State of Florida

Public Service Commission

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

DATE: DECEMBER 5, 2001

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

FROM: DIVISION OF COMPETITIVE SERVICES (HINTON) CH
DIVISION OF LEGAL SERVICES (BANKS, FUDGE) FOR

RE: DOCKET NO. 010098-TP - PETITION BY FLORIDA DIGITAL NETWORK, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED INTERCONNECTION AND RESALE AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. UNDER THE TELECOMMUNICATIONS ACT OF 1996.

AGENDA: 12/17/01 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\010098.RCM

CASE BACKGROUND

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

At the issue identification meeting, ten issues were identified by the parties to be arbitrated. Prior to the

administrative hearing, the parties resolved or agreed to stipulate to all of those issues except for one. The administrative hearing was held on August 15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. Staff notes that the motion/response is being addressed separately. This is staff's recommendation on the one remaining issue in this proceeding. Staff notes that the Commission's jurisdiction is addressed in Issue A.

DISCUSSION OF ISSUES

LEGAL ISSUE A: What is the Commission's jurisdiction in this matter?

RECOMMENDATION: Staff believes that the Commission has jurisdiction pursuant to Chapter 364, Florida Statutes, and Section 252 of the Federal Telecommunications Act of 1996 (Act) to arbitrate interconnection agreements, and may implement the processes and procedures necessary to do so in accordance with Section 120.80 (13)(d), Florida Statutes. Section 252 states that a State Commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions required. This section requires this Commission to conclude the resolution of any unresolved issues not later than nine months after the date on which the ILEC received the request under this section. In this case, however, the parties have explicitly waived the nine-month requirement set forth in the Act.

Further, staff believes that while Section 252(e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration not inconsistent with the Act and its interpretation by the FCC and the courts, the Commission should use discretion in the exercise of such authority. **(BANKS)**

POSITION OF PARTIES

FDN: The Commission's jurisdiction is set forth in Section 252 of the Federal Telecommunications Act of 1996 and Chapter 364, Florida Statutes.

BELLSOUTH: BellSouth did not provide a position on this issue in its brief.

STAFF ANALYSIS

In its brief, FDN states that the Commission's jurisdiction is set forth in Section 252 of the Act and Chapter 364, Florida Statutes. (BR 1) BellSouth did not address the Commission's jurisdiction in its brief. Therefore, BellSouth has waived any objection to the Commission's jurisdiction in this matter. However, in its brief, BellSouth states that the Commission must resolve disputed issues in a manner that ensures that the requirements of Sections 251 and 252 of the Act are met. (BR 2)

Staff notes that it appears that the parties agree that the Commission has jurisdiction to arbitrate this proceeding.

Pursuant to Chapter 364, Florida Statutes, and Section 252 of the Act, staff believes that the Commission has jurisdiction to arbitrate interconnection agreements, and may implement the processes and procedures necessary to do so in accordance with Section 120.80 (13)(d), Florida Statutes. Section 252 states that a State Commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions required. This section requires this Commission to conclude the resolution of any unresolved issues not later than nine months after the date on which the ILEC received the request under this section. In this case, however, the parties have explicitly waived the nine-month requirement set forth in the Act.

Further, staff believes that while Section 252(e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration not inconsistent with the Act and its interpretation by the FCC and the courts, the Commission should use discretion in the exercise of such authority.

ISSUE 1: For purposes of the new interconnection agreement, should BellSouth be required to provide xDSL service over UNE loops when FDN is providing voice service over that loop?

RECOMMENDATION: Staff recommends that for the purposes of the new interconnection agreement, where BellSouth has deployed a DSLAM in the remote terminal for the purposes of providing DSL service to customers served by that remote terminal, BellSouth should be required to provide a broadband UNE that includes unbundled DSL-capable transmission facilities between the customer's Network Interface Device and the BellSouth distribution frame in its central office, including all attached electronics that perform DSL multiplexing and splitting functionalities. Staff recommends the Commission not require BellSouth to offer either its FastAccess Internet Service or its DSL transport service to FDN for resale in the new BellSouth/FDN interconnection agreement. Finally, staff recommends the Commission not require BellSouth to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops. **(HINTON)**

POSITION OF PARTIES

FDN: Yes. The Commission should require BellSouth to offer a UNE broadband product as set forth in FDN's testimony and pleadings. BellSouth must also be required to resell BellSouth's high-speed data services to FDN and must be required to provide BellSouth-branded xDSL services to any end users receiving FDN voice service.

BELLSOUTH: BellSouth is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop. Nor is BellSouth required to: provide access to a DSLAM BellSouth has placed in a remote terminal; or offer its federally-tariffed DSL service to FDN at the wholesale discount.

STAFF ANALYSIS

Staff would like to acknowledge the good faith efforts of the parties to continue the negotiation process throughout this proceeding. Although this docket initially included ten issues to be arbitrated by the Commission, BellSouth and FDN were able to settle nine of those issues prior to the August 15, 2001, hearing. Staff commends the parties for their work.

The remaining issue to be arbitrated involves the provision of digital subscriber line (DSL) service in a network environment where BellSouth has deployed digital loop carrier (DLC) systems in remote terminals (RT). DSL is a technology that enables high-speed data transmission over traditional copper loop facilities by placing DSL modems on each end of a copper loop. This copper loop between the customer's DSL modem and the carrier's digital subscriber line access multiplexer (DSLAM) must typically be shorter than 18,000 feet, and free of bridged tap, load coils, and repeaters in order to provide a viable DSL transmission service. (FDN Gallagher TR 30)

FDN witness Gallagher states that 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 those offices. (TR 30-31) In addition, witness Gallagher states that FDN is able to provide DSL service to some end users by collocating its DSLAM in BellSouth central offices. However, he contends that FDN is precluded from providing DSL service where BellSouth has deployed DLC systems. (TR 29) Witness Gallagher states that in the past, and still today in much of the country, the majority of last mile loops consisted of "home run" copper facilities between the customer and the central office. However, as Florida's population grew in the last quarter-century, BellSouth has deployed DLCs at remote terminals in its distribution network. (TR 31)

Witness Gallagher explains that the DLC performs an analog to digital conversion that aggregates traffic from individual customer subloops onto a shared transmission facility to the central office. (TR 31) This shared transmission facility from the DLC to the central office (feeder loop) typically consists of fiber or copper T-1 facilities. (TR 325, 339) He states that DSL cannot be transmitted through a DLC unless it is first multiplexed at the RT for digital transmission to the central office; therefore, the carrier must locate a DSLAM at the remote terminal. (TR 31)

Witness Gallagher contends that it will be very difficult for FDN to sustain its long-term viability as the demand for DSL increases, if it is limited to providing DSL only on non-DLC loops. He explains:

> 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. (TR 32-33)

Witness Gallagher states that a growing number of residential and business customers are seeking carriers that can satisfy their voice and high-speed data needs through a single point of contact. He contends that if FDN is "unable to provide 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." (TR 33) Witness Gallagher explains:

> 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 . . . . 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. (TR 34-35)

In this arbitration, FDN requests that the Commission order BellSouth to: (1) unbundle the packet switching functionality of the DSLAMs that BellSouth has deployed in remote terminal facilities throughout its network and offer a broadband unbundled network element (UNE) consisting of the entire transmission facility from the customer's premises to the central office; (2) permit the resale of the DSL transmission services that BellSouth provides to Florida consumers at retail; and (3) end the practice

of insisting that consumers who buy BellSouth DSL also purchase BellSouth voice. (BR 3) Staff will address these three requests separately in this recommendation.

Broadband UNE Loop

FDN witness Gallagher requests that BellSouth be required to offer an unbundled broadband loop as a UNE. (TR 36) The point of controversy centers around the fact that FDN's proposed broadband loop would include the packet switching functionality of the DSLAM located in the remote terminal. (Gallagher TR 53) BellSouth witness Williams argues that "FDN's proposed new broadband UNE is not recognized by the FCC, nor the industry, and includes functionality which the FCC and this Commission have been very clear in their intent not to require ILECs to provide on a UNE basis." (TR 309)

BellSouth witness Ruscilli cites the FCC's 1999 *UNE Remand Order,*[1] in which the FCC stated that "[t]he packet switching network element includes the necessary electronics (e.g., routers and DSLAMs)." (TR 186, *UNE Remand Order* at ¶304) He asserts that the "FCC then expressly stated 'we decline at this time to unbundle the packet switching functionality, except in limited circumstances'." (Emphasis added by witness)(TR 186, *UNE Remand Order* at ¶306) The "limited circumstances" in which ILECs are required by the FCC to unbundle packet switching are contained in 47 C.F.R. Section 51.319 (Rule 51.319). Rule 51.319(c)(5) states:

> (5) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability only where each of the following conditions are satisfied.
>
> > (i) The incumbent LEC has deployed digital loop carrier systems [DLC], including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to

[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Report and Order, Order No. FCC 99-238; 15 FCC Rcd 3696 (1999).

> remote terminal, pedestal or environmentally controlled vault);
>
> (ii) There are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer;
>
> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer in the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by paragraph (b) of this section; and
>
> (iv) The incumbent LEC has deployed packet switching capability for its own use.

