be selling DSL today to customers served by DLC loops in Florida.

Q. What options do you believe that BellSouth may assert as justifications for withholding UNE designation of broadband loops?

A. I am aware that ILECs have alleged that at least three alternatives are available to CLECs -- CLEC collocation of DSLAMs at the remote terminal, the use of all-copper loops, and construction of their own distribution network. None of these options offer viable options for FDN or other CLECs. If left only with these options, FDN would be not only impaired but prevented from being able to offer DSL service to a growing majority of Florida consumers, and, as a result, would be impaired in its ability to offer voice local exchange services as well.

Q. Could FDN provide ubiquitous DSL service to end-users served by DLCs by collocating DSLAMs at BellSouth's remote terminals?

A. No. The cost of providing ubiquitous service throughout the state of Florida by collocating DSLAMs at remote terminals would be staggeringly

12 *See* 47 C.F.R. § 51.317(c).

expensive, and well beyond the capability of FDN or other CLECs. FDN invested millions of dollars and much of its human and technical resources to collocate equipment in 100 of BellSouth's 196 central offices in the state of Florida. By contrast, BellSouth has more than **12,000** remote terminals in the state of Florida. Collocation on this scale is financially impossible for FDN and would be tantamount to duplication of a significant portion of BellSouth's monopoly-built last mile distribution network. In any case, collocation even at single remote terminals is precluded by numerous other factors. As evidence of this reality, according to BellSouth's discovery responses in this case, no CLEC has collocated, or even requested to collocate, at a BellSouth remote terminal in the entire state of Florida.

Q. What factors preclude CLEC collocation at individual remote terminals?

A. First, in most cases, even if BellSouth permitted FDN to collocate a DSLAM inside the remote terminal, no fiber feeder will be available to transport the telecommunications back to FDN's collocation site in the central office. BellSouth has repeatedly maintained that dark fiber will in most cases not be available to CLECs at these locations. In most or all cases, no dark fiber would be available from any third parties, as third parties would have had little reason to invest in fiber between two locations controlled and highly regulated by BellSouth. Therefore, in most cases, FDN could only use a remotely-collocated DSLAM if it were to construct its own fiber-optic

transport between the remote terminal and FDN's facilities, such as those it has collocated at BellSouth's central office.

Q. Could FDN construct its own fiber-optic transmission between BellSouth's remote terminals and central offices for the purpose of providing DSL service through remotely-collocated DSLAMs?

A. No. Such an endeavor would be prohibitively costly and time-consuming. The FCC noted that "the costs associated with self-provisioning or purchasing alternative elements from third-party suppliers are relevant to [a] determination of whether the element is a practical and economical alternative to the incumbent LEC's unbundled network element."[13] The cost of constructing new fiber facilities would be incredibly expensive, and completely unaffordable, to FDN or to a third-party supplier. Such construction would require FDN to incur tremendous costs to secure rights-of-way, dig up the path of the fiber, and install equipment. These costs would not justify the comparatively limited revenues that could be realized from high-speed data services to the limited number of end-users served by a single remote terminal.

Q. How would these costs compare to the costs borne by BellSouth for its DSL connectivity?

A. BellSouth has already years ago secured rights-of-way and incurred most of the costs of placing fiber. Unlike FDN, BellSouth would not be required to place new fiber in order to carry new traffic. When BellSouth informs CLECs that no dark fiber is available, that does not mean that no

13 *UNE Remand Order* at ¶ 72.

fiber is available for *BellSouth's* use. ILECs typically reserve a substantial amount of fiber capacity between their remote terminals and central offices. Therefore, BellSouth would not have needed to place new fiber facilities to add DSLAMs and DSL to its remote terminals. Furthermore, even if its bandwidth were exhausted between an RT and central office, BellSouth can upgrade its bandwidth by changing the electronics on the ends of its lit fiber to secure additional bandwidth for its DSL. This option, which BellSouth will not provide to CLECs, is tremendously cheaper than installation of new fiber.

Q. Even if dark fiber was available, would FDN be able to collocate DSLAMs at BellSouth's DLCs?

A. No. In many cases, collocation may not be physically possible, and in all or nearly all cases, it would be prohibitively expensive and time consuming for FDN.

Q. Why would CLEC DSLAM collocation at BellSouth remote terminals be physically impossible in some circumstances?

A. The vast majority of BellSouth's 12,000-plus remote terminals in Florida are cabinets, which are much smaller than other typical RT structures, such as huts or controlled environmental vaults. Many DLCs therefore are housed in structures that are too small to support additional collocation of DSLAMs and necessary supporting infrastructure by several CLECs, or perhaps even by a single CLEC. DSLAMs require power and climate control infrastructure that likely is often not available at a remote terminal. Addition

of this additional infrastructure would require even more space, which may not be available.

Q. Why would collocation of a DSLAM at BellSouth remote terminals be prohibitively expensive and time-consuming for FDN?

A. DSLAM power and temperature control requirements exceed the standards of many remote terminals. CLECs would incur tremendous expense and delays in arranging for sufficient power capacity and infrastructure. In addition, as I noted above, if space within the RT were unavailable, FDN would be required to build an external structure to house its facilities, which would require substantial time and expense, including, but not limited to, securing acquisition of new land and/or establishment of new rights-of-way and all other approvals from local authorities necessary to construct FDN's own remote terminals. Remote terminals are often located in residential neighborhoods and are subject to increasing scrutiny. Neighborhoods now quiet about the presence of a single remote terminal may well object to plans by numerous CLECs each to place their own remote terminals. FDN, which does not have long-standing relationships with local authorities, could experience significant delays or expenses in securing such permission, if not outright rejection. On top of these expenses, BellSouth might seek to charge FDN for cross-connection facilities to its remote terminal. Taken together, ubiquitous collocation of DSLAMs at BellSouth remote terminals would cost FDN millions of dollars and would require years of difficult, if not impossible, efforts.

Q. Could FDN cost-justify these high DSLAM collocation expenses at a remote terminal for the purpose of offering DSL?

A. No. DSLAMs are very often too expensive to justify at a remote terminal due to the smaller number of customers that are served by an RT. Also, the FCC has determined that, in applying the cost factor of the impairment test, the state commission should consider the economies of scale enjoyed by incumbents as a result of their ubiquitous networks.[14] Unlike at a central office, the level of concentration present at a remote terminal is often as low as a hundred or a few hundred lines in total. At least in their early years of operations, CLECs cannot realistically hope to obtain a "take rate" of more than a small, single digit percentage of the total possible market for DSL service. BellSouth is able to garner a higher take rate, at least initially, because of its greater name recognition and established relationships with existing customers. Therefore, the cost of establishing a DSLAM collocation arrangement and fiber connectivity at each remote terminal may be so prohibitive as to never make economic sense given the few customers that any given CLEC might serve from an individual remote location. Indeed, if collocation of a stand-alone DSLAM at the remote terminal were the only available "option", DSL competition in markets served by DLCs might never develop.

Q. Would CLECs be able to collocate DSLAMs at BellSouth remote terminals on the same terms and conditions afforded by BellSouth to its own DSL operations?

14 *UNE Remand Order* at ¶ 84.

A. No. First, as I mentioned before, BellSouth has indicated that it will not provide the lit fiber to CLECs that BellSouth's DSL utilizes for transport to the central office. Second, CLECs will be severely disadvantaged wherever BellSouth deploys Next Generation Digital Loop Carrier ("NGDLC") systems, because BellSouth will be able to use digital line cards rather than DSLAMs at the remote terminal. These line cards, which perform the role of the DSLAM in NGDLC architecture, are small pieces of electronic equipment that that are plugged directly into the channel bank assembly of the Digital Loop Carrier.[15] Line cards are significantly smaller and cheaper and are more effective even than the smallest commercial DSLAM. I understand from BellSouth's statements in other proceedings that it has opposed collocation by CLECs of line cards at BellSouth NGDLCs. Therefore, BellSouth would deny the ability of CLECs to place DSLAM functionality at the remote terminal on the same terms and conditions that it affords to its own operations.

Q. You testified that it would be prohibitively time-consuming for FDN to collocate stand-alone DSLAMs and connect to lit fiber at BellSouth remote terminals. At what point does the resulting delay to FDN's deployment constitute an impairment of FDN's ability to provide high-speed data service?

A. Even if FDN had sufficient funding to collocate remote DSLAMs and construct or obtain lit fiber to the central office, the process in my estimation would require well more than one year before FDN could start to provide

15 See, e.g., *Pronto Order* at ¶ 16.

service, and perhaps much longer. Construction of new external remote facilities or placement of new fiber could require time-consuming public approval processes. Furthermore, it is my understanding that in one of the few instances where a CLEC attempted to collocate a DSLAM at an ILEC remote terminal, cross-connection and construction issues remained unresolved more than one year after the initial collocation request was made. The FCC has held that "delays caused by the unavailability of unbundled network elements that exceed six months to one year may, taken together with other factors, materially diminish the ability of competitive LECs to provide the services that they seek to offer."[16] FDN and the investors on which it relies place a valuable premium on speed to market, which is critical in the telecommunications market, especially for new advanced services. The FCC observed the importance of speed to market, noting that "incumbent LECs can take advantage of delays caused by the unavailability of unbundled network elements by using their unique access to most customers to gain a foothold in new markets, and, in markets where services may be offered pursuant to long term-contracts (*e.g.*, DSL and other advanced data services), to 'lock-up' customers in advance of competitive entry."[17] Moreover, delays in the introduction of competitive services caused by the unavailability of unbundled elements would give BellSouth valuable time to entrench itself with existing customers.[18] If forced to endure delays of additional months or

16 *UNE Remand Order* at ¶ 89.

17 *UNE Remand Order* at ¶ 91.

18 *See UNE Remand Order* at ¶ 93.

years to build new remote structures, collocate DSLAMs, obtain cross-connections and deploy lit fiber, all while BellSouth adds thousands of new DSL customers in Florida every month, FDN will suffer serious competitive injuries. Delays increase the risk that FDN will fall irreparably behind BellSouth in the high-speed data market, and further enable BellSouth to use its growing control of the Florida DSL market to injure FDN's position in the voice services market.

Q. Would it be possible for FDN to offer DSL on a ubiquitous basis over home run copper loops that do not pass through the BellSouth's DLCs?

A. No. In the first instance, many DLCs are deployed at locations where copper loops are longer than 18,000 feet, and are therefore too long to carry DSL signals. Even 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. The FCC concluded that "the quality of alternative network elements available to the competitive LEC is relevant to a determination of whether a requesting carrier's ability to provide service is impaired" and that "a material degradation in service quality associated with using an alternative element will materially diminish a competitor's ability to effectively provide service."[19] Second, in many BellSouth serving areas, no copper facilities remain available for DSL.

19 *UNE Remand Order* at ¶ 96.

Q. Could FDN self-provision DSL transport to end-users who are served by BellSouth DLC facilities?

A. No. FDN cannot replicate BellSouth's facilities in order to sell DSL. Even if FDN had at its disposal the billions of dollars that ILECs are spending on the deployment of DLC loop facilities, it would cost FDN billions on top of that amount to produce a functionally equivalent last mile distribution network to carry FDN's own telecommunications. BellSouth's DLC facilities utilize BellSouth's existing copper distribution network, existing rights-of-way, and existing remote terminal facilities. Furthermore, construction of a new distribution network would require several years at a minimum. Therefore, this is clearly not a realistic option for FDN. Further, I believe that competitive voice service to residential users would be accelerated, as competitors to Bellsouth would have access to both parts of the competitive "bundle" of voice and data.

Q. Can FDN obtain DSL transport to end-users served by BellSouth DLCs from a third-party provider?

A. No. I am not aware of any third-party provider that could and would provide the last mile distribution facilities necessary for high-speed data services to FDN or other CLECs on a ubiquitous basis throughout BellSouth territory, or even in a small fraction of that territory. Any third party would face the same obstacles that prevent FDN from constructing its own last mile distribution network. Given FDN's interest in obtaining such access, I

believe to a near certainty that I would be aware if a viable, ubiquitous third-party provider were available in Florida.

Q. Would the availability of a broadband UNE promote the rapid introduction of competition for high-speed data services in Florida?

A. Yes. I agree with the FCC's finding in the Project Pronto Order that the availability of a broadband offering would promote the rapid introduction of competition.[20] FDN would plan to obtain this service as soon as possible and would be able to offer DSL soon thereafter. The availability of a broadband UNE loop would have a far more immediate and profound effect on DSL competition in Florida than it had in SBC's region due to the higher percentage of BellSouth DLCs deployed in the state.

Q. Would the broadband UNE loop that you have proposed include packet switching functionality?

A. Yes.

Q. Has the FCC established a test used to determine whether packet switching must be unbundled?

A. Except for the "impair" standard I described above, the FCC has not issued a generally applicable test to determine whether packet switching should be unbundled. However, in the 1999 *UNE Remand Order*, the FCC created a four-part test setting forth one set of circumstances where packet switching clearly must be unbundled. ILECs have argued that a state commission may order unbundling of packet switching only when this test is satisfied; however, nothing in the Order suggests that packet switching may

20 *Project Pronto Order* at ¶¶ 23, 30.

not be unbundled in other circumstances. Once a state commission finds that a CLEC would be impaired without access to unbundled packet switching, it can and should order such unbundling without literal application of the *UNE Remand* test.

Q. Could you please state the packet switching unbundling standard from the *UNE Remand Order*?

A. The test set forth in the *UNE Remand Order* requires ILECs to unbundle packet switching when (1) the ILEC has installed DLC systems; (2) there are no spare copper loops that are capable of supporting the xDSL services the CLEC seeks to offer; (3) requesting CLECs are not allowed or able to collocate DSLAMs at ILEC remote terminals on the same terms and conditions that apply to the ILEC's own DSLAM; and (4) the ILEC has deployed packet switching for its own use.[21]

Q. Are these four conditions met for the purposes of this arbitration?

A. Yes. BellSouth has indisputably installed DLC systems, and likely has the highest percentage of DLCs deployed of any large ILEC in the country. Second, in the vast majority of cases where BellSouth has deployed DLCs, there are no xDSL-capable copper loops available that FDN can use to provide high-speed data service. FDN and other CLECs have requested such loops through BellSouth's ordering system and received notice that no copper loop is available. My response to the third part of the test varies based on whether BellSouth has deployed NGDLC systems. Where NGDLCs are deployed, BellSouth's DSLAM functionality is performed through line cards

21 *UNE Remand Order*, at ¶ 313; 47 C.F.R. 51.319(c)(3).

plugged into the channel bank of the NGDLC. BellSouth will not allow CLECs to collocate their own line cards at the NGDLC. Where traditional DLCs are deployed, although BellSouth nominally allows CLECs to collocate stand-alone DSLAMs at the remote terminal, such collocation is subject to untenable terms and conditions, for the reasons I explained above. These reasons include, but are not limited to, the fact that BellSouth refuses to allow CLECs to connect the DSLAMs to the lit fiber that is used to carry BellSouth's high-speed data service to the central office. Because dark fiber is often not available, a CLEC DSLAM would be stranded at the remote terminal. Therefore, whether BellSouth deploys DLCs or NGDLCs, CLECs are denied collocation of DSLAM functionality on the same terms and conditions applicable to BellSouth's DSLAM functionality. Finally, it should be beyond dispute that BellSouth has deployed packet switching functionality for its own DSL services. Therefore, the FCC's four-part test is satisfied, and BellSouth must be ordered to offer unbundled packet switching where it has deployed DLCs.

Q. Should unbundled packet switching be made available generally or only where the Commission conducts a remote terminal by remote terminal unbundling analysis?

A. Because these conditions are satisfied in the vast majority, if not all, of BellSouth's DLC deployments, a general unbundling requirement is warranted. Otherwise, BellSouth will be able to effectively prevent CLECs from obtaining service in a timely and affordable manner by delaying entry

over protracted and expensive litigation addressing each one of BellSouth's hundreds or thousands of DLC sites.

Q. Have any state commissions found that ILECs are required to unbundle packet switching at DLCs generally using the FCC's four-part standard?

