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June 20, 2002

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

Re: Docket No. 010098-TP (Florida Digital)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Reconsideration or, in the Alternative, Clarification with regard to Section III of the Commission's Final Order on Arbitration, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Patrick Turner
Patrick Turner (CA)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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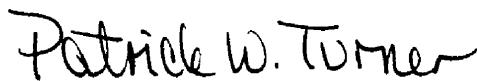
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**CERTIFICATE OF SERVICE
DOCKET NO. 010098-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and Federal Express this 20th day of June, 2002 to the following:

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**(+) Signed Protective/Non Disclosure
Agreement**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of 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	
)	Filed: June 20, 2002	
)		
)		

BELLSOUTH TELECOMMUNICATIONS, INC'S PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, CLARIFICATION WITH REGARD TO SECTION III OF THE COMMISSION'S FINAL ORDER ON ARBITRATION

BellSouth Telecommunications Inc. ("BellSouth") respectfully submits its Petition for Reconsideration or, in the alternative, Petition for Clarification.¹ As explained below, the Florida Public Service Commission ("Commission") should reconsider its decision 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,"² because the Commission overlooked numerous points of fact and law in reaching that decision. See *Diamond Cab Co. v. King*, 146 So.2d 889, 891 (Fla. 1962). In the alternative, BellSouth respectfully requests that the Commission clarify that the manner in which BellSouth plans to implement this decision (to the extent that the decision is not stayed pending appeal of the Order) complies with the Commission's Order.

¹ These alternative Petitions relate solely to Section III of the Final Order on Arbitration ("Order") entered by the Florida Public Service Commission in this docket on June 5, 2002. BellSouth is not seeking reconsideration or clarification of Sections IV or V of the Order.

² See Order at 11.

I. THE COMMISSION SHOULD RECONSIDER ITS DECISION AND EITHER DELETE SECTION III FROM ITS ORDER OR, IN THE ALTERNATIVE, RULE THAT BELL SOUTH IS NOT REQUIRED TO CONTINUE TO PROVIDE ITS FASTACCESS SERVICE TO END USERS WHO OBTAIN VOICE SERVICE FROM FDN OVER UNE LOOPS.

In reaching the decision that is set forth on page 11 of the Order, the Commission overlooked various points of fact and law including, without limitation, that: (1) under Section III of the Order, an arbitration proceeding under the federal Telecommunications Act of 1996 ("the Act") has been improperly converted into a state law complaint case; (2) the FCC has ruled that BellSouth's practice of not offering DSL over a UNE loop is neither discriminatory nor an unreasonable denial of service; (3) section 706 of the Act does not support the Commission's decision; (4) the efficiencies that make ADSL and FastAccess competitively viable depend on the simultaneous provision of voice service; (5) no evidence suggests that BellSouth has market power in the market for high-speed Internet access, and no evidence suggests that BellSouth could use whatever power it may have in that highly competitive market to have any appreciable negative effect on the market for local telecommunications service; and (6) even if BellSouth had market power in a properly defined market for DSL services or DSL-based Internet Access, the ability of BellSouth to use that power to have a substantial effect on the market for local voice services is small, given that relatively few voice customers purchase high-speed Internet access.

A. The Commission Should Reconsider its Decision and Delete Section III from its Order because Under that Section, an Arbitration Proceeding under the Telecommunications Act of 1996 has been Improperly Converted into a State Law Complaint Case.

BellSouth has both a wholesale DSL regulated transport service and a retail non-regulated DSL-based Internet access service. BellSouth offers the tariffed DSL transport service through BellSouth's Special Access F.C.C. Tariff No. 1. This tariffed DSL service is a regulated telecommunications service offering, and it is designed for use by Internet service providers ("ISPs"), such as AOL, EarthLink, MSN and BellSouth's own ISP operations. During the hearing, this service was analogized to the pipe through which Internet and other enhanced services can flow. BellSouth FastAccess Internet Service ("FastAccess") is BellSouth's retail high-speed DSL-based Internet access service. It uses the regulated DSL transport service as an input to the Internet access offering. FastAccess is a non-regulated information service offering.