BellSouth witness Ruscilli argues that BellSouth should not be required to unbundle its packet switching functionality except when these specific conditions are met. (TR 210) He contends that the FCC "clearly stated that an incumbent has no obligation to unbundle packet switching functionality '<u>if it permits a requesting carrier to collocate its DSLAM in the incumbent's remote terminal</u>, on the same terms and conditions that apply to its own DSLAM'." (emphasis added by witness)(TR 200, *UNE Remand Order* at ¶313) Witness Ruscilli states that BellSouth will permit FDN to collocate its own DSLAM at a BellSouth RT, and if BellSouth is unable to accommodate such a collocation it will then unbundle packet switching functionality at that RT. (TR 201) BellSouth witness Williams explains:

> Through the collocation process, currently offered by BellSouth, an ALEC that wants to provide xDSL where DLC is deployed also can collocate DSLAM equipment at BellSouth DLC remote terminal ("RT") sites. This will allow the ALEC to provide the high speed data access in the same manner as BellSouth. BellSouth will attempt in good faith to accommodate any ALEC requesting such collocation access at a BellSouth DLC RT site that contains a BellSouth DSLAM. In the very unlikely event that BellSouth cannot accommodate collocation at a

> particular RT, where a BellSouth DSLAM is located, BellSouth will unbundle the BellSouth packet switching functionality at that RT in accordance with FCC requirements. BellSouth therefore, provides ALECs the same opportunity to offer DSL service where DLC is deployed as BellSouth provides itself. (TR 289-290)

FDN witness Gallagher acknowledges that the FCC has established a four-part test, but states that this is merely "one set of circumstances where packet switching clearly must be unbundled." (emphasis added)(TR 53) However, he states that nothing in the *UNE Remand Order* suggests that packet switching may not be unbundled in other situations. (TR 53-54) Nevertheless, witness Gallagher contends that all four of these conditions are met in BellSouth's network. In particular, witness Gallagher disagrees that ALECs are afforded the ability to collocate DSLAMs at RTs on the same terms and conditions as BellSouth's DSLAM. (TR 55) He argues that although BellSouth "nominally allows" ALECs to collocate DSLAMs in RTs, such collocation is subject to untenable terms and conditions. Witness Gallagher contends that BellSouth refuses to allow ALECs to connect DSLAMs to lit fiber that is used to carry BellSouth's traffic to the central office. He argues that since dark fiber is often not available, FDN's DSLAM would be stranded at the RT. For these reasons, witness Gallagher claims that BellSouth does not permit collocation of DSLAMs at RTs on the same terms and conditions applicable to BellSouth's DSLAM functionality. (TR 55)

However, witness Gallagher suggests that the Commission is not required to apply the four-part *UNE Remand Order* test before establishing a broadband UNE. (TR 56-57) Witness Gallagher contends that "the Florida Commission can and should order unbundling of packet switching if it finds that [ALECs] would be impaired without such access, pursuant to the terms of FCC Rule 51.317." (emphasis added)(TR 57) In this proceeding, FDN witness Gallagher actually requests that the Commission establish a new UNE. He explains:

> 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 [sic] fiber and DLCs. Due to the differences between BellSouth's DLC dominated Florida network and other ILEC's 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 [ALECs] can provide ubiquitous xDSL service in Florida using UNEs. (TR 36-37)

Witness Gallagher states that the Commission has been granted the authority to establish new or additional UNEs by Section 251(d)(3) of the Act. (TR 37)

Witness Gallagher describes the new UNE that FDN is requesting as a "broadband loop." (TR 38) He explains that where BellSouth has deployed DLC facilities, "FDN requests access to unbundled DSL-capable transmission facilities between the customer's Network Interface Device (NID) and the BellSouth distribution frame in its central offices, including all attached electronics that perform DSL multiplexing and splitting functionalities." (TR 37-38) Witness Gallagher explains that the difference between the "broadband loop" and the DSL-capable loop that is already classified as a UNE, is that the broadband loop includes the packet switching and splitter functionalities performed by BellSouth equipment in RTs. (TR 38)

BellSouth witness Ruscilli disagrees that the FCC's *UNE Remand Order* was based upon a model that did not take into account the deployment of DLCs, as FDN witness Gallagher contends. Witness Ruscilli cites the *UNE Remand Order*, at ¶218, which states in part:

> [C]ompetitors seeking to offer services using xDSL technology need to access the copper wire portion of the loop. In cases where the incumbent multiplexes its copper loops at a remote terminal to transport the traffic to the central office over fiber DLC facilities, a requesting carrier's ability to offer xDSL service to customers served over those facilities will be precluded, unless the competitor can gain access to the customer's copper loop before the traffic on the loop is multiplexed. Thus, we note that the remote terminal has, to a substantial degree, assumed the role and significance traditionally associated with the central office. (footnotes omitted)(TR 189-190)

Witness Ruscilli argues that in light of these facts, the FCC expressly declined to unbundle packet switching functionality except in limited circumstances. He contends that the FCC made this decision after carefully considering the manner in which proposed UNEs would affect an ALEC's ability to provide advanced services, such as DSL, where the incumbent has deployed DLC systems at RTs. (TR 190)

Nevertheless, witness Ruscilli acknowledges that the Commission has been granted the authority to establish additional UNEs. However, he argues that the Commission "may establish a new UNE only if the carrier seeking the new UNE carries the burden of proving the impairment test set forth in the FCC's *UNE Remand Order.*" (TR 195) FDN witness Gallagher agrees, stating that the legal standard to be used by the Commission when creating a new UNE is prescribed in FCC Rule 51.317. (TR 41) Staff would note that the standard set forth in the *UNE Remand Order,* as referred to by BellSouth witness Ruscilli, and that set forth in FCC Rule 51.317 are one and the same. FDN witness Gallagher explains:

> FCC Rule 51.317 prescribes the legal standard to be used by state commissions when creating new UNEs. 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 [ALECs] would be "impaired" without access to the element. (footnote omitted) (TR 41)

The *UNE Remand Order,* in paragraph 305, states that packet switching is not proprietary and is to be examined under the "impair" standard as set forth in Rule 51.317. Rule 51.317(b)(1) states in part:

> A requesting carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent LEC'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.

The rule states that if the state commission "determines that lack of access to an element impairs a requesting carrier's ability to provide service, it may require the unbundling of that element. . . ." (Rule 51.317(b)(1))

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

FDN witness Gallagher argues that there are no viable alternatives available. He asserts that if there were alternatives available, "FDN would be selling DSL today to customers served by DLC loops in Florida." (TR 43) However, BellSouth witness Williams disagrees. He states that there are several alternatives available, including collocating a DSLAM at the RT, locating available 'home-run' copper loops, and entering line splitting agreements with other ALECs. (TR 297-298)

Witness Williams contends that if sufficient space exists, "BellSouth will allow an ALEC to collocate its DSLAM in the RT, regardless of whether BellSouth has installed its own DSLAM at that RT." (TR 293) He states that once FDN collocates its DSLAM in the RT, BellSouth offers UNEs that allow FDN to offer high-speed data service on a ubiquitous basis over the same UNE loops that it uses to provide voice service to its customers. (TR 313) BellSouth witness Ruscilli explains:

> BellSouth offers UNEs that allow FDN to transport data from its packet switch to a DSLAM it collocates at a remote terminal, and BellSouth provides UNEs that allow FDN to transport data from a DSLAM it collocates at a remote terminal to its end user's premises. BellSouth,

therefore, offers FDN all the UNEs it needs to provide its own xDSL service in Florida. (TR 192)

However, FDN witness Gallagher argues that the "cost of providing ubiquitous service throughout the state of Florida by collocating DSLAMs at remote terminals would be staggeringly expensive, and well beyond the capability of FDN or other [ALECs]." (TR 43-44) He states that FDN has spent millions of dollars to collocate equipment in 100 of BellSouth's 196 central offices in Florida. With over 12,000 remote terminals in BellSouth's network, witness Gallagher contends that collocation on that scale would be financially impossible for FDN. (TR 44) BellSouth witness Williams confirms that as of May 23, 2001, there are 12,037 remote terminals in BellSouth's Florida network. (TR 323) Witness Gallagher also contends that it would be prohibitively time-consuming to collocate a DSLAM in a RT. He states that "the process in my estimation would require well more than one year before FDN could start to provide service, and perhaps much longer." (TR 49-50)

In addition, FDN witness Gallagher argues that collocation at even a single RT is precluded by numerous other factors, as evidenced by the fact that not a single ALEC has collocated at a BellSouth RT in the entire state. (TR 44) Witness Gallagher explains that even if FDN were to collocate a DSLAM in a RT, in most cases there would be no dark fiber available to transport traffic back to FDN's central office collocation. (TR 44) He states that it is unlikely it would be able to obtain dark fiber from third parties, and it would be prohibitively costly and time-consuming for FDN to self-provision dark fiber between BellSouth's RT and central office. (TR 44-45)

BellSouth witness Ruscilli challenges FDN's position that it would have to collocate DSLAMs in over 12,000 remote terminals. He argues that BellSouth has not even deployed DSLAMs in all of its remote terminals. (TR 252) BellSouth witness Williams confirms that BellSouth plans to have 3,249 DSLAMs deployed in remote terminals by the end of 2001. (TR 329) Witness Ruscilli explains that "BellSouth doesn't have 12,000 DSLAMs. It only has [3,249] DSLAMs, and we didn't get those yesterday. We've been building those up over four years based on a market model." (TR 252)

