BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

The following Commissioners participated in the disposition of this matter:

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

APPEARANCES:

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On behalf of Florida Digital Network, Inc.

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On behalf of BellSouth Telecommunications, Inc.

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On behalf of the Commission.

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

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I. CASE BACKGROUND

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

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

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

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

II. JURISDICTION

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

III. BELLSOUTH DSL OVER FDN VOICE LOOPS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Line Sharing Order at ¶4.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

unduly burdensome. As such, we find that this practice unreasonably penalizes customers who desire to have access to voice service from FDN and DSL service from BellSouth. Thus, this practice is in contravention of Section 364.10, Florida Statutes, and Section 202 of the Act. Furthermore, because we find that this practice creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another ALEC as their voice service provider, this practice is also in violation of Section 364.01(4), Florida Statutes.

Conclusion

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

IV. BROADBAND UNE LOOP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

V. RESALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Computer III at ¶113.

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

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

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

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

ASCENT II at p.32.

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

Conclusion

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

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

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

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

Based on the foregoing, it is

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

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

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

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

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

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

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

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