A. Yes. The Illinois Commerce Commission found that the test had been satisfied in ordering Ameritech to unbundle broadband loops.[22] In addition, the New York Public Service Commission declined to make this determination *only* because Verizon was not yet currently deploying packet switching for its own use or for the use of an affiliate. The New York Commission held that, were Verizon to deploy packet switching for its own use or to its affiliate, it would have to offer it to all competitors.[23] The facts of the New York case were materially different than here because of the far more advanced stage of BellSouth's DSL deployment over DLCs and ongoing utilization of packet switching for DLC loops in Florida. Had the Florida facts been before the New York Commission, a general unbundling of packet switching clearly would have been warranted.

Q. Is the Florida Commission required to apply a four-part test established in the FCC's *UNE Remand Order* for unbundling of packet switching if before it can designate broadband loops as UNEs?

22 *Illinois Pronto Arbitration Order* at 31.

23 Proceeding on the Motion of the Commission to Examine Issues Concerning the Provision of Digital Subscriber Line Services, Case 00-C-0127, Opinion and Order Concerning Verizon's Wholesale Provision of DSL Capabilities Opinion No. 00-12 (N.Y. P.S.C. October 31, 2000).

A. No. As I stated previously, the Florida Commission can and should order unbundling of packet switching if it finds that CLECs would be impaired without such access, pursuant to the terms of FCC Rule 51.317. The four-part test from the *UNE Remand Order* is only one of many routes that the Commission could take to find such impairment. Above all, the Commission should consider that the fundamental purpose of the FCC test is clearly to enable CLECs to offer high-speed data service where the ILEC has deployed Digital Loop Carriers. If FDN had such access, it would be providing high-speed data over these loops today. BellSouth's contrived arguments that the *UNE Remand Order* precludes the unbundling of packet switching fails when viewed in the context of the purpose of the FCC's order and the reality today that CLECs lack meaningful access to DLC loops. Therefore, the BellSouth should be required to unbundle packet-switched broadband loops in Florida.

III. BELLSOUTH IS REQUIRED BY SECTION 251(C)(4) OF THE FEDERAL ACT TO OFFER ITS HIGH-SPEED DATA SERVICE FOR RESALE

Q. Should BellSouth be required to offer wholesale high-speed data service to FDN for resale pursuant to Section 251(c)(4) of the Telecommunications Act of 1996?

A. Yes. 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. While resale is not FDN's preferred means of access, and, under FCC Orders, is not a substitute for UNE access,[24] the Act does require BellSouth to offer it, and BellSouth should be required to provide FDN such access in this case.

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

A. No. BellSouth's only wholesale high-speed data service in Florida is its voluntary, market-rate offer to Internet Service Providers (ISPs). BellSouth offers this service only for telephone lines on which BellSouth is the local exchange carrier. Therefore, this service is not a long-term option for FDN, which seeks to combine high-speed data services on the same line as its facilities-based local exchange service. Furthermore, since BellSouth considers the service to be voluntary, there is no guarantee that it will continue to be made available at rates, terms and conditions that would allow a competitor to compete with BellSouth's retail service.

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

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

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

24 See *UNE Remand Order* at ¶ 67.

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

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

A. BellSouth claims that its DSL services are exempt from the resale obligations of Section 251(c)(4) of the Telecommunications Act, which applies to retail telecommunications services. As I understand its position, BellSouth maintains that its local exchange carrier entity does not sell retail DSL, but instead sells DSL only to Internet Service Providers (ISPs). This position is based upon the FCC's 1999 decision that sales of DSL to ISPs are wholesale services that are exempt from resale obligations under Section 251(c)(4).[25] However, the BellSouth group of companies, taken together, is the largest retail DSL provider in Florida. BellSouth does sell retail DSL through an ISP that it owns and controls. BellSouth's ISP obtains DSL from

25 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").

BellSouth's local exchange company. BellSouth promotes and sells its telephone and DSL services using the same advertisements, customer service and sales agents, and Internet sites, including www.BellSouth.com. 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.

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

A. Yes. In *ASCENT v. FCC,*[26] decided in January 2001, the United States Court of Appeals for the District of Columbia held that retail sales of advanced telecommunications services by ILEC affiliates are subject to the resale obligations of the Act. The court found that an ILEC may not "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate." Although the case involved a regulation pertaining only to SBC, the logic of the decision applies equally to BellSouth. Therefore, the FCC's ISP exemption cannot be read to exempt BellSouth

26 *Association of Communications Enterprises v. FCC*, 235 F.3d 662, (D.C. Cir. January 9, 2001)("*ASCENT*").

from its obligation to resell the retail telecommunications service that is provided by any BellSouth affiliate.

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

A. Yes. On May 7, 2001, the Connecticut Department of Utility Control (DPUC) issued a draft decision that would require the state's largest incumbent, Southern New England Telephone Company (SNET), to resell any telecommunications service, including DSL, that is sold by its ISP affiliate and any other affiliates. The draft decision rejected arguments by SNET that are virtually identical to those offered by BellSouth. As the DPUC noted, "[t]he ASCENT Decision clearly holds that 'an ILEC [may not be permitted] to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services.' [SNET's] repeated claim that this holding has no application to the services it offers ignores that decision's plain language."[27]

Q. Is FDN asking that BellSouth be required to resell both the telecommunications and enhanced services that are sold together by BellSouth's ISP?

A. No. Section 251 applies only to telecommunications services, and that is all that FDN is seeking to resell. However, BellSouth cannot refuse to separate its telecommunications service from its enhanced services for the purpose of denying resale. FCC bundling rules require BellSouth to offer its

27 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).

telecommunications services separately from any enhanced services, even if it only sells them as a bundled product.[28]

Q. If BellSouth only offers a bundled DSL and ISP product to the public, how should the resale rate under Section 251(c)(4) be calculated?

A. BellSouth's current bundled ADSL/Internet Service rate, according to its Internet web site, is $49.95, which includes DSL transport and unlimited access Internet service. When unlimited Internet service is ordered separately from BellSouth, the cost is $20.95. Therefore, in the absence of any Commission-approved cost study allocating costs between the DSL and Internet service, the DSL transport service should be attributed to have a retail rate of ~~$29.95~~ $29.00. The existing resale discount rates established by the Florida Commission would be applied to the ~~$29.95~~ $29.00 rate. BellSouth would be free to avail itself of any procedures available under this Commission's rules and prior decisions to seek modifications to the discount rates or to seek the establishment of a specific rate applicable to DSL.

IV. FDN'S REQUEST IS NOT INCONSISTENT WITH PRIOR COMMISSION DECISIONS

Q. Prior arbitration decisions in Florida have rejected arguments that BellSouth should be required to provide splitters to CLECs. Is FDN's request inconsistent with those decisions?

28 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.

A. No. FDN recognizes that the Commission has previously decided not to require BellSouth to offer unbundled splitters to CLECs in the central office. The fact that FDN's proposed broadband UNE loop includes splitter functionality at the remote terminal is not inconsistent with these prior findings. In the central office environment, there is no dispute that CLECs are able to collocate equipment, and in these prior cases, CLECs sought unbundled splitters for reasons other than complete infeasibility. At remote terminals, as I have explained previously, CLECs cannot realistically collocate DSLAMs. For the same reasons, CLECs cannot collocate splitters at RTs. In addition, unlike the central office that may have multiple DSLAMs, it would be nonsensical to have multiple splitters all lined up to connect to a single (BellSouth) DSLAM.

Furthermore, in NGDLC systems, the splitter is an inseparable part of the same line card equipment that performs DSLAM functionality. Unlike most current central office deployments, where the splitter is a separate item of equipment, inclusion of splitter functionality requires no additional burden on BellSouth. I am not aware of any technically feasible means of performing splitter functionality in NGDLC loops other than by the line card. The fact that the splitter functionality is included does not alter the Commission's overall impairment analysis for broadband loops.

Q. Why do you believe that the *Line Sharing Reconsideration Order* did not endorse the ILECs' refusal to sell DSL service?

A. 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. On the contrary, the FCC determined only that AT&T's request was beyond the scope of a reconsideration order, which, for procedural reasons, was limited to consideration of the ILECs' obligation to provide access to line sharing to data CLECs who would provide DSL service. The FCC specifically noted that it did *not* rule on the merits of AT&T's argument, instead noting that any party aggrieved by an ILECs refusal to provide service could file a petition alleging that the ILECs practice constitutes an unreasonable practice in violation of the common carrier obligations to provide service to the public on a nondiscriminatory basis, pursuant to Section 201 of the Communications Act of 1934.

Q. Has FDN considered pursuing a complaint at the FCC based on Section 201 to require ILECs to sell DSL service to requesting consumers who subscribe to CLEC voice services?

A. Not at this time. As I stated before, FDN is not seeking a requirement that BellSouth provide retail xDSL service to FDN's local exchange customers. Instead, FDN is seeking access only to the resale and UNE products that it is entitled to under Section 251(c) of the Telecommunications Act of 1996 so that it may provide its own retail DSL service. However, if FDN later decided to pursue a different strategy, I would consider filing a Section 201 complaint at the FCC. BellSouth can offer no reasonable justification for its policy, which clearly appears designed to leverage its

market power in the high-speed data market as an anticompetitive tool to injure its competitors in the voice services market. Because competitive providers of DSL have been unable to offer DSL service where DLCs are present, there have always been fewer competitive options in BellSouth territory in Florida to the extremely high percentage of such loops. Now, with numerous competitive DSL providers folding or downsizing even in markets where copper loops were more readily available, if FDN does not obtain the relief requested in this case, there is a very real possibility that BellSouth will in the foreseeable future be the only remaining DSL provider in its incumbent region in Florida. 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 CLECs is unreasonable and unlawful.

ISSUE 2 -- SETTLED

ISSUES 3A & 3B.

Q. Issues Nos. 3A and 3B concern trouble ticket closure and charges. Please describe FDN's position on Issues Nos. 3A and 3B.

A. FDN experiences a significant number of trouble conditions for loss of dial tone or other service problems that FDN believes are attributable to BellSouth's service or facilities. Accordingly, FDN has a keen interest in BellSouth's disposition of trouble tickets and how FDN might be charged for trouble tickets. FDN does not dispute BellSouth's request to charge

FDN for trouble tickets where BellSouth is not responsible for the trouble. However, FDN has experienced problems with BellSouth's closing trouble tickets without notifying FDN and closing tickets as "No Trouble Found" (or "NTF") when problems persist, forcing FDN to attempt to reopen the ticket or open a new ticket. Also, in FDN's experience, a significant number of BellSouth trouble tickets are closed as NTF when FDN believes there was a legitimate trouble with the line.

When calling in a trouble ticket to BellSouth, FDN will conduct its own trouble isolation evaluation or line diagnostics test. Typically, an FDN representative will conduct a tip-to-ring capacitance test on the line the customer reported a problem with. If FDN believes the source of the trouble is with FDN's network, then the matter is referred to FDN's Operations & Engineering Group. If FDN believes BellSouth may be the source of the problem, FDN will call in a trouble ticket to BellSouth.

With respect to Issue No. 3A, FDN's position is simply that BellSouth should notify FDN prior to closing a ticket and should refrain from closing a ticket if FDN cannot confirm that the trouble has been resolved. In the past FDN's representatives were told by BellSouth that BellSouth would not notify FDN for closing trouble tickets on SL-1 loops. It is my understanding that this practice recently changed and FDN representatives are now getting calls from BellSouth field technicians upon closing trouble tickets for SL-1 loops. Therefore, BellSouth should not object to confirming the new practice in the interconnection

agreement such that FDN will be notified of the disposition of all trouble tickets.

A related problem is the situation where FDN places a trouble ticket with BellSouth and BellSouth closes the ticket though the end user continues to experience the problem condition after the BellSouth technician worked the ticket.

Thus far, BellSouth's answer to this sort of problem has been a proposal for joint acceptance testing that must be completed within 15 minutes for FDN to avoid additional charge. FDN opposes paying BellSouth an additional "time" charge when FDN's own remedies for appointments that BellSouth delays or misses are problematic or nonexistent. Nonetheless, FDN can accept BellSouth's joint acceptance testing proposal if BellSouth agrees to terms to the effect that: (1) BellSouth will contact FDN at the time a trouble is worked/disposed on all loops, (2) FDN may conduct its portion of joint acceptance testing remotely and will not be required to field dispatch within 15 minutes, (3) FDN will not be charged for acceptance testing if the trouble is not resolved at the time of the test, and (4) FDN's acceptance testing permits closure of the ticket if the problem is cleared but does not constitute acceptance of BellSouth's stated disposition of the ticket.

With respect to Issue No. 3B, FDN's maintains that BellSouth should not charge FDN for NTF trouble tickets if FDN can show there was a trouble on BellSouth's end.

As indicated above, FDN regularly experiences a significant number of no dial tone conditions which FDN believes are attributable to BellSouth. Attached hereto as Exhibit ____ (MPG-2) is a list of no-dial-tone tickets since January 2001 in cases where FDN believes the problem was attributable to BellSouth. FDN has pursued arbitrating issues relative to trouble tickets in this case because FDN has been very concerned with the number of these tickets, their causes and disposition. Attached hereto as Exhibit ____ (MPG-3) are notes taken from FDN's ordering and tracking system reflecting a few examples of trouble ticket information and FDN line diagnostic results. FDN believes the line diagnostics taken before and after these tickets reflect BellSouth's having pulled F2 pair in the field or F1 pair in the office, leaving FDN customers without dial tone. In looking at the trouble tickets and based on experience, these pulled jumper situations are not isolated cases. FDN has been anxious for BellSouth to eliminate the root causes of no-dial-tone conditions that are caused by BellSouth. Since BellSouth has seemed unwilling to help FDN and was unwilling to address prevention in this case, such as through tagging FDN lines to prevent them from being pulled, FDN asserts that it must have better rights on issues of ticket disposition.

A number of the tickets listed on Exhibit ___ (MPG- 2) were disposed as NTF. However, FDN believes BellSouth has closed tickets as NTF even though the tickets should not have been closed as NTF. Attached hereto as Exhibit ____ (MPG-4) are notes taken from FDN's ordering and

tracking system reflecting a few examples of trouble tickets BellSouth closed as NTF but which FDN believes should not have been NTF. FDN believes that the tip-to-ring capacitance results taken before and after the disposition of these tickets show that a repair/change was made to the line, yet the tickets were closed as NTF. In some cases, it appears that a circuit was open in the BellSouth office or that a loop was changed from straight copper to a DLC design, but an NTF was reported.

FDN seeks assurance of proper billing for trouble tickets. FDN's position is that it should not be charged for tickets closed as NTF where results show the trouble was resolved when BellSouth worked the ticket.

ISSUES 4A & 4B.

Q. Issues Nos. 4A and 4B concern move orders. Please describe FDN's position on Issues Nos. 4A and 4B.

A. When an FDN customer changes locations from one address to another, BellSouth must execute a "move order" for FDN. This involves BellSouth's disconnecting service to the customer's first location, BellSouth's provisioning a new UNE loop in the second location and transferring the same customer telephone number to the new loop. In most cases, BellSouth does not establish the new UNE loop in the second location in an acceptable time frame, that is, at parity with the interval in which BellSouth provisions moves for its own retail customers. If the customer has already moved and BellSouth has missed the required due date, the customer can be left without phone service.

BellSouth can generally move its retail customers' service from one location to another in three business days. BellSouth takes well in excess of a three-business-day interval to provision move orders for FDN customers. To avoid its customers being without service, FDN has ordered and paid for retail service from the BellSouth business office and then call forwards traffic from the UNE loop in the old location to the Bell-provided retail line. FDN maintains that if BellSouth cannot meet the required due date for an FDN move order, FDN should receive retail BellSouth service to the new customer location at no cost until the move order is executed. Attached hereto as Exhibit ____ (MPG-5) is a schedule of 20 or so examples of FDN move orders submitted to BellSouth. The information on the left of the schedule shows the dates on which FDN ordered and BellSouth installed retail lines to the new location for FDN's moving customers. According to the schedule, there is just a three-business-day interval for turning up the retail service more than 90% of the time. The information on the right of the schedule shows when FDN submitted a move order (via a LSR) and the date that the move order was executed. According to the schedule, sometimes it takes more than a month to execute the move order, and, in most cases, there is at least a two-week interval.

FDN does not believe that the Commission should refuse to rule on its request just because BellSouth thinks the issue should be addressed in the permanent performance measures docket. The parties should be

entitled to present for arbitration any open issue, and the Commission should resolve any open issue. This issue on move orders is in dispute and should be arbitrated.