BellSouth witness Williams argues that "it is no more expensive or time-consuming for FDN to collocate a DSLAM at an RT

than it would be for BellSouth to accomplish the same thing." (TR 301) Witness Williams also calls into question the argument that FDN would have to construct its own transport facilities from the RT to the central office. He explains:

> While that would be one method available to FDN, BellSouth offers several sub-loop feeder UNEs that allow ALECs to connect from the RT to the CO. To the extent that it is available, BellSouth offers dark fiber feeder to connect the ALEC's optical equipment collocated at the remote site to the CO. Regardless of whether dark fiber feeder is available, BellSouth also offers a DS1 sub-loop feeder UNE that allows ALECs to connect from the RT to the CO. Beginning in August 2001, BellSouth will offer a DS3 and OC3 feeder UNE. (TR 299-300)

Another alternative proposed by BellSouth for providing DSL service to consumers served by a DLC loop is utilizing an available "home run" copper loop. Witness Williams explains that FDN could perform an electronic Loop Make-Up and locate an available home-run copper loop from the customer's NID all the way to FDN's central office collocation space. FDN would then reserve this loop and place an order for that home-run copper loop. (TR 290) BellSouth would then do a loop change to move FDN to an all-copper loop. (TR 338)

However, FDN witness Gallagher argues that in many BellSouth service areas, no copper facilities are available for DSL. In addition, he states that many DLCs are deployed where copper loops are longer than 18,000 feet. At that distance they are not capable of carrying DSL transmission. He contends that "[e]ven where home run copper loops are DSL-capable, the quality of the DSL transmissions would be inferior to DLC loops and therefore would not be competitive in the consumer market." (TR 51)

Witness Gallagher argues that FDN is not able to offer DSL service over DLC loops using only the presently existing UNEs. He explains:

> In the *UNE Remand Order*, the FCC determined that [ALECs] 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 . . . .[ALECs] 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 [ALECs]. Therefore . . . [ALECs] would be impaired if DSLAM functionality is not included as part of the broadband loop UNE. (TR 38-39)

In addition, witness Gallagher states that there is regulatory precedent for requiring incumbents to provide a broadband UNE. He cites the SBC-Ameritech merger proceedings, in which the FCC required SBC to offer a "Broadband Offering" that is functionally equivalent to the broadband loop requested by FDN in this arbitration. (TR 39) He also refers to a recent Illinois Commerce Commission (ICC) decision that established the broadband loop with packet switching functionality as a new UNE. (TR 40) FDN contends that in its decision, the ICC determined that it would not be possible for competitors to collocate in the 2,100 remote terminals that SBC planned to deploy, and therefore would be impaired without access to the DSLAM functionality of SBC's next-generation DLC (NGDLC) equipment. (BR 24)

However, BellSouth witness Williams argues that SBC utilizes architectures, technologies, and equipment that are different from those that BellSouth has deployed. (TR 295) He explains that SBC has not chosen to unbundle its packet switched network, but rather has chosen an architecture that uses a NGDLC system with combo cards. He states that "[t]his allows [SBC] to provide a tariffed end-to-end broadband service to their wholesale customers, which coincidentally uses their switched packet network as a part of the total offering. What they are offering is NOT an unbundling of their switched packet network on a UNE basis." (emphasis in original)(TR 294-295) He argues that even if SBC chooses to use NGDLC and allow ALECs to place a combo card in that equipment, that does not obligate BellSouth to do so. (TR 306) Witness Williams states:

> Approximately seven percent of BellSouth's access lines are served by NGDLC systems. Of these NGDLC systems, only a very small number (which are used for technology testing) are equipped with the necessary functionality to make use of combo cards. As I mentioned above, BellSouth

> does not use the combo cards for its xDSL service. (TR 293)

BellSouth witness Ruscilli contends that FDN is not impaired by the fact that BellSouth does not provide packet switching functionality or the DSLAM as a UNE because FDN can purchase, install, and utilize these elements just as easily and cost-effectively as BellSouth. (TR 197) In addition, witness Ruscilli argues that in determining whether to create a new broadband UNE, the Commission must consider the effects unbundling will have on investment and innovation in advanced services. He states that an important part of the FCC's reasoning in not unbundling advanced services equipment was to avoid stifling competition and to encourage innovation. (TR 198) He argues that ALECs can choose to install ATM switches and DSLAMs just as BellSouth has done, and they would not be impaired by implementing this strategy. Moreover, he asserts:

> It would be inherently unfair to allow ALECs to simply use the ILEC's equipment as unbundled network elements where the ALEC is not impeded in deploying its own equipment. Indeed, where an ALEC can deploy its own equipment, parity demands that the ALEC should deploy such equipment and not ride the investment and risk of the ILEC. (TR 199)

Furthermore, witness Ruscilli contends that requiring the unbundling of advanced services equipment would have a "chilling effect" on BellSouth's incentives to invest in such equipment. He states that just as ALECs would have no incentive to invest in advanced services equipment, an ILEC's incentive to invest in such equipment would be stifled if its competitors can take advantage of the equipment's use without incurring any of the risk. (TR 199) In essence, BellSouth claims that FDN has sat on the sidelines and observed the results of the risks BellSouth has taken in deploying DSLAMs in remote terminals, and now seeks to reap where it has not sown. (BR 4)

Resale

Although not its preferred means of access to DSLAM functionality in a DLC environment, FDN also requests that BellSouth be required to offer its DSL service at resale discounts. (TR 58) FDN witness Gallagher contends that "BellSouth and its

affiliates are required to offer, on a discounted wholesale basis, all of their retail telecommunications services, including xDSL and other high-speed data services, pursuant to the resale obligations applicable to incumbent local exchange carriers under Section 251(c)(4) of the Federal Act." (TR 57-58) He states that while not a substitute for UNE access, the Act does require BellSouth to offer access to these services through resale. (TR 58)

Section 251(c)(4)(A) states that ILECs have "the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." BellSouth witness Ruscilli argues that BellSouth is not obligated to make its Internet access offering available at the resale discount because it is an enhanced, nonregulated, nontelecommunications service. (TR 210) He explains:

> If BellSouth markets DSL to residential and business end users, then the service is clearly a retail offering, and the wholesale discount applies. However, if the DSL service is offered to Internet Service Providers as an input component to the ISP service offering, it is not a retail offering, and the resale requirements of the Act do not apply. BellSouth's Fast Access Internet service falls into the latter category. Fast Access is not a telecommunication service. It is an enhanced, nonregulated, nontelecommunication Internet access service that uses BellSouth's wholesale DSL telecommunication service as one of its components. (TR 209-210)

Witness Ruscilli contends that BellSouth does not offer a tariffed retail DSL service, and has no obligation to make available its wholesale DSL service at the resale discount. (TR 210) In support of his position, witness Ruscilli cites the FCC's *Second Advanced Services Order* in CC Docket No. 98-147[2] (TR 204). The *Second Advanced Services Order* states:

> Based on the record before us and the fact specific evaluation set out above, we conclude that while an incumbent LEC DSL offering to residential and business

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

> end-users is clearly a retail offering designed for and sold to the ultimate end-user, an incumbent LEC offering of DSL services to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering. Accordingly, we find that DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4). We conclude, however, that section 251(c)(4) does not apply where the incumbent LEC offers DSL services as an input component to Internet Service Providers who combine the DSL service with their own Internet service. (footnote omitted)(Order at ¶19)

Witness Ruscilli states that the United States Court of Appeals for the District of Columbia Circuit recently issued a decision that confirms the FCC's ruling.[3] (TR 202) In its decision, the court considered ASCENT's objections to the above mentioned language, and found that the FCC's Order was in all respects reasonable. (TR 203)

However, FDN argues that to qualify for this exclusion, ILEC offerings must be exclusively wholesale offerings. FDN contends that BellSouth's offering is not so narrowly tailored, and thus is not exempt from resale obligations. (BR 29) FDN witness Gallagher contends that BellSouth does sell retail DSL through an ISP that it owns and controls. He maintains that "the BellSouth group of companies, taken together, is the largest retail DSL provider in Florida." (TR 59) He explains:

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

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

> 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. (TR 59-60)

In support of this position, witness Gallagher cites a January 9, 2001, decision by the Unites States Court of Appeals for the District of Columbia Circuit (*ASCENT*)[4], in which he states that the court held that ILECs may not "sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate." (TR 60) Witness Gallagher argues that the court held that retail sales of telecommunications services by ILEC affiliates are still subject to the ILEC's resale obligations. He explains that although the court's decision in *ASCENT* involved a regulation pertaining to SBC specifically, the logic of the decision should apply to BellSouth as well. (TR 60)

BellSouth witness Ruscilli contends that the *ASCENT* decision does not support FDN's position in this issue. He argues that the *ASCENT* decision deals with regulatory relief granted by the FCC in the Ameritech/SBC merger, regarding the resale of advanced services if offered through a separate affiliate. He states that this ruling does not require BellSouth to offer advanced services at resale. In addition, witness Ruscilli argues that BellSouth does not have a separate affiliate for the sale of advanced services. (TR 205) In its brief, BellSouth explains that BellSouth's FastAccess Internet Service is sold by BellSouth Telecommunications, Inc. as a non-regulated Internet access service offering, that utilizes BellSouth's wholesale DSL service as a component. (BR 34)