In Section III of its Order, the Commission did not make any findings under state law with regard to any interconnection, services, or network elements that are addressed by section 251 of the Act. Instead, the Commission made findings under state law with regard to the manner in which BellSouth offers a retail service that is not even a telecommunications service, and thus is not a service over which this Commission has jurisdiction. See Order at 8 (finding that BellSouth's FastAccess Internet Service is an "enhanced, nonregulated, nontelecommunications Internet access service."). Thus, even if FDN had asked the Commission to determine whether the manner in which BellSouth offers its retail FastAccess service complies with any state statutes, the Commission has no authority to do so in the context of this arbitration proceeding because section 252 of the Act only allows the Commission to arbitrate issues regarding "a request for interconnection, services, or network elements pursuant

to Section 251” that have not been resolved by negotiations or mediation. See 47 U.S.C. §252(a)(1),(b).

In fact this issue was never properly in this arbitration because nothing in Sections 251 or 252 addresses an ILEC's provision of a non-regulated retail service. An ILEC's obligations under section 251 include such duties as interconnecting its network with that of an ALEC, providing unbundled access to network elements, making retail telecommunications services available for resale, and allowing for collocation. There is no duty or obligation anywhere in section 251 that would in any way require an ILEC to provide or continue providing a non-regulated Internet access service to customers of an ALEC. The issue of BellSouth's continued provision of FastAccess to customers of FDN, therefore, is wholly inappropriate for an arbitration case submitted pursuant to 252(b) of the Act.³

With respect to what the Commission perceives may be violations of state law, neither FDN's Petition, its pre-filed testimony, nor the testimony it presented during the hearing asks the Commission to determine whether any BellSouth retail practice violates any provision of state law. Instead, it was only in its post-hearing brief that FDN “suggests” that BellSouth may be violating certain state statutes. See, e.g., Order at 8. If FDN wishes to file a complaint case against BellSouth under state law, it is free

³ Moreover, the Commission lacks jurisdiction to address this issue in this arbitration proceeding because it was not presented by FDN in its Petition for arbitration or by BellSouth in its Response to the Petition. In fact, FDN's witness testified that FDN was not seeking to require BellSouth to provide retail service to FDN's voice customers and that it was not seeking to require BellSouth to have an end-user relationship with FDN's voice customers. (See Tr. at 36; 64; 79).

to do so. FDN's reference to state statutes in its post-hearing brief, however, cannot serve to convert an arbitration proceeding that is governed by federal law into a complaint case under state law. Under Section III of the Order, however, that is exactly what has happened. The Commission, therefore, should correct this error of law by deleting Section III from its Order.⁴

B. In the Alternative, the Commission Should Reconsider its Decision and Rule in BellSouth's Favor on the Issues Addressed in Section III of its Order.

If the Commission determines that the issues addressed in Section III of its Order were properly before it in this arbitration proceeding (and it should not), the Commission should reconsider its decision and rule that BellSouth is not required to continue to provide its retail FastAccess service to end users who obtain voice service from FDN over UNE loops.

1. The Commission overlooked the FCC's ruling that BellSouth's practice of not offering DSL over a UNE loop is neither discriminatory nor an unreasonable denial of service.

After the parties filed post-hearing briefs in this docket, the FCC released its Order addressing BellSouth's Georgia and Louisiana 271 applications. See Memorandum Opinion and Order, *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, Docket No. 02-35 (May 15, 2002). Parties to that proceeding raised issues that are similar to those addressed in

⁴ As noted above, these state law arguments appeared in this proceeding for the first time in FDN's post-hearing brief. This Petition, therefore, represents BellSouth's first opportunity to address these state law issues in this proceeding.

the Section III of the Commission's Order, and the FCC addressed those issues accordingly:

BellSouth states that its policy “not to offer its wholesale DSL service to an ISP or other network services provider [] on a line that is provided by a competitor via the UNE-P” is not discriminatory nor contrary to the Commission's rules. Commenters allege that BellSouth will not offer its DSL service over a competitive LEC's UNE-P voice service on that same line.⁵ We reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities. Furthermore, a UNE-P carrier has the right to engage in line splitting on its loop. As a result, a UNE-P carrier can compete with BellSouth's combined voice and data offering on the same loop by providing the customer with line splitting voice and data service over the UNE-P loop in the same manner. Accordingly, we cannot agree with commenters that BellSouth's policy is discriminatory.