The interconnection agreement negotiated up to this point includes a number of cost allocation or recovery mechanisms for fault or cost-causing behavior. For example, for line troubles caused by BellSouth, FDN does not have to pay for the trouble ticket and may be entitled to a credit. If BellSouth's TAG gateway is inoperable other than for scheduled maintenance, FDN does not have to pay the manual order charge. In some circumstances, BellSouth has the right to charge FDN for removal of collocated equipment or investigation of improper conduct in collocation space. The negotiated agreement addresses at length liability limitations and indemnification. Cost allocation or recovery mechanisms for fault and cost-causing activity exists in the negotiated agreement and should be balanced in favor of both parties. In the case of this move order issue, FDN asserts that BellSouth's failure to properly perform causes FDN to incur a finite cost that FDN should not have to incur to serve its customers.

BellSouth's position in the Commission's permanent performance measure docket has been that the PSC has no authority to impose a self-executing remedy plan on BellSouth, especially where BellSouth has not been granted 271 relief. Further, the Performance Measurement Attachment to the draft interconnection agreement only becomes

effective if and when BellSouth receives section 271 relief. After appeals, a final decision in the permanent performance measure case and in BellSouth's 271 case could take more than another year. Under the interconnection agreement negotiated thus far, if BellSouth does not get 271 relief, BellSouth's liability for not meeting the required due date for move orders (or failure to meet service obligations generally) would be no greater than "an amount equal to the proportionate charge for the service provided pursuant to [the interconnection agreement] for the period during which the service was affected." In other words, it appears FDN may be entitled to a few dollars off a UNE rate it would otherwise pay even though this does not bear a direct relationship to the cost FDN will incur to continue providing its moving customers with service – an available and finite cost.

Whether BellSouth is granted 271 relief or not, and regardless of possible compensation of some kind pursuant to a Commission performance measure plan, FDN's requested approach for BellSouth's failure to meet reasonable dates for move orders is preferred because it is fair, reasonable and bears a direct a relationship to the finite cost incurred as a result of BellSouth's conduct. FDN would still bear the full cost of the UNE loop for one customer location before, during and after the move. Needless to say, if BellSouth can execute move orders for FDN as required, at parity with what BellSouth provides its own retail customers, then BellSouth has nothing to worry about.

ISSUE 5 – WITHDRAWN BY FDN.

ISSUE 6 – WITHDRAWN BY FDN.

ISSUE 7 – WITHDRAWN BY FDN.

ISSUES 8A & 8B.

Q. Issues Nos. 8A and 8B concern FDN's request for an FDN-funded and dedicated frame attendant. Please describe FDN's position on these issues.

A. As I indicated earlier when addressing Issues 4A and 4B, FDN believes that it should be allowed to arbitrate any open issue. I would make the same points here against BellSouth's permanent performance measure argument as I made earlier relative to Issues 4A and 4B.

In FDN's view, this issue is about insuring fair, reasonable and nondiscriminatory service. In FDN's experience, BellSouth takes an average of at least seven days to provision a voice loop. FDN orders over 700 lines from BellSouth a week. Prior to January this year, BellSouth would not begin working FDN orders until after 10:00 a.m. each day. This often made it difficult for BellSouth and FDN to complete all orders as scheduled. When a "bad cut" occurs, due to defective cable pair in the field or the CO or other issues, problem solving is absolutely critical because FDN is cutting over a "live" business customer who cannot be left without dial tone. FDN regularly experiences problems with BellSouth's inability to resolve troubles on bad cuts as quickly as the circumstances require. Included with my testimony as Exhibit __ (MPG-

6) is a schedule of some recent bad cuts. The schedule shows the cut date, resolution date, and comment information for the bad cuts. This schedule shows BellSouth does not address bad cut repairs immediately. Customers are left without dial tone as a result, and, more often than not, these customers blame FDN for their plight. Although a few bad cuts can be expected, when bad cuts do occur, it is imperative that they be addressed immediately.

During the week of January 15, 2001, KPMG was observing BellSouth's cutovers of FDN orders as part of KPMG's OSS evaluation. During that week, BellSouth began processing FDN orders early in the morning, were finished with all scheduled orders early in the day, and bad cuts were nonexistent. The overall service provided FDN the week of KPMG's observation was a departure from FDN's prior experience and showed that BellSouth is capable of providing good service when it chooses.

FDN is entitled to service at parity with what BellSouth provides itself. To insure that FDN receives such service and to improve scheduling and bad cut resolution, FDN should have the option of a dedicated frame attendant to execute only FDN orders/services.

To insure that it receives adequate service without penalty to BellSouth, FDN proposes to pay the salary, benefits, and costs for a BellSouth employee charged with working only FDN orders or, at least, FDN orders on a priority basis. The individual will be a BellSouth

employee; only the focus of his/her duties and responsibilities will be with FDN matters. If FDN is allowed a frame-attendant, the labor component of service charges assessed FDN would have to be removed to avoid double charging for labor. In theory, the overall cost to FDN should not be higher when FDN pays a composite labor charge for a dedicated attendant versus when FDN pays on a cumulative basis the labor component (for the same labor) incorporated into the service charges. And there is no extra cost or penalty to BellSouth.

ISSUE NO. 9 -- SETTLED

ISSUE 10.

Q. Issue No. 10 concerns a third ordering option. Please describe FDN's position on Issue No. 10.

A. When FDN first started operating in Florida, it submitted SL-1 orders for voice grade UNE loops. BellSouth would issue a firm order confirmation (FOC) with a due date. FDN would then schedule the due date with the customer, but more than 50% of the time, BellSouth could not install service by the provided FOC due date because the loop was served through a DLC rather than by continuous copper from the central office. BellSouth would then require FDN to clarify the order, canceling the original due date of the FOC. So FDN would then submit an SL-2 order, await a new FOC and reschedule for a later date with the inconvenienced customer, significantly delaying the ordering and provisioning

process. Because FDN had no reasonable means to access BellSouth's network information to make advanced determination of the presence of DLCs, FDN turned to submitting orders for the more expensive SL-2 service ($80 v. $140 non-recurring charges) in order to avoid delays and associated scheduling problems.

FDN has sought a third ordering option whereby FDN would simply submit an order for a UNE voice-grade loop and BellSouth would make the determination of whether the order should be processed as an SL-1 or SL-2 before issuing an FOC, and charge FDN for the SL-1 or SL-2 as appropriate.

BellSouth's response to FDN's request has been that BellSouth now offers loop make up (or "LMU") information FDN can access prior to issuing LSRs to BellSouth. FDN has learned more about LMU over the course of continued negotiations during this case. FDN is willing to explore LMU database access as a compromise for resolving FDN's ordering issue. However, access, whether mechanized or manual, comes at an additional charge, and FDN must incur start-up and recurring costs for the systems to make LMU queries.

Thus, absent the third order option which FDN favors, FDN has three choices. First, order all SL-1s and accept the associated lack of reliable scheduling and provisioning. Second, continue ordering all higher cost SL-2s to insure better scheduling and

provisioning reliability. Or, third, incur additional cost to access the LMU information and order SL-1s or SL-2s as the LMU information dictates. However, these choices sidestep the core question: Why should FDN bear additional risk or burden associated with simple ordering in the first place?

FDN does not instruct BellSouth how to execute the order or engineer voice service any more so that a retail customer would when ordering voice service. I do not believe BellSouth tells retail customers that BellSouth will have to set a later due date for service and the customer will have to submit a new service request solely due to BellSouth's own network design.

There is no reason why BellSouth should not bear the burden of examining its own network configuration and design to process a CLEC order for voice service. FDN should be able to simply order a voice-grade UNE loop (with order coordination and time-specific cutover options) and have BellSouth figure out how to get the job done on its own network by an FOC's due date.

FDN is not asking that it be relieved of paying charges for SL-2 loops where those charges should apply. This is an ordering issue, not a provisioning issue. FDN is even willing to agree that BellSouth be allowed some additional time to issue an FOC under its proposed third order option if BellSouth can reliably meet the due dates. FDN's position is simply that FDN should not have to guess at BellSouth's network

configuration for voice orders to be completed or pay for network information. BellSouth, not FDN, should have the burden of knowing its own network.

Q. Does that conclude your direct testimony?

A. Yes.

Q. Please state your name and address.

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

Q. What is the purpose of your rebuttal testimony?

A. I will respond to some of the arguments of BellSouth witnesses Williams and Kephart concerning issues still in contention in this case.

Q. Did you also provide direct testimony in this case?

A. Yes.

ISSUE NO. 1

Q. Mr. Williams of BellSouth testified that FDN's position on Issue #1 is that "FDN wants the Commission to order BellSouth to provide BellSouth's ADSL service to FDN's end user over the same UNE loop that FDN is using to provider voice service to that end user." Is Mr. Williams' description an accurate characterization of FDN's position?

A. No. BellSouth has apparently misread or unduly limited the scope of FDN's request. As I explained in my direct testimony, FDN seeks the provision of wholesale UNE and resale products with which FDN can provide retail xDSL service.

Q. Given Mr. Williams' restrictive view of FDN's request, do the legal arguments in his testimony overcome those in support of FDN's request?

A. No. The FCC and South Carolina decisions relied upon by Mr. Williams do not relate to FDN's request for wholesale UNE and resale

products, as those cases address only an ILEC's providing retail xDSL service on lines where it is not the voice carrier. Moreover, as I explained in my direct testimony, the FCC's decision in the *Line Sharing Reconsideration Order* does not have any bearing on BellSouth's obligation to provide access to UNEs and resale products under Section 251. (Gallagher Direct at 10-11, 38-40.) The FCC's *Line Sharing Reconsideration Order* did not address the merits of the underlying issue; rather, it stated that reviewing the issue of ILEC-provided retail xDSL service over ALEC UNE voice loops was outside the permissible scope of reconsideration because it was not an issue in the final order being reconsidered.

Several of the "business reasons" offered by Mr. Williams as justification for BellSouth's refusal to provide xDSL service on ALEC-served voice lines are likewise irrelevant to FDN's request for wholesale UNE and resell products, as they are based upon scenarios in which BellSouth would provide retail services on an FDN UNE loop.

Q. In addition to the "business reasons" that Mr. Williams cites as justification for BellSouth's refusal to provide the wholesale service that FDN is entitled to under the Act, Mr. Williams further states that "the systems BellSouth uses to provide its ADSL service do not currently accommodate providing ADSL service over such a loop." Is this adequate grounds for denying FDN's request?

A. No. 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. These systems were developed in response to the obligations imposed by the Act, and as directed by state and federal regulatory proceedings such as this one. The requirements of applicable law, regulations, and arbitrated interconnection agreements should drive the development of these support systems, not the other way around.

Q. One "business reason" cited by Mr. Williams a justification for BellSouth's policy is his statement that BellSouth's databases do not include loop qualification information for FDN's UNE loops, such that BellSouth cannot determine whether such loops are qualified for DSL. Do you agree with his assessment?

A. No. FDN uses unbundled loops that are owned, controlled, and provided by BellSouth. BellSouth is in the best position to determine whether these loops are DSL-qualified, and if they are not, whether other DSL-qualified loops would be available. FDN does not at this time have the ability to obtain all of the necessary information to determine whether these loops are DSL-qualified. Other Regional Bell Operating Companies are modifying their databases to enable DSL qualification to be performed based upon circuit identification numbers in addition to telephone numbers. BellSouth should make such changes as are necessary to enable it to provide the UNEs and resale products as required by Section 251 of the Act.

Q. Did BellSouth offer any testimony that undermines FDN's request that BellSouth be required to make available for resale a wholesale high-speed data service pursuant to Section 251(c)(4)?

A. No. In fact, the testimony of Mr. Williams demonstrates conclusively that BellSouth must offer resold high-speed data service pursuant to Section 251(c)(4). On page 5, lines, 22-24 of his testimony, Mr. Williams acknowledges that BellSouth offers "retail xDSL service."

Q. Have any legal developments since your direct testimony materially affected your position that BellSouth's high-speed data service is subject to the resale obligations of Section 251(c)(4) of the Act?

A. No. On June 26, 2001, the United States Court of Appeals for the District of Columbia denied a petition for review of the FCC's Advanced Services Second Report and Order that defined ILEC sales of high-speed data service to Internet Service Providers as a wholesale offering that is not subject to Section 251(c)(4).[1] However, this decision never comes into play in the scenario I described in my direct testimony, where BellSouth sells its own retail DSL through a BellSouth-owned ISP affiliate, because BellSouth's ISP affiliate is treated as part of BellSouth's ILEC operation for the purposes of Section 251, and not as a separate affiliate.[2] The recent court decision in no way addressed instances in which an ILEC provides retail high-speed data

1 *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).

2 *See* Gallagher Direct Testimony at 32-37, citing *Assn. of Comm. Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. January 9, 2001) ("*ASCENT*").

service through its own ISP affiliate and has no bearing on FDN's request in this arbitration.

Q. Have any State commissions found that the "ISP exemption" created by the FCC's Second Report and Order is not relevant to an ILEC's obligation to resell the high-speed data it provides through its own ISP?

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

If the Second Report had no bearing on the decision to require Ameritech to resell its high-speed data service in Indiana, the D.C. Circuit's

affirmation of the Second Report likewise has no bearing on BellSouth's obligation to resell its high-speed data services in Florida.

ISSUES 3A & 3B

Q. In Mr. Kephart's direct testimony on page 7, beginning at line 7, he states "FDN is asking the Commission to assume that any trouble that clears while a trouble ticket is open was the result of a problem in BellSouth's network . . . ." Is that what FDN is asking in this case?

A. No. FDN is not asking the Commission to make any assumptions about the underlying cause of a given trouble ticket.

The principles FDN seeks to be incorporated into the interconnection agreement are spelled out in my direct testimony. In Mr. Kephart's direct testimony, he agrees FDN will be notified before closing all trouble tickets, he agrees to terms for cooperative testing, and he agrees FDN will not be charged for continued cooperative testing and dispatch where a trouble is on BellSouth's network. Thus, there appears to be agreement in principle as to the intent behind Issue No. 3A. FDN's position on Issue No. 3B is not that FDN should benefit from an assumption that all cleared/corrected no-trouble-found tickets are BellSouth's fault. Rather, FDN simply asks that the interconnection agreement establish the basis for FDN's not being charged where FDN can prove through remote diagnostic test results or otherwise that trouble tickets closed as no-trouble-founds should not have been. Beginning at page 7, line 14 of his testimony, Mr. Kephart accepts the concept that FDN should not be charged "where FDN can show that the trouble reported

stemmed from BellSouth's network." FDN maintains that it can make that showing through its remote line diagnostic test results. Further, FDN can make that showing where FDN proves there was dial tone at FDN facilities at the CO but not at the customer's demarcation point. The interconnection agreement should accept these testing methods as proof and as sufficient basis for FDN not to be charged unless BellSouth can otherwise prove that FDN or the end-user caused the trouble. Attached as Exhibit ___ MPG-7 is a copy of language reflecting FDN's proposal recently submitted to BellSouth.

ISSUE 10

Q. On page 15, starting at line 4, Mr. Kephart states that "FDN is in essence asking BellSouth to determine which loop type is needed rather than FDN making that determination for itself." Should FDN have the burden of determining whether BellSouth must design a circuit or not prior to ordering a voice-grade loop?

A. No. FDN should be able to simply order a voice-grade loop. It is unfair for BellSouth, with over 60% of its access lines served through remote DLCs and therefore likely in need of design work, to require FDN to follow what amounts to a pre-qualification process (similar to complex DSL ordering) for every UNE voice-grade loop just to avoid delay in service delivery and additional charges.

FDN does not seek to dictate to BellSouth how BellSouth should provision a voice loop. FDN seeks the ability to simply order all voice-grade loops the same way, on reasonable terms, without delays that jeopardize

parity, and with coordination options. FDN should not have to go through a pre-qualification process to achieve its desired results. BellSouth designed and built its network and stores its network information. BellSouth fashioned its SL-1 and SL-2 voice-grade loop types in apparent recognition of its DLC-dominated network architecture.