However, FDN witness Gallagher argues that "BellSouth cannot refuse to separate its [DSL] telecommunications service from its enhanced services for the purpose of denying resale." (TR 61) He contends that "FCC unbundling rules require BellSouth to offer its telecommunications services separately from any enhanced services, even if it only sells them as a bundled product." (TR 61-62) In its brief, FDN refers to an FCC Memorandum Opinion and Order in CC Docket No. 98-79,[5] stating that the "FCC has expressly held that

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

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

DSL transmission is an interstate telecommunications service that does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II." (BR 33) FDN also cites the recent D.C. Circuit Court's *WorldCom* decision,[6] to argue that as long as a carrier "qualifies as a LEC by providing either 'telephone exchange service' or 'exchange access,' then it must resell and unbundle all of its telecommunications offerings, including DSL." (BR 34) FDN witness Gallagher states that FDN does not seek to resell BellSouth's Fast Access Internet service, but rather only the DSL telecommunications transport component of that service. (TR 152)

BellSouth DSL over FDN voice loops

In addition to the establishment of a broadband UNE loop and resale opportunities, FDN also seeks relief from what it claims to be BellSouth's "anticompetitive practice of leveraging its control of the DSL market in Florida to injure competitors in the voice market." (TR 34) FDN witness Gallagher explains that when customers of BellSouth's voice and FastAccess Internet Service seek to switch their voice service to FDN, BellSouth will disconnect their FastAccess Internet Service. He states that because FDN is unable to offer DSL and voice over the same telephone line in most cases, customers are likely to lose interest in obtaining voice services from FDN. (TR 35)

BellSouth witness Ruscilli agrees that BellSouth will not offer its FastAccess Internet Service to a voice customer of another carrier. (TR 250) Witness Ruscilli explains that the only way a voice customer of FDN could obtain, or maintain, BellSouth FastAccess Internet Service would be for FDN to convert that customer from facilities-based service to a resale service, in which FDN would resell BellSouth's voice service to that customer. (TR 252-253) BellSouth witness Williams explains that in the situation in which FDN resells BellSouth's voice service, BellSouth would still be considered the voice provider. For that reason, BellSouth would continue to provide FastAccess Internet Service to that customer. (TR 370)

However, witness Williams contends that BellSouth is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop. (TR 281) In support of this

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

position, he cites the FCC's *Line Sharing Reconsideration Order*[7] which states in ¶26:

> We deny, however, AT&T's request that the Commission clarify that incumbent LECs must continue to provide xDSL service in the event customers choose to obtain service from a competing carrier on the same line because we find that the *Line Sharing Order* contained no such requirement. (TR 281)

Witness Williams states that "the FCC then expressly stated that its *Line Sharing Order* 'does not require that [LECs] provide xDSL service when they are no longer the voice provider'." (TR 281)

Witness Williams also suggests several "business reasons" for BellSouth's decision not to offer DSL over FDN voice loops. First, witness Williams states that the systems BellSouth uses to provide DSL service do not currently accommodate providing DSL service over an ALEC's UNE loop. He states that prior to provisioning DSL service over a given loop, BellSouth must determine whether that loop is DSL capable. (TR 283) He explains:

> In order to make this determination, BellSouth has developed a database that stores loop information for inventoried working telephone numbers. When an ALEC like FDN provides dial tone from its own switch, the ALEC (not the end user) is BellSouth's customer of record, and the ALEC (not BellSouth) assigns a telephone number to the end user. BellSouth's database, therefore, does not include loop information for facilities-based UNE telephone numbers, and BellSouth cannot use the database to readily determine whether a facilities-based UNE loop is ADSL compatible. (TR 283)

Witness Williams states that BellSouth's troubleshooting, loop provisioning, and loop qualification systems would not contain telephone numbers assigned by ALECs. (TR 365) Therefore, he argues that these mechanized systems do not support the provisioning of DSL service over a UNE loop that an ALEC such as FDN uses to provide voice service. (TR 316) In addition, witness Williams contends that it would be "quite costly to try to take telephone

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

numbers that are not resident in our system today and to put those into those multiple databases." (TR 366)

Further, witness Williams states that processing DSL orders from an end user served by a facilities-based ALEC would be inefficient and costly. (TR 283) He explains that since the ALEC has access to all the features and functionalities of a UNE loop it purchases from BellSouth, for BellSouth to provision DSL it must negotiate with each ALEC for use of the high frequency portion of these loops. (TR 284)

However, FDN witness Gallagher argues that BellSouth's "business reasons" for not providing DSL over ALEC UNE loops are not adequate grounds for denying FDN's request. He contends that when the Telecommunications Act of 1996 was adopted, "the ILECs did not have in place many of the systems that would ultimately be necessary to support the UNEs, interconnection, collocation and resale requirements of the new Act." (TR 80-81) Witness Gallagher argues that these systems were developed in response to the Act's requirements and the development of these support systems should continue to be driven by regulatory decisions and applicable law, not the other way around. (TR 81)

In addition, witness Gallagher challenges BellSouth's reliance upon the *Line Sharing Reconsideration Order*. He states:

> 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 loops was outside the permissible scope of reconsideration because it was not an issue in the final order being reconsidered. (TR 80)

Witness Gallagher contends that BellSouth can offer no reasonable justification for its policy of not providing DSL over ALEC UNE loops. (TR 64) He states that this practice is apparently designed to leverage its market power in the DSL market as an anticompetitive tool to injure its competitors in the voice market. Witness Gallagher argues that with numerous competitive DSL providers folding or downsizing, if FDN does not obtain the relief it seeks in this proceeding, there is a very real possibility that BellSouth will eventually be the only DSL provider in its incumbent region in Florida. (TR 64-65) He states:

> Therefore, BellSouth's ability to exert unreasonable and unlawful anticompetitive pressures on the voice services market will continue to increase. For these reasons, BellSouth's refusal to offer xDSL service to Florida consumers who purchase facilities-based voice service from [ALECs] is unreasonable and unlawful. (TR 65)

Analysis

Staff believes the most compelling evidence presented in this proceeding revolves around the state of competition in the Florida DSL market, and how that relates to the network architecture deployed by BellSouth. Presently, BellSouth has 133,015 wholesale and retail DSL subscribers in the State of Florida. (EXH 1, p.2) On the other hand, ALECs provide DSL service to approximately 1,000 customers in BellSouth's Florida footprint. (Williams TR 380) In its brief, FDN argues that this difference in customer volume is "not a matter of ALECs being out-marketed or out-hustled by BellSouth. Rather BellSouth simply makes it impossible for ALECs to serve prospective customers." (BR 2)

FDN bases this argument primarily upon the network architecture deployed by BellSouth. BellSouth extensively utilizes remote terminals with DLC equipment in its network, because this architecture makes BellSouth's voice network more efficient. (Williams TR 324) BellSouth serves perhaps as much as 90 percent of its access lines in Florida through the 12,037 remote terminals it had deployed as of May 23, 2001. (Williams TR 323-324) The record indicates that roughly 61% of the remote terminals are served by fiber feeder facilities, with approximately 1.2 million additional customers served through copper-fed DLCs. (TR 345-346; EXH 5, p.5) The existence of fiber-fed DLCs in remote terminals effectively precludes the provisioning of DSL service absent a DSLAM located in the remote terminal. Although in unique situations there may be work-around solutions in the copper-fed scenario, any work-around solution would be limited by overall loop length. In order to effectively provide DSL service in a DLC environment, a DSLAM must be placed in the remote terminal to multiplex the data prior to traveling over the shared transport facility to the central office. (Williams TR 326-327)

As of July 2001, BellSouth had deployed 2,728 DSLAMs in remote terminals, and plans to have 3,249 DSLAMs deployed in remote terminals by the end of the year. (Williams TR 329) However,

presently there are no ALEC DSLAMs collocated in BellSouth remote terminals. (EXH 1, p.22) Staff believes that without collocating a DSLAM at the remote terminal, any ALEC desiring to provide DSL service would be limited to a central office-based strategy in which the ALEC could serve customers over a dedicated all-copper facility from the ALEC's collocation arrangement in the ILEC's central office to the customer's premises. Staff believes this strategy is limited not only by the fact that the vast majority of access lines in BellSouth's territory are served via remote terminals, but also by the fact that DSL requires copper loops no more than 18,000 feet in length (from the end user to the DSLAM) to provide a viable transmission. This loop must also be free of bridged taps, load coils, and repeaters. (Gallagher TR 30)

FDN witness Gallagher states that "[w]ith such a high percentage of the DSL market closed to central-office-only strategies, [ALECs] 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 . . . ." (TR 32-33) Witness Gallagher explains that when a BellSouth customer desires to switch its voice service to FDN, BellSouth will disconnect the customer's FastAccess Internet Service. He states that since FDN is often unable to provide DSL service to the customer on the same phone line, the customer is likely to lose interest in obtaining voice service from FDN. (TR 35)

BellSouth witness Williams argues that the market is not closed for central office-based strategies, and that at least one ALEC has been successful in this area. (TR 295-296) In addition, witness Williams contends that ALECs have the same opportunity to collocate DSLAMs in remote terminals that BellSouth has. He states that once FDN collocates its DSLAM in the remote terminal, BellSouth offers UNEs that will allow FDN to offer DSL on a ubiquitous basis in Florida over the same UNE loops that it uses to provide voice service. (TR 313)