Id. at ¶157 (emphasis added). The FCC, therefore, was squarely presented with the issue of whether BellSouth's policy of not providing its federally tariffed, wholesale DSL telecommunications service over a UNE loop violates federal law. The FCC found no such violation. To the contrary, the FCC explicitly and unequivocally found that BellSouth's policy is not discriminatory and, therefore, does not violate section 202(a) of the Act. By necessary implication, the FCC also found that BellSouth's policy does not amount to unreasonable denial of service pursuant to Section 201 of the Act.

The FCC made these findings with regard to BellSouth's wholesale DSL telecommunications service – a service to which Sections 201 and 202 of the Act apply. In light of these findings, it cannot seriously be argued that the same practice with

⁵ Commenters also claimed that “in order to prevent a customer from losing its billing telephone number (BTN) or change its established hunting sequence, the customer may be required to change the DSL service from the existing line to a “stand alone” line.” *Id.* at ¶157 n. 561.

regard to BellSouth's retail FastAccess service – an enhanced, nonregulated, nontelecommunications Internet access service to which sections 201 and 202 of the Act simply do not apply – is either discriminatory or an unreasonable denial of service. Thus, to the extent that Section III of the Order suggests that BellSouth's practice is discriminatory or is an unreasonable denial of service under either state or federal law, see, e.g., Order at 8-11, the Commission should reconsider the Order and delete any such suggestion from the Order.

2. The Commission overlooked the fact that Section 706 of the Act does not support the Commission's decision set forth in Section III of its Order.

In its Order, the Commission is careful to note that it is not attempting to address competition in the advanced services market, but that instead, it is attempting to remove what it erroneously perceives to be a barrier to entry into the voice market. After noting that BellSouth's retail FastAccess service is not a telecommunications service but is, instead, an enhanced service, the Order provides:

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

* * *

We 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.

See Order at 8-9 (emphasis added). The Order then notes that section 706 of the Act directs State commissions to use "measures that promote competition in the local

telecommunications market, or other regulating methods that remove barriers to infrastructure development.” *Id.*

Section 706, however, directs State commissions to take such measures for the express purpose of “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability” The Order acknowledges that the Commission’s decision is not designed to encourage deployment of advanced services. Instead, the Commission’s decision is designed to remove what is erroneously perceived to be a “competitive barrier in the voice market.” *Id.* (emphasis added). Accordingly, Section 706 of the Act does not support the decision that is set forth in Section III of the Order.

3. The Commission overlooked the fact that the efficiencies that make ADSL and FastAccess competitively viable depend on the simultaneous provision of voice service over the same loop.

BellSouth’s tariffed DSL service and BellSouth’s FastAccess service are efficient for BellSouth to provide because BellSouth is also providing the basic telephone service. The costs of providing ADSL service on a stand-alone basis would necessarily entail the costs of providing basic telephone service in any event, because that is how ADSL is designed to be provisioned. This situation is directly analogous to a cable television company that provides a cable modem high-speed Internet access service to customers that also have basic cable service. The provision of a cable modem service is efficient because the cable company is already providing basic cable service. If a cable company were to choose to provide cable modem service independent of basic cable service, it undoubtedly would do so at substantially higher prices. Similarly, if

BellSouth provided a customer only with FastAccess, the price that BellSouth would need to charge to cover its costs would be significantly higher than the price it charges for FastAccess when the customer also takes its basic telephone service from BellSouth.