BellSouth witness Kephart suggests FDN make a manual or mechanized loop make-up ("LMU") query of BellSouth prior to ordering a voice loop so FDN could know which type of voice loop to order. In other words, BellSouth would require FDN to prequalify voice loops. BellSouth's LFACS database and LMU process are clearly geared toward xDSL ordering, not voice loop ordering. A UNE voice-grade loop is unlike an xDSL-capable loop where prequalification may be necessary because the ordering CLEC or DLEC may desire to review loop architecture or order specific facilities or services for the loop to make it functional with the CLEC/DLEC technology and equipment. There are no such peculiarities for a voice-grade loop that should necessitate ordering prequalification of the sort BellSouth promotes. No other ILEC with which FDN does business differentiates voice loop types as BellSouth does or insists on a prequalification look-up as a means for the CLEC to know what type of voice loop it should order. FDN simply orders a voice-grade loop from those ILECs. Voice service is not advanced service and should not be treated as such when it comes to ordering and prequalification.

FDN's arbitration petition was filed in January 2001. It is not clear from Mr. Kephart's testimony when BellSouth made its LMU data available electronically to all CLECs. In any case, Mr. Kephart acknowledges the LFACS database may not have IDLC information available for all loops and that a manual query may be necessary. BellSouth's standard interval and costs for manual queries are wholly impractical for voice service ordering. BellSouth previously informed FDN that the standard turnaround for a manual look-up is seven business days. By its May 25, 2001, final order on BellSouth UNEs in Docket No. 990649-TP, the FPSC set a manual look-up rate, without facility reservation, of $43.10. Prior to that Order, BellSouth sought $134 per manual LMU query, without facility reservation. There is no way that a seven-business-day interval just to figure out what loop type to order and a non-recurring charge of about $1.50 less than the non-recurring charge for the SL-1 loop itself will work from a practical or economic standpoint for ordering voice service.

On a mechanized basis, BellSouth sought to charge $1.08 per query before the FPSC's May UNE Order, which approved a $.6757 per query charge. Although FDN has discussed a mechanized LFACS – LMU option with BellSouth as a means for addressing efficient voice loop ordering, FDN does not know when the LFACS database will have the necessary information and when it won't. The bottom line, however, is that no CLEC should have to go through a prequalification process to know which

BellSouth-created voice loop type to order. CLECs should be able to simply order a voice-grade loop.

BellSouth currently offers coordination options for SL-1 loops that were not available at acceptable prices before the Commission's May UNE Order. FDN requests that those same options be available for its proposed generic voice-grade loop type.

Q. Does that conclude your rebuttal testimony?

A. Yes.

BY MR. FEIL:

Q Mr. Gallagher, do you have a summary of your testimonies?

A Yes, I do.

Q Could you please provide the summary to the Commission.

A Yes. Good morning, Commissioners. As I said, I'm Mike Gallagher, CEO of FDN; I appreciate the time here today. We're based down in Orlando. That's my hometown. Florida is where I've been in the competitive local exchange business for most of my career. It's been a great business up until about a year ago. I founded FDN to serve the small to medium customers that were bypassed by the first wave of ALECs that hit the State that were interested in connecting larger companies and providing local competitive service to larger companies.

Our plan from the beginning was to serve the small to medium businesses, widely disbursed, and possibly even residential customers. Our strategy employs the UNE loop offering where we built our own switches. We have four classified switches, built our own fiber. We have several hundred miles of fiber, built our own collocations out. We have roughly a hundred collocations built out. We've spent about $60 million on our network, but the last mile or the last couple hundred feet we buy from BellSouth as a UNE. It's really the only economically feasible way to provide

competitive service to small customers.

We're unique in that we're the largest procurer of UNEs in the State. We've been told that by BellSouth, our BellSouth account team. We currently serve about 60,000 lines and 20,000 customers to give you a ratio of roughly three lines per customer, so just, you know, to show we are -- we do serve the small customers. Now that the UNE loops have been lowered in price recently, we intend to plan to go into the residential market, so we're looking at that pending a positive outcome of this matter.

Most people think of the telephone network as an exchange building and a copper loop that runs right to the customer. In the state of Florida we're different. The simple model works in a lot of the rest of the country, but here, Florida is uniquely different. If I may draw just a quick picture.

COMMISSIONER DEASON: You need to have a microphone close by so the court reporter can hear.

THE WITNESS: Just real briefly, I'll draw the simple diagram where we have a central office, and we have copper running directly to the customer. Florida, however, had a late population growth happening in the '70s and '80s, as I'm sure you-all are aware, where we just boomed. In that case that coincided with a different architecture for the local loop. The telephone companies at the time -- when a developer bought

a, you know, burnt out orange grove out here and made houses and businesses out further away, there was the technology available to run the long route on fiber or some sort of other TDM long-haul piece here, and then put a remote terminal in where copper was then employed from there out. And this is really what the state of Florida's architecture looks like a lot more so.

You know, this is a typical northern town, you know, maybe, and this is a fast-growing late in the '70s and '80s southern town. So I can do my voice business fine through this architecture because the telecom law says that even if there's remotes out there and common transport, I can buy a UNE loop for my collocation. I've built a collocation out in here, FDN, and I can get a UNE loop through this shared transport out to the customer. It works, like I said, on about 60,000 of those lines. But if I want to put a DSLAM, which is what you need to provide DSL, it also needs continuous copper, and I put a DSLAM in here, it won't work for 90 percent of the subscribers in BellSouth territory. Roughly 90 percent are served behind remotes. So I could get about 10 percent of the market share, and, you know, I really think that's a big reason why you're seeing all these DLECs, you know, going bankrupt and out of business, among other things. But we could not do that.

Now, BellSouth places their DSLAM out at the remote. They are telling me that I can place a DSLAM out at the remote.

There's 12,000 remotes. There's 12,000 remotes out there. What I need is the ability to have a UNE loop that goes just like my voice loop, but it goes as a -- instead of low frequency here, I need high frequency, and instead of common digital transport here, I need packets that go back. And I'll be able to do the same thing that I do with my voice except I'll be able to do it as data. And that's very important to understand. And that's kind of the drawing I just wanted to drawn.

COMMISSIONER JABER: Mr. Gallagher, how is all of that -- could you leave that for just a minute?

THE WITNESS: Sure.

COMMISSIONER JABER: How is all of that different from the Line Sharing Order requirements?

THE WITNESS: Line sharing was pushed by the DLECs, which you could see the "D" stands for dead now since NorthPoint is bankrupt. Rhythms is bankrupt and shutting off, and Covad is filing for bankruptcy. They didn't have a voice strategy. We have a voice strategy and a data strategy. We think you need both to survive in this new world. Where we've had a voice on this customer line and they order this BellSouth DSL, or when they have BellSouth DSL and BellSouth voice, when they order our voice, it shuts off the DSL. So 90 percent, theoretically, of our potential market we can't sell even our voice to it if they all take DSL.

COMMISSIONER JABER: Okay. So the difference in technology is with the DSL technology, it's your position you have to have a DSLAM to make that technology work for Internet --

THE WITNESS: Correct.

COMMISSIONER JABER: -- or data services.

THE WITNESS: Right.

COMMISSIONER JABER: With the Line Sharing Order and the requirements there, that required ILECs to provide a loop that could be split between data and --

THE WITNESS: Exactly. And that works fine if you're in Worcester, Massachusetts, or Richmond, Virginia, or something like that, where we have common copper and I'm a DLEC and I'm sitting in here and then the phone company has the low-frequency voice and line sharing says, okay, you've got to split that in here so that the DLEC can put high frequency on there from my collocation cage here. And if I have continuous copper that runs to most places, that works great. But that's why I want to make sure that you-all understand this is not a federal issue. The Federal Act in their Line Sharing Order, they said that they -- well, said up to 30 percent of the loop we expect could have remotes. They had no idea what they were talking about when it comes to Florida. They weren't talking about Florida. They were making a guess, and, you know, it's just different down here. It's a different deal.

So just -- the proof is in the pudding. Of 134,000 DSL subscribers in BellSouth's footprint, 133,000 of them are served by BellSouth, and the other thousand are served by a carrier that, you know, may not even be here in a month or two. So, you know, there is no competition for DSL service in BellSouth's footprint. You know, that's just undeniable. Ninety-nine percent to me is, you know, monopolistic market share.

COMMISSIONER PALECKI: Those 1,000 customers who are served by competing carriers, are they competing carriers that have installed a DSLAM in the remote office?

THE WITNESS: No, sir.

COMMISSIONER PALECKI: How are they being served?

THE WITNESS: They are serving, like, the 10 percent of the copper that -- well, of this architecture of this CO, there is a small amount of home run copper. There is a small amount. So they will be sitting in there, and they will serve it that way. And, you know, that just isn't a sustainable market, we believe. So we believe we're impaired.

I've run the math. At 12,000 remotes times the DSLAM, the cost of the DSLAM, I run that, I run the 12,000 remotes plus, you know, the back-haul cost that gets me back to the central office, I run that against my revenue, and I can never make a buck.

COMMISSIONER PALECKI: What is the cost of the DSLAM?

THE WITNESS: We estimate that it would cost approximately $52,000 to install a DSLAM at a remote. It could cost more, it could cost less, but that's what we use in our model.

COMMISSIONER PALECKI: And how many customers could be served with DSL off of a single DSLAM?

THE WITNESS: For our model that was 48 customers, but you can add additional cards and blades in the DSLAM for more. We would be guessing on our take rates. That's the key for us. We don't really have the captive market to sell into. We would have to make an estimation as to how much, and that goes into our business model. And that, we believe, from the get-go -- I've been raising money for several years now, and I know I couldn't raise that money. The rates of return aren't there.

COMMISSIONER DEASON: Under a typical architecture here in Florida, how many customers are served from a remote terminal?

THE WITNESS: There can be as small as -- as little as a hundred and as much as a thousand. We've made an estimation of about 500, as an average, lines, and depending on the resi (sic) business mix that could be, you know, anywhere from 50 to several hundred customers.

COMMISSIONER DEASON: Assume that there are 500 customers served from a given remote terminal and just for the

sake of argument say that half of those wish to have DSL service, 250 customers out of the 500, how many DSLAMs would BellSouth have to put in to meet that demand? One or more than one?

THE WITNESS: Well, a 250-port DSLAM is probably -- they're probably out there. That's a dense DSLAM.

COMMISSIONER DEASON: That's one of the bigger --

THE WITNESS: That would be a bigger one, yes, sir.

COMMISSIONER DEASON: But BellSouth could -- if that was their market projections and this is what they felt they needed, they could get one DSLAM to serve 250 customers?

THE WITNESS: I'm not completely -- I've never looked at one that big.

COMMISSIONER DEASON: That would be on the larger end?

THE WITNESS: Yes, sir.

COMMISSIONER DEASON: When you go to an area, your model looks at serving, did you say, 40 -- how many customers from one DSLAM?

THE WITNESS: Well, the DSLAM that we priced out is 48 ports, but you can add additional ports to it. I don't know if it could get up to 250, but we made a guess. And that was just simply on a -- if we have 500 lines in a remote, we think at best we'd do a 10 percent, you know, take. And that would mean we'd need about 50 ports, so that's where we get the 48

number.

COMMISSIONER DEASON: What are the readily available sizes of DSLAMs? There's 48. Is there a 96-port DSLAM?

THE WITNESS: Yes, there are. And it depends on -- you buy the chassis and the common equipment and the ATM backplane to it, and then you just put in cards for how many customers you think you're going to get. There's 12-port cards; there's 24-port cards; there may even be 48-port cards. And you just drop those in on "X" dollars per card. And if you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly cheap.

COMMISSIONER DEASON: So your cost to serve per customer goes down with the number of customers you serve?

THE WITNESS: Yes, sir. The magnitude of the collocation process is also something that impairs me. I have collocated a hundred Bell COs. I know the pain that goes along with it. I've personally been involved in it. It's an arduous process. I'd have to collocate 12,000 remotes. Just -- if you do the $3,000 is the application fee, that's $36 million right there. It's a long time that goes by between when you put your collo app (sic) in and when you get your response back from Bell. There's a whole lot of stuff that goes on when they are preparing the space. We've sort of have had to manage that process very closely, and, you know, I've heard so far that they are going to make it easier, but based on my experience, I

just don't believe that that will be that easy to do that.

Even if I decided to begin the process of doing it, though, I'm still impaired because I will never catch up. I'll never be ubiquitous. I'll never be able to have the mass market. They are going to be at about 4,000 DSLAMs in these remotes or roughly a third of the way through by the end of this year, they've estimated. And that's taken several years to go for them to do that.

COMMISSIONER DEASON: You mentioned an application fee. What was that number again?

THE WITNESS: It's approximately $3,000. In a central office, it's around that number. And I believe --

COMMISSIONER DEASON: This is a collocation application fee?

THE WITNESS: Yes, sir.

COMMISSIONER DEASON: That same fee would apply to the collocated DSLAM in a remote terminal?

THE WITNESS: It's my understanding that it would.

COMMISSIONER JABER: For each collocation for each remote terminal?

THE WITNESS: Yes.

COMMISSIONER PALECKI: Does BellSouth have a DSLAM in every remote terminal?

THE WITNESS: No, sir. It's our understanding that they're up to about 3,700 of their 12,000 and project to be at

about 4,000 by the end of the year.

COMMISSIONER PALECKI: Does that mean the customers in those other locations where there are no DSLAMs located don't have DSL service options?

THE WITNESS: Probably, yes, unless they have one of these home run copper loops that goes -- if they're lucky enough to be --

COMMISSIONER PALECKI: Unless they're part of that 10 percent that connects directly to the home office.

THE WITNESS: Yes, sir, like an old neighborhood that might be close to downtown that was built, you know, right next to the central office.

COMMISSIONER DEASON: Let me ask a question; it may be silly. Have you entered into any negotiations with BellSouth as they expand these DSLAMs and say, we wish to provide service in these territories that are served from these remote terminals, and you don't have a DSLAM there yet, we're willing to pay "X" percentage of the cost of putting in your DSLAM if you let us use it to serve our customers?

THE WITNESS: We have not had any of those discussions, no.

COMMISSIONER DEASON: Because you feel like it would be unfruitful, or because it's just a concept you haven't considered?

THE WITNESS: Both.

COMMISSIONER DEASON: I mean, see, the reason I asked the question is that you're talking about a massive deployment of capital. Capital is not cheap.

THE WITNESS: Right.

COMMISSIONER DEASON: It's not cheap for you; it's not cheap for BellSouth. If we want to provide DSL service to the maximum number of customers out there who wish to have it as quickly as possible, if you share the cost, it may be the most economic way and perhaps the quickest way to do it, and you may do it in a cooperative manner such that customers benefit. Does that sound unreasonable?

THE WITNESS: No, it does not sound unreasonable, except for the fact that if I'm BellSouth, I know I'm going to get a pretty much enough take rate and return, and return my investment rather quickly.

COMMISSIONER DEASON: They have no incentive to do it.

THE WITNESS: I don't think they'd have an incentive to do that. And I don't, you know, have -- they're already -- all those customers behind those remotes are probably already their voice customers. So they can -- you know, they've got sort of a pond they can shoot into, and I'd be coming in -- or maybe I'd be at a 10 percent market share I could get out of that, maybe more, maybe less. So my business model is a lot more variable on that revenue line and on that take rate line.

COMMISSIONER JABER: But assuming we address the incentive issue, or that you're just incorrect with respect to your position on the incentive issue, there isn't anything technology-wise that prevents you-all from sharing that DSLAM in each remote terminal; right?

THE WITNESS: No, I don't think so. The other piece you need to think about is, there's the remote, then there's back-haul to get you back to the CO. They have their own fiber that's been out there for years. That's a key piece of this. You know, don't be as focussed on the DSLAM itself. The transmission, we estimate, can cost about a thousand dollars to get from the remote back to the CO, times ten, twelve thousand, that's a million bucks a month in overhead right there.

COMMISSIONER DEASON: I thought in the opening statement -- I know it's not evidence, and we'll get to it when we hear the BellSouth witnesses, but I understood that BellSouth indicated that they recognized that they had a requirement to basically provide that type of transport to you if you had a DSLAM collocated at their RT.

THE WITNESS: Right. And we buy those UNEs right now between our central offices. We buy a UNE DS-3 from BellSouth. We pay about 1,500 bucks a month for it. We buy them all day long. So I still run that math, and I'm still way underwater economically unless something happens on a, you know, cost of capital or higher take rate.

COMMISSIONER DEASON: And $1,500 per what?

THE WITNESS: Per DS-3, which is a high capacity --

COMMISSIONER DEASON: Is that more capacity than you need to serve the number of customers you would sign up from one RT?