However, staff is concerned that the evidence in the record, such as no ALEC collocations in RTs and the overwhelming market share of BellSouth, may indicate that the options presently available to ALECs for providing DSL service have not facilitated meaningful competition in Florida. As such, staff believes it may be appropriate in this proceeding to examine these options and determine if FDN would be impaired in providing the service it

seeks to offer without some form of relief being granted by the Commission. As mentioned above, in this arbitration FDN requests that the Commission order BellSouth to: (1) unbundle the packet switching functionality of the DSLAM that BellSouth has deployed in remote terminal facilities throughout its network and offer a broadband unbundled network element (UNE) consisting of the entire transmission facility from the customer's premises to the central office; (2) permit the resale of the DSL transmission services that BellSouth provides to Florida consumers at retail; and (3) end the practice of insisting that consumers who buy BellSouth DSL also purchase BellSouth voice. (BR 3)

Broadband UNE

BellSouth witness Ruscilli states that the FCC has limited unbundling of packet switching to specific situations in which a four-part test is met, as set forth in FCC Rule 51.319(c)(5). (TR 186) FDN witness Gallagher contends that since "these conditions are satisfied in the vast majority, if not all, of BellSouth's DLC deployments, a general unbundling requirement is warranted." (TR 55) Staff disagrees. Staff does not believe that a general unbundling requirement based upon the four-part test contained in Rule 51.319 is appropriate; rather, this rule contemplates a case-by-case analysis of whether these conditions are met at specific remote terminals. Staff agrees with BellSouth witness Ruscilli, who states that "[r]equiring the statewide unbundling of packet switching if an ALEC can find one remote terminal to which this exception applies would impermissibly ignore the FCC's intent by allowing the limited exception to swallow the general rule." (TR 201-202)

There is insufficient evidence in the record to make a determination regarding each of the specific remote terminals deployed in BellSouth's network. Regardless, staff believes that BellSouth does allow for the collocation of DSLAMs in remote terminals. As BellSouth witness Ruscilli explains:

> BellSouth will permit FDN to collocate its DSLAM in BellSouth's remote terminal on the same terms and conditions that apply to BellSouth's own DSLAM. If BellSouth is not able to accommodate such collocations at a given remote terminal, BellSouth will unbundle packet switching functionality at that terminal. (TR 201)

Staff does not believe the record supports a finding that the four-part test contained in Rule 51.319 has been met; therefore, the record does not support unbundling packet switching pursuant to Rule 51.319.

However, as previously mentioned, in this proceeding FDN is not requesting the Commission find that packet switching be identified as a separate UNE. Rather, FDN requests that the Commission create an entirely new UNE, the so-called "broadband loop." (TR 38) FDN witness Gallagher describes this broadband loop as "unbundled DSL-capable transmission facilities between the customer's Network Interface Device and the BellSouth distribution frame in its central office, including all attached electronics that perform DSL multiplexing and splitting functionalities." (TR 37-38) He states that FDN requires access to this broadband loop where BellSouth has deployed DLC facilities in the remote terminal. (TR 37)

The parties agree that the "impair" standard contained in Rule 51.317 is controlling when a state commission determines whether to mandate UNEs in addition to those established by the FCC. (BellSouth TR 195; FDN TR 41) FCC Rule 51.317(b)(1) states:

> A requesting carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent LEC'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. . . . If the Commission determines that lack of access to an element impairs a requesting carrier's ability to provide service, it may require the unbundling of that element . . . .

In considering whether lack of access to a network element "materially diminishes" a requesting carrier's ability to provide service, state commissions shall consider whether alternatives in the market are available as a practical, economic, and operational matter. In doing so, the state commissions are to rely on factors such as cost, timeliness, quality, ubiquity, and impact on network operations, to determine whether alternative network elements are available. (FCC Rule 51.317(b)(2)) State commissions may also consider additional factors, such as whether unbundling of a

network element promotes: the rapid introduction of competition; facilities-based competition, investment and innovation; and reduced regulation. The state commission may also consider whether unbundling the network element will provide certainty to requesting carriers regarding the availability of the element, and whether it is administratively practical to apply. (FCC Rule 51.317(b)(3))

There is no evidence in the record to support a finding that FDN can obtain the ability to provide the desired functionalities through third parties. However, in the record there are several proposed alternative methods of providing DSL to consumers served by DLC loops when an ALEC is the voice provider. The two primary alternatives raised by BellSouth witness Williams are locating an available "home-run" copper loop and collocating a DSLAM at the remote terminal. (TR 290)

The first alternative is the utilization of home-run copper loops. This option requires locating an all-copper loop from the customer premises to the central office, in essence bypassing the DLC located in the remote terminal. FDN witness Gallagher argues that "in many BellSouth serving areas, no copper facilities remain available for DSL." (TR 51) In addition, witness Gallagher states that "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." (TR 51) Staff agrees that utilizing an available home-run copper loop would not provide a viable alternative when seeking to provide DSL service over a DLC loop. Staff believes that the quality of this service could be diminished, and that this alternative is not available on a ubiquitous basis. BellSouth witness Williams acknowledges that home-run copper loops could raise quality of service issues due to distance limitations, but suggests that if this is the case, FDN could collocate a DSLAM at the remote terminal. (TR 305)

This second alternative, self-provisioning a DSLAM in a RT, is the predominant matter of contention in this proceeding. BellSouth witness Williams asserts the FCC has already specified that collocating a DSLAM at the remote terminal is the means by which an ALEC is to provide its end users DSL service in a DLC environment. Yet in spite of this, FDN has not even applied to collocate a DSLAM at a BellSouth RT. (TR 300) He argues that "it is no more

expensive or time-consuming for FDN to collocate a DSLAM at an RT than it would be for BellSouth to accomplish the same thing." (TR 301)

Witness Williams argues that BellSouth did not initially deploy its data network on a large scale basis. Rather, BellSouth began with central office-based solutions, and only located DSLAMs in remote terminals when a customer base was built or a prospective base was located. Even then, he explains, BellSouth started with 8-port DSLAMs, and did not increase capacity until the 8-port DSLAM began to fill. He suggests that FDN shouldn't look to collocate DSLAMs in all remote terminals with large equipment and DS-3 feeder facilities until the customer base justifies it. (TR 331-332)

FDN witness Gallagher argues that even installing 8-port DSLAMs would not be a workable solution. Witness Gallagher estimates the of collocating an 8-port DSLAM to be $10,000 per remote terminal. He estimates the capital outlay to provide DSL throughout the city of Jacksonville alone would be $11.7 million. Witness Gallagher explains that with an 8-port DSLAM, the expected revenue per unit would be $270, but the recurring costs would be $542 per unit. (EXH 13, p. 2)

While the initial cost of installing a DSLAM in a remote terminal may be similar for FDN and BellSouth, certain advantages may be enjoyed by the first to market. Due to its incumbent customer base and relatively extensive deployment of DSLAMs, it is evident that BellSouth has advantages over other potential providers. FDN witness Gallagher contends that "early entry and early name recognition are crucial to success in markets for new technologies and new services." (TR 34) He states that with each day FDN falls further behind BellSouth in the DSL market. He explains that "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." (TR 34)

Although BellSouth suggests that FDN need not attempt to collocate in all 12,037 RTs, staff believes that the sheer magnitude of collocating in the 3,249 remote terminals in which BellSouth intends to have DSLAMs installed by year-end 2001 would be a daunting task for an ALEC of FDN's size. Notwithstanding the capital expenditure required for such an extensive deployment of DSLAMs, the time and logistical resources required to collocate in 3,249 remote terminals may be prohibitive. In its brief, FDN cites

the Illinois Commerce Commission (ICC) decision regarding the Project Pronto deployment associated with the SBC/Ameritech merger. FDN asserts that in this decision the ICC found that ALECs could not possibly collocate in the 2,100 remote terminals that were to be deployed by SBC, and would be impaired without access to SBC's NGDLC equipment. (BR 24)

The FCC determined that the type of customers that a competitive LEC seeks to serve is relevant when determining if the cost of self-provisioning impairs the ability of a requesting carrier to provide the services it seeks to offer. (*UNE Remand Order* at ¶81) In paragraph 82 of the *UNE Remand Order* the FCC states:

> Competitive LECs generally seek to provide service to residential and small business customers and/or to large business customers. The different revenue-generating potential of these different customer groups will often determine whether or not a competitive LEC can afford to incur the costs of self-provisioning a facility or of acquiring it from a third-party supplier, to the extent that it is available from a third-party provider. For example, a model submitted by MCI WorldCom that compares the costs of serving residential customers using unbundled elements from the incumbent LEC with the costs of serving the customers using its own facilities indicates that, at low market penetration levels, the costs of collocation would impair a competitive LEC's ability to serve residential customers using its own facilities. The model further demonstrates, however, that using the incumbent LEC's unbundled network elements, the entrant would be able [to] provide service, even at the same low market-penetration levels. (footnote omitted)

The FCC stated that although MCI WorldCom's model was not dispositive, it did illustrate that a requesting carrier's ability to serve residential and small business customers may be materially diminished without access to the incumbent LEC's network. (*UNE Remand Order* at ¶83) FDN witness Gallagher explains that FDN was founded with the mission of offering packaged services (local, long distance and Internet) to small and medium-sized businesses. (TR 27-28) Witness Gallagher states that with "the 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." (TR 29)

Another matter to be considered when determining whether to create a new UNE is "timeliness." In paragraph 89 of the *UNE Remand Order*, the FCC states:

> We conclude 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.