4. **The Commission overlooked the fact that no evidence suggests that BellSouth has market power in the market for high-speed Internet access, and no evidence suggests that it could use whatever power it may have in that highly competitive market to have any appreciable negative effect on the market for local telecommunications service.**

FDN complains that BellSouth's current practice "clearly appears designed to leverage its market power in the high-speed data market as an anticompetitive tool to injure its competitors in the voice services market" (Tr. at 64-65). FDN, however, failed to either allege or prove that BellSouth has market power in the high-speed Internet access market. Instead, FDN alleges that BellSouth has a high percentage of the DSL business in Florida. E.g., Tr. at 94. Both FDN and the Commission, however, overlook the fact that DSL is only part of the high-speed Internet access market, as FDN's own witness acknowledges. (Tr. at 166-167).

In fact, BellSouth witness John Ruscilli presented evidence that "cable is out there providing high-speed entertainment and high-speed Internet access at a level of almost two to one over what DSL is as far as the penetration in the marketplace." (Tr. at 236). Later, Mr. Ruscilli presented evidence that "cable has 78 percent of the market, and ADSL has 16 percent." (Tr. at 239). The evidence presented by Mr. Ruscilli is entirely consistent with the opinion that the Court of Appeals for the District of

Columbia issued last month, in which it vacated the FCC's "Line Sharing Order." See *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

The Line Sharing Order required ILECs to unbundle the high frequency spectrum of copper loops to enable ALECs to provide DSL services. The D.C. Circuit vacated the FCC's order because the FCC had failed to take into account the substantial competition for DSL service today. *Id.* at 428-29. Significantly, the Court noted that "[the FCC's] own findings (in a series of reports under §706 of the 1996 Act) repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market." *Id.* at 428. The D.C. Circuit was appropriately concerned that unbundling requirements "come[] at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource." *Id.* at 429 (*citing Iowa Utilities Board*, 525 U.S. at 428-29). The D.C. Circuit concluded that "[the FCC's] naked disregard of the competitive context risks" inflicting costs on the economy where the competitive conditions would not allow the FCC to conclude that imposing those costs "would bring on a significant enhancement of competition." *Id.*

Just as the D.C. Circuit was concerned about the requirement that ILECs unbundle the high-frequency portion of the spectrum to allow CLECs to provide their own DSL service over the ILECs' loops in the face of substantial competition in the broadband market, this Commission should be concerned about a rule requiring BellSouth to continue to provide a service that is designed to be provided in tandem with its voice service when it is no longer the voice provider based on an alleged (and unproven) concern that BellSouth has market power in the high-speed Internet access

market. Although this Commission states that it has “not relied on the *Line Sharing Order*” for its decision, see Order at 8, the D.C. Circuit's rationale for vacating that Order applies equally here. The existence of significant competition in the high-speed Internet access market means that customers that want FDN's voice service *do have* an option for high-speed Internet access, and that BellSouth's decision not to continue to provide those customers with FastAccess cannot have an appreciable negative effect on competition for local voice service. Further, given the competition in the high-speed Internet access market, the Commission certainly should not impose this burdensome, costly and inefficient requirement on BellSouth.

5. **The Commission overlooked the fact that even if BellSouth had market power in a properly defined market for DSL services or DSL-based Internet Access, BellSouth has little to no ability to use that power to have a substantial effect on the market for local voice services because relatively few voice customers purchase high-speed Internet access.**

Even if this Commission determined that BellSouth has market power in a properly defined market, the evidence presented was that “[a]s of the end of April 2001, BellSouth had 133,015 wholesale and retail high-speed data subscribers in the State of Florida” (See Hearing Exhibit 1, BellSouth’s Response to FDN’s 1st Set of Interrogatories, Item No. 2). This is in comparison to the millions of BellSouth subscribers in the State of Florida to which FDN can offer voice service. Even if the number has grown substantially since last summer, the percentage of BellSouth’s customers that purchase FastAccess is still relatively small, meaning that the “problem” that FDN asserts it faces is also small.