THE WITNESS: It would depend on what type of customers. If we were selling SDSL customers or we were buying a higher chunk of, you know, dedicated bandwidth, you've got to reserve that for them. If you're just going to sell residential, you know, and you can sort of engineer it to be you don't need as much bandwidth, you could get by with potentially less.

COMMISSIONER DEASON: Okay. So I guess, what are you taking issue with, that you're having to buy more capacity than you need, or the price is just too high?

THE WITNESS: Well, they just jump on their fiber network. It's already sitting there. They don't have to do anything. They just jump on a SONET transmission system, give themselves an OC3 feeder, a DS-3 feeder, a T-1 feed that's sitting out feeding those remotes.

COMMISSIONER DEASON: Okay. But it's their network.

THE WITNESS: Right.

COMMISSIONER DEASON: I mean, they have installed it. They have paid for it, and they use it the way we wish. What do you -- how do you think that you are being impaired?

THE WITNESS: Because that network was built with a captive customer base when they could guarantee how much return they were going to get on it, and there was not at risk capital.

COMMISSIONER DEASON: Well, I guess my question is, are you taking issue with the TELRIC price which applies to that transport?

THE WITNESS: Well, possibly. I mean, I haven't -- I know that there's new UNE rates coming out for those DS-3s. We need to evaluate and see. Maybe we can do it at less cost, and also, it would depend on how we engineer it, what type of customers are we expecting to get, how much bandwidth do we need.

COMMISSIONER JABER: I know we're still in the summary of the testimony, Mr. Chair, and I apologize for that, but I want to make sure I understand the technology. If you could, take that drawing and draw me the DSL technology. I want to see what it looks like.

THE WITNESS: Okay.

COMMISSIONER JABER: The DSL -- the DS-3 is a loop; right? And that's the loop that's necessary -- it's part of what we would call DSL; correct?

THE WITNESS: Sure. Sort of. A DSLAM sort of -- you can think of it as two parts. There's an ATM side, asynchronous transfer mode, which is the "A" -- well, it's not

the "A" in the DSLAM, but it's the way all these -- the high-frequency circuits are groomed and made into packets.

So here's sort of the side of the DSLAM that has the customer subscriber cards in it, and these could be 12, 24, 48 port, whatever. That connects the copper, and that's putting a high-frequency tone on the line, higher than the voice frequency because it can ride -- the voice and data can ride. So that's putting a high-frequency carrier wave that can carry maybe up to a megabit and a half. So out here we have a splitter. The low frequency goes to the telephone in the case of a residential DSL. It could be HDSL where there's no voice services -- or SDSL. And then you would have some sort of modem that gives you a connection to your computer. Back here, these circuits are all aggregated and packetized, and these DSLAMs on the back of them have several the interfaces. They are all ATM --

COMMISSIONER JABER: What is it you are calling the DSLAM? What part of that drawing --

THE WITNESS: This whole thing is a DSLAM. This whole thing. These circuits can be as slow as T-1. They can be a T-3. They can be OC3, optical carrier 3, optical carrier 12, and maybe even some versions of electrical STS1, STS3s. And if I'm sitting here in a remote and I've got some transmission system -- let's just say I'm Bell. I'm sitting inside this remote terminal. I've got a digital loop carrier

sitting here that's -- you know, this copper comes in, and it's punched down on some sort of block where we both have access to the same copper. Before I put this DSLAM in here, I'm providing dial tone to this customer. I jump onto this transmission system somehow with T-1 from my digital loop carrier, and this thing goes on back to the CO. It might go to another remote. It might go to, you know, Ryder Truck or some big corporate customer. You know, it's their fiber network, I don't know where it goes.

So this is the BST fiber that's, you know, been bought and paid for there. They are just simply going to jump from this ATM right over into this transmission system and ride on that fiber somehow. These ATM switches also even have optics. So they could -- rather than even get on the transmission system, if there's a fiber cable here that's got some spare fibers in it, you can just plug those guys right back into this ATM, and it produces the light.

COMMISSIONER JABER: Okay. So the configuration of the DSLAM allows you to do more or less depending on what's coming out of the DSLAM.

THE WITNESS: That's right, you oversubscribe. If you have 100 customers here, you don't put 100 times the amount of bandwidth here. You engineer it to oversubscribe.

COMMISSIONER JABER: So then my question is, if the ALECs put the DSLAM there and configure it the way they want,

doesn't that provide more flexibility for the ALEC? And price notwithstanding, but if --

THE WITNESS: Right.

COMMISSIONER JABER: -- you have more flexibility by placing your own DSLAM.

THE WITNESS: Price notwithstanding and collocation application process notwithstanding. I mean, this thing might be sitting there; it's all full up. I've got to now go over and get a piece of land. I've got to condemn it, or I've got to use my common carrier to go in the city right away and say, pour a pad, you know, put one of these things in. I need power. They are going to have power in here. I'm going to run breakers over to, you know, some power. I'm going to need cable to run into this MDF. That is a big job. That's a big job to do that in addition. It wouldn't be a big job if there was only a couple hundred of them, but the magnitude here is enormous.

COMMISSIONER PALECKI: What is the greatest number of customers you serve in any single -- out of any single remote terminal?

THE WITNESS: You know, we don't serve any customers out of remotes now, so I don't think I'm qualified to answer that. We estimate how many -- we just divide BellSouth's total lines, you know, into their remote, so we estimate, you know, that there's roughly, you know, 500 lines out.

COMMISSIONER PALECKI: So you don't even know what remote terminals your signal goes through?

THE WITNESS: Yes, sir. I don't know where they are. I don't know exactly how they correspond to addresses. We've looked into this. We've realized that we've got to tie the remote not necessarily to a geography but also to the address, because then we can, you know, mark it, you know, sort of surgically after those guys --

COMMISSIONER PALECKI: As a marketing strategy, could you identify -- you testified earlier that these remote terminals typically serve between 100 and 1,000 customers. Could you identify those remote terminals that serve a greater number of customers, a thousand or so, and target those remote terminals for your own DSLAM rather than seeking to serve a BellSouth?

It would seem, if the DSLAM can serve 48 customers out of 1,000 BellSouth customers, it would be practical to believe that you could market DSL to that many.

THE WITNESS: It's my belief from just a pure business perspective that they have already gone to the largest. They have already hit those, and they've got a fairly decent penetration in those remotes. So we might be the second one in there, and that impacts our revenue projections, the market share, but that --

COMMISSIONER JABER: I wish someone would realize --

THE WITNESS: If that was a green -- I'm sorry?

COMMISSIONER JABER: I wish someone would realize that there's a huge market in some of the most rural areas.

THE WITNESS: There is, there is.

COMMISSIONER JABER: That area is going to grow. You identified yourself that Florida is amazingly large with respect to development and growth, and if we have developed in the busiest areas, that only leaves one major place for future development.

THE WITNESS: That's right, and also residential. There's no real CLEC -- facilities-based CLEC. Now, I'm not talking about UNE-P or resale, but there's nobody doing these UNE loops for resis (sic), and that's what we want to do. But if we are providing residential dial tone to somebody and they're doing the dial-up modem, that works great, but as soon as they decide they want DSL, and they inevitably are going to get BellSouth DSL, it won't work. And that's what we need immediate relief on right now.

We've been doing this for two years. We're running out of customers to sell to who don't have BellSouth DSL, because when we switch them over to our voice, BellSouth chooses to shut off that DSL and say, sorry. And the customers, they don't know. You know, we're talking about the concept of BellSouth doesn't sell to retail, they wholesale to the ISPs or themselves. Customers don't know that. They think

they are buying it from BellSouth. It comes in on their bill and it says BellSouth. It's marketed BellSouth. You know, they think it's all bundled together with the phone company.

COMMISSIONER JABER: I'm going to ask you one final question, and we should get back to the procedure. How quickly could you penetrate the residential market if we ruled in favor of your position on this issue? You said that -- you've identified you're targeting small businesses now, and you've been relatively successful, and your next course of action would be the residential consumer for DSL. How quickly could that happen?

THE WITNESS: I don't know how successful we would be, but I do have peers that have started companies like ours in other parts of the country and in the mid-Atlantic area, specifically Richmond. My one colleague up there was able to get 10 percent market share residential, you know, within his first 18 months of operation. So I'd feel pretty excited about going after and getting some good residential market share.

COMMISSIONER PALECKI: Now, you've testified that if a potential customer has BellSouth DSL, that you cannot provide them with voice service.

THE WITNESS: No, sir.

COMMISSIONER PALECKI: What if one of your customers wants DSL service? Do they have any option other than BellSouth?

THE WITNESS: I don't believe so at this time, no.

COMMISSIONER PALECKI: So you would lose that customer if they wanted to hook up with DSL?

THE WITNESS: Yes, sir, and that happens every day. And I take escalation calls from customers who have switched to us. Their DSL shuts off. They are out of business, you know, and they want me to do something about it.

COMMISSIONER PALECKI: So the problem is twofold. You're losing existing customers, any existing customer that wants DSL is gone, and any customer you want to target that has DSL, you have no potential to capture that customer.

THE WITNESS: Yes, sir. That's the one big issue that we're here. The second issue that we're asking for is, the same way we buy the voice UNE, we're asking for some sort of resale or DSL UNE.

COMMISSIONER PALECKI: But the resale you're talking about is only where BellSouth already provides DSL service; correct?

THE WITNESS: Yes. Yes, sir.

COMMISSIONER PALECKI: Not where there is not DSL service already connected to the customer.

THE WITNESS: Right. I --

COMMISSIONER DEASON: Another question and we'll let you get back to your summary in just a moment.

THE WITNESS: No, no. Go ahead.

COMMISSIONER DEASON: In your opinion, to get meaningful penetration into the residential market, must you package your services and market to customers who are going to be subscribing to both data and voice, or do you think there's any market out there just for voice residential?

THE WITNESS: I think that there's a good market for just voice, but I think I would be irresponsible to go into this thinking that the DSL percentages is not going to go up over time, and then I would eventually lose my customer base I bought. I couldn't represent to investors that I have a sustainable business if I didn't have a DSL strategy.

COMMISSIONER DEASON: So even if you got significant penetration in the residential market, would the growth of DSL or data services and customers' desires you feel like that even with that significant penetration, you would then lose customers who decided to change?

THE WITNESS: Yes, sir, exactly.

COMMISSIONER DEASON: When I say "change," to add --

THE WITNESS: DSL.

COMMISSIONER DEASON: -- DSL service.

THE WITNESS: Yes. We think we could have a nice bundle of dial-up and local and add some features in and long distance and do really good, but as soon as they wanted DSL, we'd be in trouble.

So just in summary, I've gone on a while here, and I

appreciate the time. We started with ten issues, we dropped nine of them. Over the two years of working together, we believe in working stuff out with BellSouth. We try to work it out at the field level, at the CO level, you know, in the engineering level, at the legal level, but this is just one that just is, you know, it's really paramount important for us, and it's quickly becoming a life or death matter for FDN. We think we're a real player here in Florida. We've got the right strategy. We just have a unique circumstance that we need help. So that's all I had to say.

COMMISSIONER JABER: Mr. Gallagher, overall, your experiences with BellSouth have been good, haven't they?

THE WITNESS: I would say yes. We believe in cooperation. Like I said, we try to keep out of you-all's chamber's here and work it out and usually we can.

COMMISSIONER JABER: How is it you communicate with your staff about how they'll communicate with BellSouth?

THE WITNESS: I've typically found that when my staff gives me a bad result, its easy to blame somebody else, but if you look inward, you know, you usually find that, well, we may have, you know, done something wrong ourselves. And so a lot of the times it's ourselves. And when we do identify it, we strip away all of the parts where FDN messed up, you get a very clear picture. And once you have that clear picture, you go to BellSouth with it and say, hey, you guys are taking -- you

know, you're throwing all our SL1s into PF status the day before, you know, the cutover. We need you to fix this. They are getting better at it. They are getting better. So if you come to them with a very specific, then you can work with them. But if it's, you know, I don't like you, you don't like me, you did this to me, you know, on a very generic basis, you don't get anywhere.

COMMISSIONER JABER: Do your employees take advantage of the training brochures and the training classes that BellSouth offers for -- I've forgotten what it's called, but for the ALEC customer, basically?

THE WITNESS: I don't know specifically. I know they go to Birmingham and Atlanta for training on the TAG gateway, for example, or for dealing with the CSR people. We've been told by them that we're the largest provider of these UNE loops. Nobody is even close. You know, there is nobody even close. So I appreciate your time, and that's all I had to say on my opening remarks.

MR. FEIL: I don't know if that was the longest summary in the history of the PSC or not, but anyway, I suppose we tender the witness for cross now.

COMMISSIONER DEASON: BellSouth.

MR. TURNER: Thank you, Commissioner Deason.

CROSS EXAMINATION

BY MR. TURNER:

Q Mr. Gallagher, good morning, I'm Patrick Turner. We met a couple of weeks ago at your deposition, I believe. And let me start by just briefly doing some housekeeping about the deposition. I received from your counsel an errata sheet in which you made a few minor changes to your deposition testimony. Aside from those changes on that errata sheet, I take it that everything else in your deposition testimony is correct?

A Yes, except I'd like to substitute proper grammar for all the times I said you-all.

Q You-all is proper grammar, Mr. Gallagher. So we can agree then that with the exception of the errata sheet, if I were to ask the same deposition questions today, your answers would be the same; right?

A Yes, sir.

Q Mr. Gallagher, before we get to far into this, there was one thing you said in your summary -- several and I'm going to hit them as we go. But one thing I want to hit up front, I believe I understood you to say that the application fee for collocation at a remote terminal would be $3,000. Did I hear your understanding correctly?

A Yes, that's my understanding.

Q Mr. Gallagher, do you have a copy of what has been entered as Staff Exhibit Number 5?

MR. FEIL: I'll hand it to him.

Q Actually, I think it's just Exhibit Number 5. It's Stipulation 5. I believe your counsel has handed you a copy of it. Go with me, if you will, to Item Number 58, please.

A I see it.

Q Now, there BellSouth was asked to identify all recurring and nonrecurring costs and charges associated with CLEC collocation of a DSLAM at a remote terminal; right?

A Yes.

Q Would you read for us the application fee that's there under the nonrecurring cost?

A "$615.61."

Q And you've never -- FDN has never actually submitted a collocation application regarding a remote terminal; right?

A No, we have not.

Q So you have no experience to indicate that that $615.61 number is wrong; correct?

A Correct.

MR. TURNER: Commissioner Deason, if I may, I have two exhibits that are diagrams. With your permission, I'd like to pass both of them out, so we can save the time in passing them out, and then once everybody has copies, we'll start going through them, if that's okay.

COMMISSIONER DEASON: Sure. Do you wish to have these identified?

MR. TURNER: Yes, sir. I think once the witness gets

it in his hand we can -- they are a little bit different. We can go through and mark them for identification at that point, if that's okay.

COMMISSIONER DEASON: That will be fine. We will identify the exhibit which has the DSLAM within the central office as Exhibit 7 and the exhibit which has the DSLAM in the remote terminal as Exhibit 8.

(Exhibits 7 and 8 marked for identification.)

MR. TURNER: Thank you.

BY MR. TURNER:

Q Mr. Gallagher, if you would, what I'd like to do now is just generally walk through with these diagrams in basic terms what it takes to provide both voice and data service to a single customer over a single loop. And if we could, let's start with Exhibit Number 7. And as Commissioner Deason just noted, that's the one that has the DSLAM and the collocation space at the central office. Do you have that in front of you?

A Yes, I do.

Q Now, let's go through it. I'm going to walk you through how this is drawn out, and we'll start talking about it. Over to the far right of the page, we have an end user represented by that telephone; right?

A Yes.

Q And then we have a copper facility running from the end user premises to a remote terminal that serves the end

user; right?

A Yes.

Q At the remote terminal, it's hooked to another copper facility in this instance that runs back to the central office; right?

A Yes.

Q And at the central office in the CLEC collocation space, we have drawn a DSLAM; right?

A Yes.

Q And FDN does, in fact, have some DSLAM equipment collocated in central offices in BellSouth's central offices in Florida; right?

A Yes.

Q Okay. Now, just to make this a little easier, let's assume that the DSLAM in this central office has a splitter integrated into the DSLAM, okay? And, in fact, a lot of DSLAMs do have integrated splitters, don't they?

A Yes.

Q Okay. And assume with me, it's not drawn here, but just assume with me that the DSLAM is going to be connected by transport facilities back to a packet switch somewhere else on FDN's network, okay?