FDN witness Gallagher contends that even if FDN had sufficient funding to collocate remote DSLAMs, he estimates that the process would require well more than one year before FDN could start to provide service. (TR 49-50) BellSouth witness Williams argues that it is no more time-consuming for FDN to collocate a DSLAM in the remote terminal than it is for BellSouth to do so. (TR 301) As mentioned above, the record shows that presently no ALEC has collocated a DSLAM in a BellSouth remote terminal. In fact, no ALEC has even applied for such collocations. That being the case, staff believes there is insufficient evidence in the record to determine how long it would take for FDN to collocate a DSLAM in one of BellSouth's remote terminals. However, BellSouth witness Williams states that "BellSouth should be able to accommodate most RT collocation requests well within six months." (TR 304)

The "quality" of the alternative method of providing service should also be considered. As mentioned above, staff believes that the alternative of locating an all-copper loop that would bypass the DLC could be lower in quality than the DSL service provided by utilizing a DSLAM located in a remote terminal. However, staff finds no evidence in the record to suggest that the quality of service would be diminished if FDN were to collocate a DSLAM in a remote terminal.

The FCC also established that states should consider the extent to which an ALEC can serve customers ubiquitously using its own facilities or those of a third party. In its brief, BellSouth argues that "[u]biquity is not the test of impairment, especially with regard to network elements (like DSLAMs) that are not ubiquitously deployed by the ILEC." (BR 19-20) As mentioned above,

as of July 2001, BellSouth had deployed 2,728 DSLAMs, and plans to have DSLAMs deployed in 3,249 of its 12,037 remote terminals by the end of the year. (Williams TR 329) Although staff agrees that BellSouth has not deployed DSLAMs in remote terminals in a ubiquitous manner throughout the state, staff believes there is room for discussion regarding the ALEC's ability to offer service on a ubiquitous basis throughout the areas that BellSouth does serve via remotely located DSLAMs. As stated above, staff believes based on the record that it may very well be cost-prohibitive for an ALEC to collocate DSLAMs, even in only 3,249 remote terminals. As such, an ALEC may be impaired from offering ubiquitous service in the geographic areas where BellSouth has deployed DSLAMs without access to unbundled network elements. In paragraph 98 of the *UNE Remand Order*, the FCC states:

> Denying access to the incumbent's unbundled network elements, when use of alternative sources would materially diminish the competitor's ability to serve their intended geographic area, would be inconsistent with the goal of the 1996 Act to bring competition to the greatest number of customers.

An additional factor to be considered in determining whether a carrier is impaired without access to an unbundled network element is the "impact on network operations." In this evaluation, the Commission is to consider how self-provisioning a network element may affect the technical manner in which the competitor can operate its network. This involves the ALEC's ability to connect the alternative element to either its own network or to other ILEC network elements that it uses to provide service. (*UNE Remand Order* at ¶99) FDN witness Gallagher contends that "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." (TR 44) He states that in most cases FDN would have to construct its own fiber-optic transport between the remote terminal and the central office. (TR 44-45) However, BellSouth witness Williams argues that "[r]egardless of whether dark fiber feeder is available, BellSouth also offers a DS1 sub-loop feeder UNE that allows ALECs to connect from the RT to the CO. Beginning August 2001, BellSouth will offer a DS3 and OC3 feeder UNE." (TR 299-300) Staff finds no evidence in the record to indicate that there would be a significant negative impact on FDN's network operations if it were to collocate its DSLAM in a BellSouth remote terminal.

As noted above, the FCC has determined that the Commission should consider factors such as cost, timeliness, quality, ubiquity, and impact on network operations when determining whether alternatives to an ILEC's unbundled network elements are available as a practical, economic, and operational matter. (FCC Rule 51.317(b)(2)) However, the FCC has not limited the Commission's consideration to these factors alone. In fact, the FCC states in paragraph 102 of the *UNE Remand Order*:

> If Congress had intended to require the incumbent LECs to unbundle an element only when it was "necessary" to, or would "impair" the requesting carrier's ability to provide its desired service, Congress would not have used the discretionary phrase "consider at a minimum." Rather, Congress would have required the Commission apply the "necessary" and "impair" standard, without consideration of any additional factors.

As such, the FCC identifies several other factors that also may be considered which further the goals of the Act. The FCC explains that two fundamental goals of the Act are to open the local exchange and exchange access markets to competition, and to promote innovation and investment by all participants in the telecommunications marketplace. (*UNE Remand Order* at ¶103)

The first of these additional factors is the "rapid introduction of competition in all markets." The FCC states:

> We therefore find that we may consider whether an unbundling obligation is likely to encourage requesting carriers to rapidly enter the local market and serve the greatest number of customers. Conversely, we may also consider whether the failure to require unbundling will cause any class of consumers to wait unnecessarily for competitive alternatives. (*UNE Remand Order* at ¶107)

Staff believes that this factor is particularly compelling when examining the DSL market in Florida. BellSouth witness Ruscilli contends that the FCC has acknowledged that there is "burgeoning competition" to provide advanced services, and that this exists without unbundling ILEC advanced services equipment. He asserts that the "existence of this competition alone precludes a finding of impairment." (TR 197) In support of his position, witness Ruscilli cites to paragraph 316 of the *UNE Remand Order* in which

the FCC explained that it declined to unbundle packet switching due to its concern that it "not stifle burgeoning competition in the advanced service market." The FCC stated that "[w]e are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation." (*UNE Remand Order* at ¶316)

Describing this "burgeoning competition," the FCC stated:

> Both the record in this proceeding, and our findings in the *706 Report*, establish that advanced services providers are actively deploying facilities to offer advanced services such as xDSL across the country. Competitive LECs and cable companies appear to be leading the incumbent LECs in their deployment of advanced services. For example, in 1999, Rhythms expects to roll out xDSL services in 1,000 end offices nation wide. Covad's planned network deployment is expected to reach 51 MSAs by the end of 1999. In the past year, NorthPoint deployed facilities capable of transmitting xDSL signals in 17 metropolitan markets. NorthPoint plans to expand its DSL-based local networks from 25 major markets, representing 37 metropolitan statistical areas (MSAs), to 28 markets, or 61 MSAs, by the end of 1999. Qwest announced in August 1999, that it is now providing DSL service in 13 U.S. markets and plans to expand to more than 30 major markets by the end of 1999. In addition, EarthLink has partnered with Sprint to offer nationwide xDSL service. KMC Telecom Inc. announced aggressive rollout of DSL services with plans to introduce additional broadband applications by year-end. Marketplace developments like the ones described above suggest that requesting carriers have been able to secure the necessary inputs to provide advanced services to end users in accordance with their business plans. This evidence indicates that carriers are deploying advanced services to the business market initially as well as the residential and small business markets. (footnotes omitted) (*UNE Remand Order* at ¶307)

While this evidence was clearly convincing from the FCC's perspective at the time it released the *UNE Remand Order* in 1999, staff believes that the status of this prospective competition for

DSL service has changed considerably since then. As BellSouth witness Williams conceded during cross examination, the competitors Rhythms, Covad, and NorthPoint have all either declared bankruptcy or been dissolved since the release of the *UNE Remand Order*. In addition, neither Qwest, EarthLink, or KMC are providing DSL service in BellSouth's Florida footprint. (TR 380-382)

As mentioned above, BellSouth has approximately 133,000 wholesale and retail DSL subscribers in Florida, while ALECs serve approximately 1,000 DSL customers in BellSouth's territory. Although the vast majority of BellSouth's access lines are served through remote terminals, not a single ALEC has collocated a DSLAM in a BellSouth remote terminal, which would then enable them to provide DSL service to these end users. Taking all of this into consideration, staff does not believe that Florida has "burgeoning competition" for DSL service. Staff believes the Commission should consider the FCC's conclusions in the *UNE Remand Order* in light of the current state of DSL competition in Florida, and take action that will promote the rapid introduction of competition in this market.

In its brief, BellSouth argues that granting FDN's request would neither encourage ALECs to rapidly enter the local market and serve the greatest number of customers, or encourage innovation by both incumbents and competitive LECs. First, BellSouth contends that the "universe of end users" who are able to receive both voice and data service over the same line would not increase. (BR 25) In other words, the number of customers who would be able to receive this service from FDN would be limited to the customers that are already able to receive this service from BellSouth. However, in paragraph 107 of the *UNE Remand Order*, the FCC stated:

> Congress has emphasized that a major goal of the 1996 Act is to accelerate the development of local competition. Indeed, the preamble to the Act states that it provides a "pro-competitive de-regulatory national policy framework designed to accelerate rapidly" deployment of advanced telecommunications technologies by opening all markets to competition. (emphasis added)

While the number of customers that can be served via a broadband UNE would be limited to those that are already able to receive DSL service from BellSouth, staff believes that creating the broadband UNE will open this DSL market to meaningful

competition. Where presently these customers are limited to choosing BellSouth's DSL service, staff believes that creating a broadband UNE would provide these customers with a competitive alternative.