A Yes.

Q And that's, in fact, what happens in some central offices in Florida; right?

A Yes.

Q All right. Let's look at what happens to provide voice and data over this single loop to the end user. And to illustrate that, assume that the end user is talking on the telephone with a friend while at the same time he's surfing the Internet, okay?

A Yes.

Q In that case, the voice traffic is going to be transported along the lower frequency portion of this copper loop; right?

A Correct.

Q And simultaneously that data traffic that's going back and forth through the Internet, it's going to be transported on the higher frequency portion of that same loop; right?

A Correct.

Q In my diagram, the voice and the data are going to be traveling along together sort of like on a highway until they hit the DSLAM that's collocated at the central office; right?

A Correct.

Q And once it hits the DSLAM, that splitter is going to peel off the voice from the data; right?

A Correct.

Q And the voice is going to be sent from this DSLAM to the circuit switch, and it's going to go, get completed just

like any other voice call; right?

A Correct.

Q The data, once it's split off, the DSLAM is going to packetize the data; right?

A Yes.

Q And then it's going to send that data back to your packet switch; right?

A Correct.

Q And from there, it's going to be sent through and terminated just like any other packet switching type call; right?

A Yes.

Q Now, in this case here, you had drawn, and it's still there, on this diagram you have on the poster board that you were working off of, the blue diagram, that's, in effect, the same thing as what we're talking about in Exhibit Number 7; right? That's an all copper loop to the end user; right?

A Yes, sir.

Q And there you don't have to collocate. FDN does not have to collocate a DSLAM at that remote terminal in order to provide both voice and data to that end user; right?

A If the loop length is adequate, yes.

Q That's a good point. If you get above 18,000 feet, we're going to have problems; right?

A Right, or if there's cable pair exhaust.

Q And that is a technological function; right? In other words, if you had longer than an 18,000-foot loop, both BellSouth, FDN, and anyone else is going to have problems providing voice and data over that same loop to one customer; right?

A Well, we would have more problems than you because I would believe eventually you would put a DSLAM in out there, and you would shorten your loop length.

Q Okay. So you are saying that we could work around it. Let's assume they'll work around, though.

A Okay.

Q Let's assume that we have a loop length of 30,000 feet, for instance.

A Okay.

Q BellSouth is going to have a problem providing voice and data to that end user over that same loop; right?

A Right.

Q And FDN is going to have the same problem; right?

A Right.

Q And that's just a function of today's technology; correct?

A Yes.

Q I may have misheard you during your summary, and if I did, I want you to correct me, but during your summary, you said, I believe, that 90 percent of the access lines, BellSouth

access lines, in Florida are served by remotes; right?

A Correct.

Q Did you mean to imply there that 90 percent of them -- let me say it this way. Did you mean to imply that only 10 percent of the access lines in Florida are served by continuous copper like we've diagramed here in Number 7?

A Ninety percent of the customers based on the data that, you know, we've got from you-all, 90 percent are served by either a fiber or copper fed remote. So I think it was 60 percent by fiber fed, and then it would be, the other 30 percent would be copper fed. So in the case of a copper fed remote, you are using T-carrier or something on that copper you're feeding it with.

Q Okay. So I want to make sure I clarify there. Am I understanding you to say that based on BellSouth's discovery, this all copper exists about 30 percent of the time in BellSouth's network?

A Yes. But this diagram, there would be more copper going from the remote to the end user than there is copper going from the remote back to the DSLAM.

Q Okay. But in an all copper scenario like we have in Number 7 here, we've already acknowledged that FDN does not have to put a DSLAM at that remote terminal to serve that customer with DSL service; right?

A If we could get -- the important piece of copper is

the one that goes from that DSLAM to the remote. That's where you-all typically come back and say, we're out of copper, on that piece. The piece from the remote out, obviously, that's there. But it's a cable exhaust issue typically on a remote fed -- copper fed remote.

Q It's a cable exhaust issue, not a DSLAM/nonDSLAM issue; right?

A Yes, sir.

Q And we're here today on the DSLAM/nonDSLAM issue; right?

A Right.

Q Now, let's go to --

COMMISSIONER JABER: I'm sorry, Mr. Turner. May I interrupt for just a minute?

MR. TURNER: Sure.

COMMISSIONER JABER: They come back and tell you they are out of copper?

THE WITNESS: Correct. Because -- what you have here is a remote that's, you know, put in out at some far end place. They didn't -- for whatever reason, they didn't run copper from that remote back to the CO. They put a big, you know, several hundred count copper cable, and inside that cable, they're running, like, a T-carrier, a digital carrier, that they can put a bunch of capacity on, so then that cable goes to the remote. The remote might be serving, you know, hundreds and

hundreds of lines, so there might be, you know, 500 or a thousand lines feeding the remote but only a hundred or 200 pair cable going back to the CO. And they're using -- on that cable they're using time division multiplexed, TDM, digital carrier. And if you try to push DSL though that, it doesn't work. So you need a pure copper -- you have to request, I need a pure copper conductor on this route.

COMMISSIONER JABER: And forgive my ignorance on this. That's not something that's constantly available?

THE WITNESS: You know, because of the way that loop is constructed, we've typically -- our experience has been, you go through this thing called a loop makeup request, and it's been that, you know, it's just not available there.

COMMISSIONER PALECKI: But didn't you say that this pure copper scenario, which is depicted on Exhibit Number 7, exists approximately 30 percent of the time on BellSouth's network?

THE WITNESS: Thirty percent of the time you are dealing with a customer who's behind a copper fed remote. Again, our estimation in doing business, we'd say 60 percent of them are behind fiber fed remotes, 30 percent are behind fiber fed remotes, and 10 percent you can get a copper shot straight through. I don't know if they are going through a remote or not. It just -- you know, you can get a copper --

COMMISSIONER PALECKI: And those are the 10 percent

that are connected directly to the central office?

THE WITNESS: Yes, sir.

COMMISSIONER PALECKI: So you have that 10 percent plus the 30 percent you could serve now using your existing DSLAM in the collocation space?

THE WITNESS: If there was copper available, yes, if there was copper available from that DSLAM to that remote.

COMMISSIONER JABER: And if the end user is located 18,000 feet or less from the central office.

THE WITNESS: That's right.

COMMISSIONER PALECKI: You said if there is copper available.

THE WITNESS: Right.

COMMISSIONER PALECKI: What percentage of the time is there copper available? How much does that cut down on the percentage?

THE WITNESS: I don't know the exact percentages. I don't know. It's been enough that we have pretty much, because we've had to turn down customers enough, we have gone away from even trying to ask for it anymore.

COMMISSIONER PALECKI: But you're saying it's something less than the 10 percent plus the 30 percent.

THE WITNESS: Yes, sir.

COMMISSIONER PALECKI: Your scenario where you can actually serve without providing a DSLAM in a remote terminal

is something less than 40 percent of --

THE WITNESS: Yes, yes, I would say that. I would say that this Exhibit 7 drawing to be more accurate, you know, would depict a bunch of, you know, copper coming out of that remote serving subscribers, and then copper -- it's not a one-for-one copper cable going back to that DSLAM. It's one to end in some manner.

COMMISSIONER PALECKI: So sometimes it works, sometimes it doesn't.

THE WITNESS: Yes.

COMMISSIONER DEASON: But that's just -- I mean, that's efficient engineering of a network. You wouldn't want a one-to-one ratio. I mean, it would inefficient; correct?

THE WITNESS: Right.

BY MR. TURNER:

Q Mr. Gallagher, just to explore that one step further. Assume with me that you have that situation that you've just described to the Commissioners where you don't have an available copper facility going back to the DSLAM from the remote terminal.

A Uh-huh.

Q Resolving that issue is a matter of simply putting in another copper facility from the remote terminal to the DSLAM. It's not an issue of putting a DSLAM at the remote terminal; right?

A I'm sorry, could you ask that question again?
Q Sure. The issue there is, does BellSouth put in another -- some more copper facilities from the remote terminal back to your DSLAM; right?
A Or find some that may be available.
Q Okay. Let's go now to Exhibit Number 8, and as we did the first time, do you have that in front of you, Mr. Gallagher?
A Yes.
Q As we did the first time, let's just walk through what's depicted on it, and we'll go from here. End user on the right-hand side of the page; right?
A Yes.
Q And we have a copper facility going from the end user to the remote terminal; right?
A Yes.
Q Let's skip the remote terminal for right now and look at what's going from the collocation space in the central office to the remote terminal. Now, in Exhibit Number 7 that was a copper facility; right?
A Right.
Q And in Exhibit Number 8 that's a fiber facility; right?
A Right.
Q And when you have this type of architecture where you

have copper from the end user to the remote terminal and fiber from the remote terminal back to the central office, in order to provide voice and data to that end user over the same loop, somebody has got to put a DSLAM in that remote terminal; right?

A Yes.

Q And you'll see, fortunately, we have put a green DSLAM in the remote terminal on Exhibit Number 8; right?

A Yes.

Q Okay. Now, without regard to who the carrier is for now, let's just walk through like we did before technologically at a high level what happens when this end user on the right side of the page is receiving voice and data over the same line, okay?

A Yes.

Q And again, he's talking on the telephone while at the same time surfing the Internet, okay?

A Yes.

Q Now, both -- again, the voice is going to go over the low-frequency portion of the loop to the DSLAM in the remote terminal; right?

A Yes.

Q And the data is going to go over the high-frequency portion of the same copper loop to the DSLAM in the remote terminal; right?

A Yes.

Q And again, let's assume that the DSLAM in the remote terminal has a splitter integrated just to make life simple, okay? So what's going to happen is, the splitter is going to peel the voice from the data; right?

A Yes.

Q The voice will then be transported by that fiber facility back to the collocation spot; right?

A Yes.

Q And from there, it will be sent to the circuit switch network, and it will be handled just like any other voice call; right?

A Yes.

Q The data, once it is split off from the voice, is then going to be packetized by that DSLAM at the remote terminal; right?

A Yes.

Q Once it's packetized, it's going to be sent over the fiber back to the collocation space; right?

A Yes.

Q And at the collocation space that packetized data is then going to be sent back up to your packet switch, and it's going to be terminated just like any other data traffic; right?

A Yes.

Q Now, just as an aside, do you have your direct testimony in front of you?

A Yes, I do.

Q Go with me to Page 6, Lines 11 through 14.

A Yes.

Q Mr. Gallagher, you did a bad thing, you got there before I did. In Lines 11 through 14, you say, "In the past quarter-century, as Florida's population grew explosively, BellSouth deployed a tremendous number of DLCs at remote terminals in its distribution network;" right?

A Correct.

Q Now, there where you're saying "DLCs in its remote terminal," you're talking about this situation we've diagramed here on Exhibit 8 where you have fiber from the central office to the remote terminal; right?

A No, I don't necessarily mean fiber in every case. I mean there's a digital loop carrier time division multiplex device out there.

Q Okay. And we can agree, can't we, that that time division multiplex device is generally going to take place when you've got that fiber loop, right, the fiber fed loop?

A No. It can be served by copper T-carrier.

Q I understand that, but when you have fiber going into a remote terminal, then copper, you are going to have a DLC; right?

A Probably, yes. Yes.

Q And we can agree, can't we, that BellSouth has been

deploying that DLC type technology long before the 1996 Act came into place; right?

A Yes.

Q And BellSouth had been deploying that DLC technology long before FDN came into business; right?

A Yes.

Q Go back with me to Number 8. We have agreed, haven't we, that in order for any carrier to provide voice and data service over the same loop to this end user, a DSLAM is going to have to placed in a remote terminal; right?

A Yes.

Q It's fair to say then, isn't it, that wherever BellSouth today is serving both voice and DSL type data services to an end user in Florida that is served out of this type of remote terminal arrangement, BellSouth has had to place a DSLAM at the remote terminal; right?

A Yep, yes.

Q And in each of those instances where BellSouth has placed a DSLAM in a remote terminal in order to provide that type of service to an end user, we can agree that BellSouth has had to purchase a DSLAM; right?

A Correct.

Q And after it's purchased the DSLAM, it's had to install that DSLAM at the remote terminal; right?

A Correct.

Q And if there wasn't space at that remote terminal, BellSouth would have to have augmented the space in the remote terminal before it put the DSLAM in; right?

A Yes.

Q And if there wasn't sufficient power at the remote terminal, BellSouth would have had to augment the power at that remote terminal before it placed the DSLAM; right?

A Yes.

Q If there were any zoning issues or right-of-way issues involved in placing that DSLAM in the remote terminal, BellSouth would have had to resolve those issues; right?

A Right.

COMMISSIONER JABER: Mr. Gallagher, do you know through your discovery in this proceeding where these situations are in Florida, where this sort of architecture is in place and where BellSouth has already placed the DSLAMs in remote terminals?

THE WITNESS: I do not know. No, I don't know where they are. I have been told that I could have access to that information by BellSouth, but I -- and where we have tried before, we don't know where the remotes are or how they correspond to addresses and which ones have been --

COMMISSIONER JABER: So to the degree you can get this information, though, you could also request the use of the DSLAM in these remote terminals so that you can provide DSL

service.

THE WITNESS: Absolutely.

COMMISSIONER JABER: Is that -- if BellSouth provided you that information --

THE WITNESS: Right. And we sort of do that now because we buy what they call their wholesale product, our ISP, and we try to resell it. And they have this availability on their Web page where you can go and say, is this place DSL capable, you know, punch in a phone number and they'll --

COMMISSIONER JABER: Okay. So to the degree this exists, you don't have disagreement?

THE WITNESS: What is it --

COMMISSIONER JABER: To the degree this sort of architecture is already in place and BellSouth has DSLAMs in some remote terminals, you don't have an issue there at all?

THE WITNESS: No. I have an issue in that my voice service doesn't work when the customer buys -- you know, wants BellSouth DSL.

COMMISSIONER JABER: Okay. This is a BellSouth customer in Exhibit Number 8. For you to use the DSLAM in this remote terminal to provide DSL service to your potential customer, that would kick voice service off?

THE WITNESS: Right, but I would not get to quote, unquote use the DSLAM. I'd have to buy their finished product, and if I bought their finished product, which, you know, they

call their Fast Access, and I put it on a line, I've got to put it on a BellSouth line. I can't put it on an FDN line.

COMMISSIONER JABER: I see. So it's an additional service that you have to buy to be able to use this DSLAM to provide DSL service to a customer --

THE WITNESS: Yes.

COMMISSIONER JABER: -- and that's called Fast Access.

THE WITNESS: That's correct. I buy the Fast Access, and then I've got to buy a phone line.

COMMISSIONER PALECKI: You can buy BellSouth Fast Access?

THE WITNESS: Yes, sir. I have an ISP, FDN.com, that --

COMMISSIONER PALECKI: And if you buy BellSouth Fast Access, do your voice lines still work?

THE WITNESS: No, sir.

COMMISSIONER PALECKI: So basically if your end user customer wants DSL service, there is no way the customer can get that DSL service and your copper lines will still work unless you install your own DSLAM --

THE WITNESS: That's exactly right.

COMMISSIONER PALECKI: -- or unless the issue in this docket is resolved that would require BellSouth to allow you to use their DSLAM.

THE WITNESS: That's exactly right.

COMMISSIONER PALECKI: If you used their DSLAM, are you talking about providing that BellSouth DSL service, or would you provide your own brand of DSL service?

THE WITNESS: If I got unbundled access to the DSLAM as in a UNE, I would have my own brand. If I were able to resell it, I would have my own brand. Even right now when we wholesale it, we try to brand it ourselves, but see, the wholesale rate that we buy from them, it's like 35 bucks. Their retail rate is 45 bucks. So there's not much arbitrage in there, especially when we've got to put in a phone line underneath it.

COMMISSIONER PALECKI: Well, there are really two solutions to your problem, is there not? One would be if BellSouth created -- and I'm not a technician, so correct me if I'm wrong, but if BellSouth created a situation where your voice lines would still work even though they're providing DSL service --

THE WITNESS: Right.

COMMISSIONER PALECKI: -- and you would be satisfied with that; correct?

THE WITNESS: I've been asking for that for two years.

COMMISSIONER PALECKI: Or where they would provide you with access to the DSLAM and you could provide your own DSL

service.

THE WITNESS: Correct.

COMMISSIONER PALECKI: One -- either of those solutions would be satisfactory to you?

THE WITNESS: In the first case what I would also ask for is a -- sort of a better price than the $35, call it resale, call it whatever, and that's what we've tried to work out. You know, keep my voice working underneath, and we'll keep buying -- we'll be one of your biggest customers. We'll buy this Fast Access all day long, but we want a better -- we need a better rate. We need a resale like rate on it.

COMMISSIONER PALECKI: You want to be able to make some margin on selling BellSouth's Fast Access.

THE WITNESS: Yes, sir.

COMMISSIONER DEASON: But you agree that's not within our jurisdiction to tell BellSouth what their rate has to be for that service.

THE WITNESS: I believe the Fast Access service is a retail service that they sell to customers.

COMMISSIONER DEASON: So you're saying you think that it should be part of the resale requirement under the Telecommunications Act?

THE WITNESS: Yes, sir, I do. The customers think -- they don't understand there's a difference, .net and Fast Access. They get it sold to them by BellSouth. You can -- you

know, there's billboards advertising. It's put on their phone bill. It's bundled, you know, in some of the win-back cases we've had to deal with. It is absolutely marketed out there to these customers.

BY MR. TURNER:

Q Mr. Gallagher, let's explore that a bit --

A Okay.

Q -- because we're using the term "Fast Access." I want to make that we're distinguishing and understanding what we're talking about. You understand that BellSouth has a tariffed telecommunications service, a DSL offering, that it provides to Internet service providers; right?

A Yes.

Q And that is -- do you understand that that tariff offering, that telecommunications tariff offering, is different than Fast Access service that BellSouth provides to its end users?

A You know, to me, it's all the same.

Q Well, let's talk about that. You've got an entity called FDN.net; correct?

A .com.

Q .com?

A Right.

Q And there are occasions, I believe, from your deposition testimony, aren't there, where FDN.com purchases the

DSL telecommunications offering from BellSouth; right?

A Yes, they do.

Q And then it adds -- it uses that telecommunication service as the vehicle by which it gives us Internet service to its end users; right?

A Right.

Q So you'll agree with me, won't you, that the DSL product that FDN.com is buying from BellSouth is not the same thing as the Internet service offering that FDN.com is selling to its end users, is it?

A It competes directly with BellSouth.net buying Fast Access from BellSouth, the phone company. That's why it's not a very viable -- but it's not a very large percentage of our revenue, and it's not a very attractive product that has a lot of traction.

Q Mr. Gallagher, that wasn't quite my question.

A Okay.

Q My question is: Let's think about a car, okay? Ford will sell me a Taurus; right?

A Right.

Q And Ford can go out and buy the seats in that Taurus from some other company; right?

A Right.

Q Put it in the Taurus and I buy the Taurus; right?

A Right.

Q That doesn't mean that I am buying my seats from whoever made them; right? The thing I'm buying is a finished car from Ford; right?

A Right. I liked your water example earlier.

Q Okay. Now, let's go back and talk about what FDN.com is selling to its end users. FDN.com is selling to its end users an Internet service; right?

A The end users think they're buying DSL. They don't -- you know, I want DSL. They're not saying, "I want an Internet service."

Q Well, when an end user wants a telephone service, he doesn't specify to you that he wants a UNE combination or a UNE-P or resold, he just wants telephone service; right?

A Well, yeah.

Q Okay. So let's set aside for a minute what the end user is asking for, and I want to focus on what FDN.com is providing that end user.

A Okay.

Q What FDN.com is providing the end user is the Internet service as a package; right?

A Right, high speed.

Q And part of that Internet service is the telecommunications pipe; right?

A Right.

Q And what FDN.com has done is, it has bought that

telecommunications pipe from BellSouth; right?

A Right.

Q It's then put its Internet water through the pipe, and it sells the end user the pipe with the water in it; right?

A Right, but we don't own the water company. The water company and the pipe company aren't the same company in our case.

Q I understand that.

COMMISSIONER PALECKI: Let me ask a question on this matter. If a customer wants to order DSL service from BellSouth, can they order just the DSL and provide their own Internet carrier, or do they have to order the Fast Access?

THE WITNESS: It's my understanding they can't just order the Fast Access, but most of them don't -- they just want Internet access --

COMMISSIONER PALECKI: Well, it's my understanding that Fast Access is bundled.

THE WITNESS: Right.

COMMISSIONER PALECKI: It's the DSL service and the Internet service as well. But let's say a customer does not want the Internet service. They want to go through somebody else.

THE WITNESS: Like AOL or somebody.

COMMISSIONER PALECKI: Like AOL. Can a customer just say, I only want the DSL service that's being offered in the

tariff from BellSouth, and I'll go ahead and get my own Internet provider?

THE WITNESS: Here's how that works. What they say is exactly what you said. And the way to do that is, they just call AOL and say, I want Fast Access, and AOL will then just order it. So the customers can't order it, that Fast Access piece, separately from Bell. They will just go to their ISP and say, just get BellSouth DSL. I know I qualify. You know, I got a solicitation from them in the mail or something, so get me DSL to this location.

COMMISSIONER DEASON: BellSouth tells the end use customer, call AOL and let them order the DSL for you?

THE WITNESS: In that case, I don't know if it would be BellSouth telling the customer, or the customer doing it on their initiative, or AOL telling the customer, but the customer would eventually have to get --

COMMISSIONER DEASON: Well, how does AOL get in the loop?

THE WITNESS: Well, in this case it could be, I am a dial-up guy; I've got AOL. I've had it for life; I love AOL. Now, I just found out I'm qualified for DSL. I got some sort of marketing literature, something -- you know, my buddy got it, my neighbor got it. If I called BellSouth, they would try to sell me the whole Fast Access thing where I'd have to, you know, change to the ISP, the BellSouth ISP. But I'd say, no, I

want to keep AOL, so then I'd have to call AOL and say, you guys, I know I'm qualified for DSL; now go get that BellSouth service into my house.

COMMISSIONER PALECKI: So what you are telling me is that the customer cannot get the DSL service from BellSouth directly. The DSL service is only being offered to the Internet provider, so the only way the customer can get the tariff DSL service is through an Internet provider.

THE WITNESS: Correct.

COMMISSIONER PALECKI: Thank you.

COMMISSIONER DEASON: And this service, this DSL service, wholesale service is tariffed at the FCC?

THE WITNESS: You know, I don't know. I think that it is. I don't know if it's a state -- I guess it's not state, so it would have to be federal. I know we just buy it out of a -- we go to their Web site and order it that way.

COMMISSIONER DEASON: Do you know how -- what the prices that are offered to customers if they buy the whole package from BellSouth, that being the pipe and the water, as opposed to if they just get their ISP to buy the pipe, how much their ISP is having to pay for the --

THE WITNESS: I know that -- yeah, there's a term in volume deal. Like, if you buy a whole bunch of Fast -- if you are an ISP and you commit to BellSouth that you are going to buy, you know, a thousand of these things a month, you get a

volume deal that could get you down as low as, say, $30 a month. I think it's 32, and I'm not exactly sure, but somewhere around there. If you're a Regular Joe ISP and you don't have a big volume commitment, you are going to pay more, like, 35, 36 bucks for that Fast Access. BellSouth.net, though, offers it for 45 with the Internet included.

COMMISSIONER DEASON: Forty-five with the Internet included?

THE WITNESS: Yes.

COMMISSIONER DEASON: And you're saying the most attractive rate for high-volume purchasers, wholesale purchasers is around 32?

THE WITNESS: I believe it's approximately in that area, $30 to $32, yes.

COMMISSIONER DEASON: And you're talking about a $13 difference then, approximately.

THE WITNESS: Yes.

COMMISSIONER DEASON: Okay. Thank you.

BY MR. TURNER:

Q Mr. Gallagher, we're going to get into this resale stuff some more in a few minutes, but for now, let's go back to Exhibit Number 8. And let's just clarify, the DSLAM that's sitting there in the remote terminal; right? Let's assume for now that this is the way that BellSouth is providing both voice and data service to the end user, okay? BellSouth has put its

DSLAM in that remote terminal. Will you assume that with me?

A Yes.

Q The issue in this case is, FDN wants to use that DSLAM that BellSouth has purchased and installed in that remote terminal; right?

A Yes.

Q And FDN, you are not suggesting that you want to sit down and negotiate a commercial market rate for doing so; right? You are here asking this Commission to require BellSouth to provide you access to that DSLAM at TELRIC rates as a UNE. That's what you are asking; right?

A Yes.

Q Okay. We've talked about what BellSouth does to go and install the DSLAM. Let's look for a minute about what FDN can do to place a DSLAM in that remote terminal. Now, first of all, you will agree with me, won't you, that FDN can purchase a DSLAM from one of several vendors?

A Yes.

Q And FDN already has several quotes from stand-alone DSLAM providers, doesn't it?

A Yes.

Q In fact, you're even looking at buying DSLAMs from other carriers who have recently declared bankruptcy, aren't you?

A We have looked at the equipment.

Q So FDN is not having any problems finding vendors who are willing to sell FDN a DSLAM?

A Correct.

Q And based on your experience, FDN is getting competitive offers for the pricing of those DSLAMs; right?

A I hope.

Q Well, in your testimony, didn't -- or in your deposition, you told me that you thought you were getting competitive offers and competitive pricing for DSLAMs; right?

A Yes, yes.

Q And it's true, isn't it, that you filed -- well, I'm sorry, let's go back. Now, let's assume that you actually purchased a DSLAM from one of these vendors at these competitive prices, okay?

A Yes.

Q Now, you've got to put the DSLAM in the remote terminal; right?

A Yes.

Q And this is the collocation process that you were discussing with the Commission; right?

A Yes.

Q And in your testimony, your prefiled testimony, you say a lot of things about this collocation process. Let me ask you this. Isn't it true that you filed all that testimony before you read Mr. Williams' rebuttal testimony?

A Yes.

Q And it's true, isn't it, that FDN's never submitted an application to collocate a DSLAM at a single remote terminal in BellSouth's territory?

A That's correct.

Q Now, on Page 25 of your direct testimony, I'm going to look at Lines 3 through 6.

MR. FEIL: I'm sorry, could you repeat that, Counsel?

MR. TURNER: Yes, sir. It's Page 25.

MR. FEIL: Yes.

MR. TURNER: It's Lines 3 through 6.

BY MR. TURNER:

Q You state, "Furthermore, it's my understanding that in one of the few instances where a CLEC attempted to collocate a DSLAM at an ILEC remote terminal, cross-connection and construction issues remained unresolved for more than a year after the initial collocation request was made;" right?

A Yes.

Q And you will agree with me, won't you, that you don't know the ILEC who was involved?

A I do now.

Q But you didn't at your deposition?

A Right, I forgot.

Q Well, in your deposition, you didn't tell me you forgot, did you?

A No. I said that I don't remember who -- I don't know exactly what I said. What did I say?

Q Well, in the deposition, and I've got the transcript if we need to look at it, but in the deposition, didn't you tell us that those were rumors that you could not substantiate?

A Right.

Q Okay.

A But I've since investigated it, and I understand it now.

Q Well, I asked you earlier, though, if you had anything -- if your answers would be different. I'm assuming you're now telling me your answer would be different.

A My answers to the deposition, you mean?

Q Well, you are saying that they are no longer based on unsubstantiated rumors?

A I'm just saying that after you clarified that with me, I went back and, you know, I was interested in exactly the case, and I have since researched it.

Q And did your research indicate that that ILEC was BellSouth?

A No.

Q Did this instance that you talk about occur in BellSouth's territory?

A No, it did not.

Q Did the ILEC that was involved in this instance have

policies on collocation that are similar to what Mr. Williams testifies to in his testimony?

A I'm unfamiliar with what their policy is.

Q So their policy may have been something totally different than what BellSouth's policy is; right?

A That's correct.

Q You testified in your summary that there are 12,000 or so remote terminals in BellSouth's territory; right?

A Correct.

Q You will agree with me, though, won't you, that BellSouth has not collocated a DSLAM in each of those 12,000 remote terminals; right?

A Not yet, no.

Q Well, based on BellSouth's discovery responses, can you tell me how many remote terminals BellSouth thinks it will have installed a remote -- a DSLAM in by the end of this year?

A It's my understanding that you-all have about 3,700 in now, and you estimate being around 4,000 by the end of the year.

Q Okay. And we can agree, can't we, that most of those DSLAMs have been installed by BellSouth in the past couple of years?

A Yes.

COMMISSIONER DEASON: Counsel, when you get to a good breaking point, let me know, and we'll take a recess.

MR. TURNER: Now is probably a good time.

COMMISSIONER DEASON: Very well. We will take a 15-minute recess.

(Brief recess.)

COMMISSIONER DEASON: Go back on the record.

BY MR. TURNER:

Q Mr. Gallagher, I don't think we have too very much left. We sort of walked through what it would take for FDN to buy a DSLAM. We sort of walked through the collocation aspect of things. Now, assume with me that FDN has bought a DSLAM and has installed the DSLAM in a BellSouth remote terminal, okay?

A Uh-huh, yes.

Q Now, once you have the DSLAM in a remote terminal, BellSouth will sell you a UNE subloop between the remote terminal and the customer premises; right?

A Yes.

Q And BellSouth also will sell you a UNE subloop from the remote terminal back to the CO; right?

A Yes.

Q Tell me if I'm wrong, but did I hear you testify that the -- well, hold on a second, I want to make sure I've got this right -- that a DS-3 subloop would cost FDN around $1,500 a month?

A Yes. I estimated that per our current arrangement with you-all where we buy UNE DS-3s, that it would be about

that much.

Q Do you still have Exhibit Number 5 up there with you?

A Yes, I think.

Q Go with me to Item Number 56.

A Okay.

Q One of the things that FDN asked is, identify these UNEs and the respective rates and charges; right?

A Yes.

Q Go with me to the second -- it's Page 2 of 3 of the response to Item Number 56. The number on the bottom of the page that was typewritten is 7, and there's a Bates stamp number 08.

A Right.

Q Do you see the DS-3 facility termination charge down there?

A Yes.

Q The recurring charge on that is $347.59; right?

A Yes.

Q And then you've got a per mile charge of about $15; right?

A Right.

Q That's going to be a pretty long loop to get you up to $1,500 a month, isn't it?

A Do you think that we only need one facility termination?

Q Well, I'm saying per facility termination, it's going to have to be a big, long loop to get you up to $1,500 a month; right?

A Well, in a circuit like this, when you order a UNE like this, are you telling me that I only need one facility termination?

Q Sir, I'm just asking you that if you've got one facility termination, that's going to be one heck of a long loop to get you up to 1,500 a month recurring; right?

A If you only charge me one facility termination, but you don't. You charge one on each end. So it's double that number to get started, so it's 347.59 times 2. That's how we buy UNEs right now, it's my understanding.

Q So that's $700; right?

A Plus $3,386 times 2.

Q But that's a nonrecurring charge.

A Right, but that's still six grand.

Q I was talking about recurring now, your $1,500 a month.

A Right.

Q And you'll agree with me that this is a UNE rate; right?

A Right.

Q And there are other UNE rates available for FDN to choose from?

A Right.

Q FDN recently participated in the generic UNE docket in which UNE rates were established; right?

A Right.

Q So we can agree, won't we, that BellSouth is going to provide these UNEs that were established by this Commission at the rates established by the Commission; right?

A Right.

Q And if FDN was wanting different UNEs or different rates during the generic docket, it had an opportunity to ask for different rates; right?

A Right.

Q Okay. While you've got Exhibit 5 in front of you, and again, I know you were going from memory, but let's go ahead and get the right stuff in the record. I asked you how many remote terminals you anticipated BellSouth having installed DSLAM in by the end of the year.

A Yes, sir.

Q I believe you gave me a number around the $4,000, I mean, the 4,000 mark. Go with me to BellSouth's response to Item Number 63. It's in that same Exhibit 5. The page number at the bottom middle is 15, and the Bates stamp number is 16. Let me know when you get there.

A Okay.

Q Doesn't BellSouth's response say that BellSouth

currently plans to have deployed DSLAM equipment in a total of 3,249 remote terminals in Florida by the end of 2001?

A Yes, sir. I was incorrect with my 3,700 estimate.

Q And that's fine. I just wanted to make sure. This is the number you meant to refer to; right?

A Yes, sir.

Q Okay. Thank you. I want to clarify one thing on your resale request to the Commission. I will admit I'm confused as to which product FDN is wanting to resell. Is it wanting to resell the Internet service that BellSouth provides to its Internet service end users? In other words, the pipe and the water. Or does FDN only want to resell the pipe itself, the DSL telecommunications transport?