Staff believes the availability of the broadband UNE could impact FDN's ability to provide competitive facilities-based voice service as well. Staff believes the evidence in the record indicates that customers who subscribe to both BellSouth's voice and DSL service have a disincentive to switch their voice service to FDN due to the fact that their data service would be disconnected. (Gallagher TR 35) BellSouth witness Williams suggests that a customer could retain its DSL service when switching to FDN's voice service, if FDN converts this customer to resale. In that case BellSouth would permit the resale of its DSL as well, since BellSouth would still be considered the voice provider. (TR 370) Staff believes that under BellSouth's proposal there is little, if any, chance that an incentive for facilities-based provisioning will arise. However, were BellSouth to offer the broadband UNE, the probability of facilities-based provisioning of services increases. Staff believes that just as unbundled local loops are an intermediate strategy that may enable ALECs to develop facilities-based voice strategies, unbundled broadband loops could help facilitate FDN's facilities-based DSL competitive entry into certain markets. In addition, staff believes FDN could continue to expand its competitive, facilities-based voice service without the impediments associated with customers losing their DSL service, due to the fact that FDN would be able to provide its own DSL service to that customer via the broadband UNE.

BellSouth argues that creating a broadband UNE would "have a chilling effect on BellSouth's incentives to invest in the technologies upon which advanced services depend." (BR 26) BellSouth contends that "an ILEC's incentive to invest in new and innovative equipment will be stifled if its competitors, who can just as easily invest in the equipment, can take advantage of the equipment's use without incurring any of the risk." (BR 27) Staff acknowledges BellSouth's argument; however, staff believes that as the market presently stands, without such action competition in the DSL market would be stifled, as FDN would be delayed, if not inhibited, from deploying the required facilities to serve customers in a DLC environment.

An additional factor that may be considered is "certainty in the market." In the *UNE Remand Order*, the FCC states:

> [W]e find that the unbundling requirements we adopt should typically provide the uniformity and predictability new entrants and fledgling competitors need to develop and implement national and regional business plans. In addition, uniform and predictable unbundling rules will provide financial markets with reasonable certainty so that competitive LECs can attract the investment capital they need to execute their business plans. (Order at ¶114)

FDN witness Gallagher states that to survive, a carrier must have a voice and data strategy. (TR 92) Witness Gallagher asserts that he could not represent to investors that FDN has a sustainable business if it did not have a DSL strategy. (TR 111) He explains that FDN does have a voice and data strategy, but in this unique circumstance FDN needs help. (TR 112) Staff believes that the creation of a broadband UNE would permit FDN to establish and implement this voice and data strategy, and effectively pursue the business and residential markets it seeks to serve with a competitive product. Staff believes that without a broadband UNE, FDN's market potential would be severely limited.

Finally, "reduced regulation" and "administrative practicality" may be considered by the Commission. The record in this proceeding is limited with respect to these factors. However, staff believes that the creation of a broadband UNE for purposes of the new FDN/BellSouth interconnection agreement could conceivably decrease the number of arbitrations the Commission would address regarding this issue.

In the *UNE Remand Order*, the FCC states that "[w]e agree with those parties that argue that we must consider the totality of the circumstances to determine whether an alternative to the incumbent LEC's network element is available in such a manner that a requesting carrier can realistically be expected to actually provide service using the alternative." (footnote omitted)(Order at ¶62) In addition, the FCC states:

> We do not give particular weight to any of the factors we identify. Rather we consider the relationship among the factors we take into account for a particular network

> element, and determine whether the sum total of the effect of the factors require a finding that the element must be unbundled. Thus, we do not require that all of the factors be met before we decide whether or not to require incumbent LECs to unbundle a particular network element. (*UNE Remand Order* at ¶106)

Staff has taken into consideration the totality of circumstances, including but not limited to: quality and ubiquity of all copper facilities; the cost and ubiquity of self-provisioning; the current state of competition in the DSL market; and the prospect of rapid introduction of competition into the market from utilizing a broadband UNE. Although the FCC did not attach any weight to specific factors when determining if a carrier's ability to provide a service is impaired without access to the unbundled element, staff believes the cost of collocating DSLAMs in remote terminals is particularly compelling. Staff believes the cost of collocating DSLAMs in BellSouth remote terminals, when taking into account the extensive deployment of RTs in BellSouth's network, impairs FDN's ability to provide DSL service on a ubiquitous basis to the residential and small to medium sized businesses that FDN targets in its service area. Staff also believes the creation of a broadband UNE would promote the rapid introduction of competition into a market that presently lacks any significant competitive foothold.

Staff notes that since the Commission has to this point never considered mandating a UNE in addition to those established by the FCC, this is a case of first impression in determining the threshold for the impair standard to have been met. Taking the sum total of the effect of the above factors into consideration, staff believes the creation of a broadband UNE is warranted for the purposes of the new FDN/BellSouth interconnection agreement. Therefore, staff recommends that where BellSouth has deployed a DSLAM in a remote terminal for the purposes of providing DSL service to customers served by that remote terminal, BellSouth should be required to provide a broadband UNE that includes unbundled DSL-capable transmission facilities between the customer's Network Interface Device and the BellSouth distribution frame in its central office, including all attached electronics that perform DSL multiplexing and splitting functionalities. Although evidence regarding rates for the broadband UNE was not presented in the record, staff would note that Section 252(d)(1) of the Act states that such rates shall be based on the cost of

providing the network element, shall be nondiscriminatory, and may include a reasonable profit.

Resale

Although not the primary means of relief sought by FDN in this proceeding, FDN requests that the Commission require BellSouth to offer its DSL service for resale by FDN. In this issue the Commission must determine the resale obligations of BellSouth regarding its DSL service. Section 251(c)(4)(A) of the Act states that ILECs have the duty to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." When determining if a particular service is subject to the resale obligations of the Act, the Commission must consider primarily two things: (1) whether the service is a telecommunications service, and (2) whether the service is offered at retail.

BellSouth contends that its FastAccess Internet Service is an "enhanced, nonregulated, nontelecommunication Internet access service" and exempt from the Act's resale provisions. (Ruscilli TR 210) Staff agrees. While BellSouth does in fact sell this service on a retail basis (Ruscilli TR 225-226), staff believes that BellSouth's FastAccess Internet Service is an enhanced, information service that is not subject to the resale requirements contained in Section 251 of the Act.

However, FDN does not request that the Commission require BellSouth to offer its FastAccess Internet Service at the resale discount; rather, FDN seeks to resell only the DSL component of that service. (Gallagher TR 152) In its brief FDN argues that BellSouth has provided no legal basis for its claim that "bundled," "enhanced" services are exempt from the resale obligation. FDN contends this is because there is no legal basis for BellSouth's claim. On the contrary, FDN asserts that "[f]or the last 20 years, FCC bundling rules have required facilities-based common carriers to offer telecommunications services separately from any enhanced services, even if it only offers them at retail as a bundled product." (footnote omitted)(BR 33)

Staff agrees that the FCC has long required ILECs offering enhanced services to offer the basic service components to other carriers on an unbundled basis; however, staff does not believe

this requirement reaches the level of unbundling that FDN seeks. In its Third Computer Inquiry (*Computer III*)[8], the FCC stated:

> [W]e maintain the existing basic and enhanced service categories and impose CEI and Open Network Architecture requirements as the principal conditions on the provision of unseparated enhanced services by AT&T and the BOCs. The CEI standards, which will be in effect on an interim basis pending our approval of a carrier's Open Network Architecture Plan, require a carrier's enhanced services operations to take under tariff the basic services it uses in offering unseparated enhanced services. Such basic services must be available to other enhanced services providers and users under the same tariffs on an unbundled and functionally equal basis. (*Computer III* at ¶ 4)

Further, the FCC stated:

> [W]e consider Open Network Architecture to be the overall design of a carrier's basic network facilities and services to permit all users of the basic network, including the enhanced service operations of the carrier and its competitors, to interconnect to specific basic network functions and interfaces on an unbundled and "equal access" basis. A carrier providing enhanced services through Open Network Architecture must unbundle key components of its basic services and offer them to the public under tariff, regardless of whether its enhanced services utilize the unbundled components. (*Computer III* at ¶113)

Staff believes the record shows that BellSouth complies with these obligations when providing its own FastAccess Internet Service. In its brief, BellSouth explains that its "FastAccess Internet Service is a combination of a federally-tariffed wholesale DSL service (which was analogized to a pipe during the hearings) and e-mail, Internet, and other enhanced services (which were analogized to the water that flows through the DSL pipe during the hearings)." (BR 31) While BellSouth offers its DSL service to ISPs

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

at the tariffed wholesale rate, witness Ruscilli argues that BellSouth does not offer a tariffed retail DSL service. (TR 209-210)

Staff believes that BellSouth offers its DSL service as a wholesale tariffed product available to other enhanced service providers pursuant to the unbundling requirements of *Computer III*. As a wholesale product that is only offered to enhanced service providers, staff does not believe BellSouth's DSL service is subject to the resale obligations contained in Section 251(c)(4). As stated by the FCC in its *Second Advanced Services Order*, "an incumbent LEC offering of DSL services to Internet Service Providers as an input component to the Internet Service Provider's high-speed Internet service offering is not a retail offering." (Order at ¶19) Staff notes that the *Second Advanced Services Order* was recently affirmed by the D.C. Circuit Court of Appeals in *ASCENT II*[9]. However, in the *ASCENT II* decision the Court stated that.