A The pipe.

Q Okay. So you are not asking the Commission to allow FDN to resell the Internet service as a package; right?

A Correct.

Q Okay.

COMMISSIONER PALECKI: Let me ask one question on that. I realize you are not asking the Commission to sell the Internet service as well. Would you be willing through an agreement with BellSouth to sell both the pipe and the water? Because I thought that's what you had told me earlier, that you would love to be able to sell the, was it called Fast Net or whatever the name is?

THE WITNESS: Yes, sir. What I would rather sell are the pipes. That's what I meant to -- you know, I miscommunicated. I'd want to sell those pipes. I'm sure I already got my own water company built, so --

COMMISSIONER PALECKI: You want to sell the DSL service without the Internet service attached to it?

THE WITNESS: Yes, sir.

BY MR. TURNER:

Q Okay. The -- I hope, my final line of questioning. Go back with me to -- what we have marked as Exhibit 8. And again, this is the scenario where you have fiber from the central office to the remote terminal and copper from the remote terminal to the end user, okay?

A Yes.

Q All right. And assume with me for the purpose of this first group of questions that, again, this is an existing remote terminal with an existing BellSouth DSLAM in it, okay?

A Uh-huh, yes.

Q And assume with me that the Commission were to grant you access to that DSLAM as a UNE, okay?

A Yes.

Q And assume with me that once that was granted, that FDN went in, used that UNE access to the DSLAM and started providing voice and data services to customers served from that remote terminal, okay?

A Yes.

Q Okay. Under that scenario, it's true, isn't it, that you would only be able to provide that service to folks who already could get voice and data from BellSouth on the same line; right?

A Yes, who theoretically could get it. They may not know of it or may not have been marketed.

Q And the point is, by doing that, you are not expanding the universe of end users who are able to get voice and data over the same line; right?

A I'm not expanding the universe of -- could you rephrase it?

Q Yeah. In other words, again, the people who could get voice and data over the same line from FDN under that scenario --

A Right.

Q -- are the people who already could get voice and data over the same line from BellSouth; right?

A Right.

Q Now, assume with me that FDN instead of -- the Commission did not order the relief you request. Instead, FDN is going to have to place its own DSLAM in the remote terminal if it wants to provide voice and data over the same line in this fiber fed copper loop scenario, okay?

A Okay.

Q And let's assume that FDN finds a remote terminal that BellSouth has not collocated a DSLAM in, okay?

A Okay.

Q Today, BellSouth cannot provide voice and data over the same loop to a single customer, right, out of that remote terminal because there's no DSLAM in it?

A Right.

Q Assume with me that FDN puts its DSLAM in that remote terminal tomorrow, okay?

A Okay.

Q Tomorrow, customers who today couldn't get voice and data over the same line could then get voice and data over the same line from FDN; right?

A Right. They could be voice customers already, but they would now be voice and data.

Q Now, let's say that FDN did exactly that. It placed a DSLAM in a remote terminal where BellSouth did not have one, and FDN started providing voice and data to end users served from that remote terminal, okay?

A Right.

Q Would FDN be willing to provide access to that DSLAM to other carriers like BellSouth or other ALECs at the same TELRIC rates that you are asking this Commission to require BellSouth to charge you for that access?

A If we prevail in this case and get the TELRIC -- you

know, get what we are asking for, I don't see why we wouldn't consider that.

Q Well, I'm not really asking if you'd consider that, because during your deposition, you told me you would have to run some financial numbers; right?

A Right.

Q And you would have to determine whether it was financially more viable for FDN to provide that wholesale or just to provide retail only; right?

A Right.

Q So you are not committing to this Commission that FDN would in every scenario be willing to provide TELRIC-based access to a DSLAM that it placed in a remote terminal, are you?

A No.

Q But you're asking this Commission to order BellSouth to provide FDN and other ALECs TELRIC-based access to a DSLAM that BellSouth puts in a remote terminal, aren't you?

A Right.

MR. TURNER: Commissioner Deason, thank you. I have nothing further.

COMMISSIONER DEASON: Thank you. Staff.

MS. BANKS: Staff just has a few questions.

CROSS EXAMINATION

BY MS. BANKS:

Q Good morning, Mr. Gallagher.

A Good morning.

Q I'm Felicia Banks, and I have just a few questions to ask you on behalf of the Commission Staff. There were some discussion earlier regarding end users' ability to purchase DSL. Do you recall that?

A Yes.

Q Okay. In your opinion, or from your experience, when an end user purchases BellSouth Fast Access or the FDN version of DSL, is the customer requesting a specific Internet content service, or are they requesting the DSL service?

A In my experience, customers, once they get into the I want DSL mind-set, they want DSL, you know, and that's what their primary focus is.

Q Okay. So the customer requests, as you just indicated, DSL and basically they take whatever the Internet content service that goes along with it?

A You know, unless they are very, very loyal to a particular ISP, I would think in most cases they -- you know, to get the DSL they would take whatever content goes with it, yes. I believe that sort of leads -- that's the dog, and the tail is the content.

Q Okay. Changing just a little bit on focus. In the opening statements, Mr. Feil mentioned that efforts had been made to settle this one remaining issue; is that correct?

A That's correct.

Q Okay. Did FDN propose a particular resolution to BellSouth?

A Yes, we did.

Q Okay. Can you just briefly describe what FDN's proposal was?

A Am I allowed to do that?

COMMISSIONER DEASON: Excuse me. I'm not sure that -- that's probably confidential negotiations, and I'm not sure that that's really appropriate to be aired in a public setting.

MS. BANKS: That's fine.

COMMISSIONER DEASON: It could undermine future negotiations, and we don't want to do that.

MS. BANKS: Okay. That's fine. Thank you, Mr. Gallagher.

THE WITNESS: Thank you, Felicia.

COMMISSIONER DEASON: Okay. Commissioners, any further questions?

COMMISSIONER JABER: No.

COMMISSIONER PALECKI: No.

COMMISSIONER DEASON: Redirect.

MR. FEIL: Thank you.

REDIRECT EXAMINATION

BY MR. FEIL:

Q Just a few questions, Mr. Gallagher. Earlier during

your -- the summary that turned out to be a relatively long colloquy, you were talking about cards that one would plug into the DSLAM and the pricing of those cards. Could you describe the pricing of the cards a little bit more fully, please.

A Yes. When I have done an analysis on the --

MR. TURNER: I'm sorry, I turned it off and thought I turned it on. I believe that goes well beyond the scope of anything --

COMMISSIONER DEASON: It goes beyond the scope, but it is response to a question that I asked, and this is something I have an interest in, so I will allow the question.

A When I did research on the DSLAMs, I came about with a rough cost of roughly $20,000 for the chassis and the common cards and the power supply and whatnot. Then each 24-port blade was around $7,000. So if you look at it, you know, the first 24 ports are going to cost you the cost of the $20,000 plus the $7,000 port card, but then as you keep adding subscribers, your marginal cost of capital is cheaper and cheaper and cheaper because you've already got the base common cards and equipment. So when I say "fairly cheap" to add subscribers, that's what I mean. It's less capital cost per incremental user.

COMMISSIONER PALECKI: I thought we had heard testimony that there was used equipment that might be available from failing DSL providers that have gone bankrupt. What kind

of prices have you received in your negotiations for used equipment?

THE WITNESS: I have not successfully engaged in that process yet. We have looked at some. We have not had luck in entering into the negotiations with anybody, but I intend to.

COMMISSIONER PALECKI: Thank you.

COMMISSIONER DEASON: Let me ask a question. I think earlier you had indicated that a 48-port DSLAM was about $52,000, but if you take the $20,000 for the chassis plus $7,000 per 24-port capability, that according to my calculation then would be 20,000 plus 7,000 plus 7,000 or $34,000.

THE WITNESS: Right. Then I add another roughly $7,000 to $8,000 of engineering and installation costs, and then I add $15,000 of space prep collocation charges, and then I add another $3,000 of collo app because it's my understanding it costs $3,000 to, you know, do the collocation application. That's what my people have told me based on the information we have. I know that I was told that's a different number. I haven't seen that new number. That's where I get that 52.

COMMISSIONER JABER: To the degree, though, that the discovery response is correct and the testimony collaborates that, you would agree that the estimate should be adjusted to reflect that?

THE WITNESS: Yes.

BY MR. FEIL:

Q While Mr. Gallagher is on the subject, do you know whether or not the BellSouth negotiator told you about the application fee for remote terminals?

A No, I have not been told that.

Q Do you know whether or not the collocation attachment to the interconnection agreement which was attached to the petition in this case reflects a lower collocation rate for remote terminals?

A No, I do not.

Q I believe Commissioner Palecki or maybe it was Commissioner Jaber were asking you questions regarding targeting specific remotes for the installation of DSLAMs, and I believe your testimony was that BellSouth had, in your view, probably already hit the remotes from which you can get the most customers with a DSLAM of their own. If you targeted specific remotes for collocating your DSLAM, would you have the ubiquity of service that you have for voice service?

A No.

Q Would it be practical for you to target just a few remotes? Why or why not?

A It would be difficult from the marketing side. It would probably, you know, make sense from the engineering and network side, but from the marketing side, if you were only going to do several, then you would have to have a more surgical marketing arm. And I don't know -- I haven't quite

figured out how I would do that on a cost-effective basis.

COMMISSIONER DEASON: Well, let me ask you this. Apparently, BellSouth has -- they have installed DSLAMs, depending on which numbers, somewhere, 3,400 to 3,700, somewhere -- less than 4,000 at this point.

THE WITNESS: 3,200 I think is the number.

COMMISSIONER DEASON: 3,200 out of 12,000 remote terminals. Do they have to surgically market their services, or have they -- do they have a large enough footprint within certain metropolitan areas that they can market within a general metropolitan area?

THE WITNESS: It's my understanding that they go to a general metropolitan area and try to blanket that first and then market that, and they also make available via their Web site. You know, they have a pretty neat tool where you can put in the phone number, and it spits back right away whether the line is qualified. So that's sort of how it's done. And that's -- our BellSouth representatives that we talk to when we order the Fast Access service, they sort of tell us, hey, we're going to do Jacksonville, and we're going to get that city up and mostly done, and then we're going to move to Orlando or whatever, and then go on to their --

COMMISSIONER DEASON: Mr. Turner, do you have a witness that could describe BellSouth's marketing, or is that outside the scope of -- it's outside the scope?

MR. TURNER: I believe it's outside the scope, Commissioner Deason.

COMMISSIONER DEASON: Okay.

THE WITNESS: I would just like to add to that real quickly. There is almost nobody left providing DSL, so the pressure is off sort of on the marketing side of it. I would argue that, you know, it's -- everybody is dying at the rate they're dying. If you are maybe the one guy standing, you can sort of upgrade at your leisure because you know you are going to get 90 percent market share.

BY MR. FEIL:

Q On that related subject, Mr. Gallagher, could you compare the risked capital that BellSouth experiences versus FDN experiences when it comes to installation of DSLAM and provisioned DSL service?

A I would just imagine my business model would have a lower take rate because I have a lower, you know, market -- I have less customers. So I would have to project a lower take rate, and therefore, my risk on the investment is going to be much higher.

Q Do you know whether or not FDN is an ILEC with unbundling obligations under the Telecom Act?

A I don't think that we are.

MR. FEIL: Can I have a moment?

COMMISSIONER PALECKI: Let me ask a question. Is

your primary motivation here to be able to sell DSL service, or is it to be able to continue to serve voice customers if they want DSL service from BellSouth or any other provider?

THE WITNESS: I would have to prioritize that. I want both, but I have to have the latter, what you said. I have got to get it to where I can still sell my voice because that's my core business, and I'm being blocked out because there's more BellSouth DSL customers.

COMMISSIONER PALECKI: So if you could get everything you wanted, you'd get the ability to provide the DSL service without having to install the DSLAMs in each remote location?

THE WITNESS: Yes.

COMMISSIONER PALECKI: As well as the ability to continue to serve your voice customers whether or not they have BellSouth DSL service, which I think you told me accounted for a very, very high percentage of all DSL service.

THE WITNESS: That's exactly what I would like, yes.

COMMISSIONER PALECKI: And you are more concerned about losing your voice customers, but you would also like to get the ability to provide DSL through BellSouth's system.

THE WITNESS: That's exactly right.

COMMISSIONER JABER: How much of that is because -- to be able for your company to have venture capital and to do well in the technology market, how much of that is a reliance on DSL? It's my understanding that Wall Street and some of the

venture capitalists have an expectation that these new companies will be able to provide DSL.

THE WITNESS: On Wall Street they are expecting me to have the bundle for the small business: Local, long distance, and Internet product. That's what they're expecting. If they see me blocked off in any way from any one of those three things, I've got a fund raising problem. That's why I need what I need. I mean, we just pulled off a fund raising. I don't know how we did it, but, you know, we just raised a bunch of money in, you know, absolute nuclear winter of CLEC financing. And it was because we have decent traction. We're getting lots of customers. We're getting facilities-based, no resale. Wall Street hates resale and even UNE-P, for that matter. They don't see it as a viable business model. So we keep using these UNE copper -- you-all lowering the UNE copper rates helped. So we raised the money. But we're going to need to go back and get more at some point, and we're going to need to be able to sell the bundle.

MR. FEIL: Nothing further.

COMMISSIONER DEASON: Mr. Turner, we raised some questions from the bench during the redirect phase. Is there anything you need to follow up on?

MR. TURNER: Just one.

RECROSS EXAMINATION

BY MR. TURNER:

Q Mr. Gallagher, there's been references about there's no one -- or you've suggest that there is relatively no one other than BellSouth who can provide DSL service; right?

A Yes.

Q Let me ask you this. My neighbor, and granted, that's in Atlanta, not here, but my neighbor has this service where his cable modem is hooked to his computer, and he gets real fast Internet access. Are you aware of that kind of technology?

A Yes.

Q Now, you don't consider that DSL technology, do you?

A Right. No, it's not.

Q So when you were saying that there's no DSL competition in Florida, you're talking about specifically over this DSL type telecommunications facility BellSouth provides; right?

A I'm talking about DSL as a technology.

Q You weren't talking about high-speed Internet access in general, were you?

A For businesses, I was. For residential, I was not.

Q So you will agree with me that there are cable companies in particular from whom customers can go and get high-speed Internet access; right?

A Mostly residential customers; correct.

Q And by "mostly," I assume you will agree with me

there are some business customers who can get the cable type Internet access?

A I believe there is a small amount of business customers that can get cable, yes.

MR. TURNER: That was all. Thank you.

COMMISSIONER DEASON: Further redirect.

FURTHER REDIRECT EXAMINATION

BY MR. FEIL:

Q Mr. Gallagher, does cable generally support only one-way service, not two-way telecommunications that telephony requires?

A For voice, yes.

Q I meant for Internet access services -- well, the pipe, the cable service pipe.

A It is -- I believe it's two-way if it's been upgraded, but it's more of a bus fashion versus an individual private home run as in DSL.

MR. FEIL: That's all.

COMMISSIONER DEASON: Thank you. Exhibits. I believe prefiled Exhibit MPG-1 was identified as Exhibit 6.

MR. FEIL: And FDN moves that into the record.

COMMISSIONER DEASON: Okay. Without objection, hearing no objection, show Exhibit 6 as admitted.

(Exhibit 6 admitted into the record.)

MR. TURNER: Commissioner Deason, we would also move

7 and 8, please.

COMMISSIONER DEASON: Without objection, hearing no objection, show then Exhibits 7 and 8 are also admitted.

(Exhibits 7 and 8 admitted into the record.)

COMMISSIONER DEASON: Thank you, Mr. Gallagher.

THE WITNESS: Thank you.

(Witness excused.)

COMMISSIONER DEASON: We will take a recess for lunch, and we will reconvene at 1:15.

(Lunch recess.)

(Transcript continues in sequence with Volume 2.)

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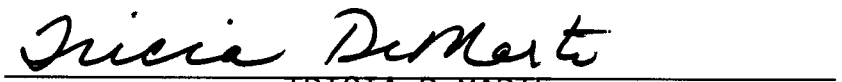
STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, TRICIA DeMARTE, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 24th DAY OF AUGUST, 2001.



TRICIA DeMARTE
FPSC Official Commission Reporter
(850) 413-6736