> If in the future an ILEC's offering designed for and sold to ISPs is shown actually to be taken by end-users to a substantial degree, then the Commission might need to modify its regulation to bring its treatment of that offering into alignment with its interpretation of "at retail," but that is a case for another day. (*ASCENT II* at p.32)

Although there has been some discussion regarding the first *ASCENT* decision by the D.C. Circuit Court of Appeals, staff does not believe this decision has any impact on the issue presently before the Commission. FDN witness Gallagher contends that in *ASCENT*, the D.C. Circuit Court found ILECs may not "sideslip §251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate." (TR 60) Staff agrees that the D.C. Circuit Court found that Section 251 resale requirements extend to ILEC affiliates; however, BellSouth does not offer its DSL service through a separate affiliate. Even if BellSouth was to offer this service through a separate affiliate, the DSL service in question is a wholesale product that would still not be subject to the resale obligations contained in Section 251.

[9] Association of Communications Enterprises v. FCC, 253 F.3d 29, 31 (D.C. Cir. 2001)

Staff believes that BellSouth's FastAccess Internet Service is an enhanced service that is not subject to Section 251 requirements. In addition, staff believes that BellSouth's DSL service is a federally tariffed wholesale product that is not offered on a retail basis. Since it is not offered on a retail basis, BellSouth's DSL service is not subject to the resale obligations contained in Section 251(c)(4)(A). Therefore, staff recommends that the Commission not require BellSouth to offer either its FastAccess Internet Service or its DSL service to FDN for resale in the new BellSouth/FDN interconnection agreement.

BellSouth DSL over FDN voice loops

The final measure of relief sought by FDN in this proceeding is a requirement that BellSouth continue to provide its FastAccess Internet Service to end users who switch their voice service to FDN. In its brief, FDN requests that the Commission "prevent BellSouth from using its monopoly in the DSL market as leverage to strengthen its already firm grip on the voice market." (BR 38)

Although some operational issues were raised, staff believes the primary matter of contention is whether BellSouth should be required to provide its FastAccess Internet Service to a customer when it is no longer that customer's voice provider. BellSouth relies on the FCC's *Line Sharing Reconsideration Order* to support its position that it is not required to provide this service. (BR 29) In this order, the FCC states:

> [W]e deny AT&T's request for clarification that under the Line Sharing Order, incumbent LECs are not permitted to deny their xDSL services to customers who obtain voice service from a competing carrier where the competing carrier agrees to the use of its loop for that purpose. Although the Line Sharing Order obligates incumbent LECs to make the high frequency portion of the loop separately available to competing carriers on loops where incumbent LECs provide voice service, it does not require that they provide xDSL service when they are not [sic] longer the voice provider. We do not, however, consider in this Order whether, as AT&T alleges, this situation is a violation of sections 201 and/or 202 of the Act. To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act

> itself, we encourage AT&T to pursue enforcement action. (*Line Sharing Reconsideration Order* at ¶26)

In its brief, FDN argues that in the *Line Sharing Reconsideration Order* "the FCC did not find that ILECs may lawfully refuse to provide DSL service on lines on which it is not the retail voice carrier." FDN contends that the FCC simply determined that AT&T's request was beyond the scope of a reconsideration order, which was limited to consideration of the ILEC's obligation to provide line sharing as a UNE. (BR 45)

In addition, FDN contends that the Line Sharing Order did not address, as a substantive matter, retail issues. (BR 45) FDN argues that "BellSouth cannot cite the *Line Sharing Orders* as a basis for evading its *retail* obligations. FDN UNE voice customers who wish to buy FastAccess DSL *at retail* should be permitted to do so." (emphasis in original)(BR 45)

Staff agrees with BellSouth that the *Line Sharing Order*[10], and the subsequent *Line Sharing Reconsideration Order,* contain no requirement that an ILEC continue to provide DSL service over a UNE loop utilized by an ALEC to provide voice service. Staff also agrees with FDN that the *Line Sharing* Orders did not address, in a substantive matter, the ILEC's provision of retail DSL service over loops utilized by ALECs to provide voice service. Instead, these orders merely established the high frequency portion of the loop as a new UNE that ILECs must make available to requesting ALECs. In its *Line Sharing Order* the FCC states:

> In this Order we adopt measures to promote the availability of competitive broadband xDSL-based services, especially to residential and small business customers. We amend our unbundling rules to require incumbent LECs to provide unbundled access to a new network element, the high frequency portion of the local loop. This will enable competitive LECs to compete with incumbent LECs to provide to consumers xDSL based services through telephony lines that the competitive LECs can share with incumbent LECs. (*Line Sharing Order* at ¶4)

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[10] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Order No. FCC 99-355; 14 FCC Rcd 20912 (1999)

The *Line Sharing Order* also provided for a state commission imposing additional line sharing requirements. In the *Line Sharing Order* the FCC states:

> It is impossible to predict every deployment scenario or the difficulties that might arise in the provision of the high frequency loop spectrum network element. States may take action to promote our overarching policies, where it is consistent with the rules established in this proceeding. (Order at ¶225)

The FCC also states that "States may, at their discretion, impose additional or modified requirements for access to this unbundled network element, consistent with our national policy framework." (*Line Sharing Order*, 14 FCC Rcd at 20917) While the FCC has provided states the discretion to impose additional line sharing regulations, provided they are consistent with the FCC's policies, this authority appears to apply to the provision of the line sharing UNE only. Staff does not believe this authority extends to an ILEC's obligation to provide its retail ADSL service offering over UNE loops utilized by ALECs to provide voice service.

Staff believes that the fundamental matter that the Commission must determine in this issue is whether an ILEC can be required to provide its ADSL service to a particular end user. More specifically, can BellSouth be required to provide its FastAccess Internet Service to particular end users? BellSouth witness Ruscilli contends that BellSouth's FastAccess Internet Service is an "enhanced, nonregulated, nontelecommunications Internet access service." (TR 210) Staff agrees. That being the case, the Commission must determine if BellSouth can be required to provide an "enhanced" service to a particular end user. In the *Computer II Final Decision*[11], the FCC states:

> Having concluded that there should be no regulatory distinction between enhanced services, we are left with two categories of services - basic and enhanced. The common carrier offering of basic transmission services are regulated under Title II of the Act. This proceeding does not address the nature and degree of regulation exercised over providers of basic services. Insofar as

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

> enhanced services are concerned, there are two options - subject all enhanced services to regulation, or refrain from regulating them *in toto*. We believe that, consistent with our overall statutory mandate, enhanced services should not be regulated under the Act. (*Computer II* at ¶114)

Staff believes that BellSouth's FastAccess Internet Service is a non-regulated enhanced service. As such, staff believes it is beyond the scope of the Commission's authority to require that BellSouth provide this service to a particular end user, regardless of whether this end user subscribes to BellSouth's or FDN's voice service. Therefore, staff recommends the Commission deny FDN's request that BellSouth be required to provide its FastAccess Internet Service over UNE loops utilized by FDN to provide voice service.

Nevertheless, staff believes that FDN has raised valid concerns regarding possible barriers to competition in the voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN voice service. In its brief, FDN suggests that this practice amounts to unreasonable denial of service pursuant to Section 201 of the Act and Section 364.03(1) of the Florida Statutes. (BR 40-41) In addition, FDN contends that this practice unreasonably discriminates among customers, citing Section 202(a) of the Act and Sections 364.08(1) and 364.10(1) of the Florida Statutes. (BR 41) FDN also asserts that BellSouth's requirement that an end user seeking to purchase its FastAccess Internet Service must also purchase BellSouth's voice service is an anticompetitive and illegal tying arrangement, and "a *per se* violation of the antitrust laws." (BR 42-43)

Staff is troubled with the possibility that BellSouth may utilize its ability to provide its FastAccess Internet Service as leverage to retain voice customers, possibly creating a disincentive for customers to obtain competitive voice service. Staff believes that this practice may be a competitive hurdle in the voice market for carriers that are unable to provide DSL service. As for FDN's allegations that this practice rises to the level of anticompetitive behavior, this proceeding is not designed to address such claims. Instead, this proceeding is an arbitration in which the Commission must resolve the issues raised by parties in the petition for arbitration, and the response thereto. That

being the case, at this time staff believes the Commission should not require BellSouth to provide its FastAccess Internet Service to any particular end user, whether a BellSouth voice customer or not.

Conclusion

Staff recommends that for the purposes of the new interconnection agreement, where BellSouth has deployed a DSLAM in the remote terminal for the purposes of providing DSL service to customers served by that remote terminal, BellSouth should be required to provide a broadband UNE that includes unbundled DSL-capable transmission facilities between the customer's Network Interface Device and the BellSouth distribution frame in its central office, including all attached electronics that perform DSL multiplexing and splitting functionalities. Staff does not believe the Commission has jurisdiction to require BellSouth to offer its enhanced FastAccess Internet Service to FDN for resale. In addition, staff does not believe BellSouth's DSL transport service is sold on a retail basis. Therefore, staff recommends the Commission not require BellSouth to offer either its FastAccess Internet Service or its DSL transport service to FDN for resale in the new BellSouth/FDN interconnection agreement. Finally, staff recommends the Commission not require BellSouth to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

ISSUE 11: Should this docket be closed?

RECOMMENDATION: No, the parties should be required to submit a signed agreement that complies with the Commission's decisions in this docket for approval within 30 days of issuance of the Commission's Order. This docket should remain open pending Commission approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996. **(BANKS)**

STAFF ANALYSIS:

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