To summarize, while it may be true that some customers that switched from BellSouth to FDN may be troubled about losing FastAccess, or that some BellSouth customers may decide not to switch to FDN’s service because they do not wish to lose FastAccess, the evidence shows that the percentage of potential customers for FDN that this represents is very, very small. It is simply not a substantial problem for FDN. At the same time, the cost to BellSouth of complying with the Commission’s order by continuing to provide FastAccess service to customers that leave BellSouth for FDN is very large. To provide FastAccess over the same loops that FDN uses for voice service would require substantial, difficult modifications to BellSouth’s systems at very high cost. It would also take considerable time to accomplish. To provide service over a

second telephone line to the customer's residence would be somewhat less of a burden on BellSouth for the relatively small number of customers involved, although it too would be very costly and inefficient, and BellSouth would have to charge considerably more than it currently charges for FastAccess for such an arrangement to be economically sensible for BellSouth because the efficiencies inherent in providing ADSL service over the same telephone line that provides customers with voice service would not be realized. Given that the market for high-speed Internet access is highly competitive, and given the fact that BellSouth clearly is not the dominant player in that market, there is simply no reason that the Commission should impose this substantial burden on BellSouth.

II. IN THE ALTERNATIVE, THE COMMISSISON SHOULD CLARIFY THAT SECTION III OF ITS ORDER DOES NOT REQUIRE BELLSOUTH TO PROVIDE FASTACCESS SERVICE OVER A UNE LOOP, BUT THAT INSTEAD, BELLSOUTH CAN COMPLY WITH SECTION III OF THE ORDER BY PROVIDING FASTACCESS OVER A NEW LOOP THAT IT INSTALLS TO SERVE THE END USER'S PREMISES AS SET FORTH BELOW.

For all of the reasons explained above, the Commission should reconsider Section III of its Order and either delete the section altogether or rule that BellSouth is not required to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops. Should the Commission decline to do so, however, Section III of the Order provides that if a BellSouth end user has FastAccess service and FDN wins that end user, BellSouth must continue to provide its FastAccess service to that end user. BellSouth respectfully requests that the Commission clarify that BellSouth is not required to provide the FastAccess service

over a UNE loop, but that instead, BellSouth may provide that service over a new loop that it installs to serve the end user's premises as set forth below.

A. The Evidence Supports a Decision that BellSouth is not Required to Provide FastAccess Service Over a UNE Loop.

BellSouth's retail FastAccess service is a nonregulated enhanced service that is not within the jurisdiction of the Commission. See Order at 8. As such, the Commission could not – and in fact, has not – ordered BellSouth to provide the service to all (or even some) of BellSouth's existing customers. Similarly, the Commission could not – and in fact, has not – ordered BellSouth to provide FastAccess to any and every FDN end user that may want to order FastAccess in the future. Moreover, as explained above, BellSouth's FCC Tariff No. 1 provides that BellSouth will provide DSL service only over an in-service BellSouth-provided exchange line facility. The Commission cannot, and did not, order BellSouth to violated this Federal tariff over which the Commission has no jurisdiction. Instead, the Commission has “caution[ed] that this decision should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service,” and it has issued a very limited ruling that “BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.” Order at 11 (emphasis added). Thus, the Commission's Order does not require BellSouth to provide its retail FastAccess service to an FDN end user that does not have FastAccess service at the time it switches its service from BellSouth to FDN. Instead, if a BellSouth end user has FastAccess service and FDN wins that end user, the Commission's Order requires BellSouth to continue to provide its FastAccess service to that end user.

The Order does not state that BellSouth must provide its retail FastAccess to the end users that are addressed by the order over a UNE loop, and it is BellSouth's understanding that the Commission has imposed no such requirement on BellSouth. As explained below, the evidence clearly supports the Commission's decision not to require BellSouth to provide its retail FastAccess service over a UNE loop.

- 1. BellSouth's FCC Tariff No. 1 provides that BellSouth will only provide its wholesale DSL service over an in-service BellSouth provided exchange line facility.**

As explained above, BellSouth's FastAccess service is an unregulated enhanced service that consists of a DSL component (the pipe) and Internet services (the water that flows through the pipe). Thus, in order to provide FastAccess service over a UNE loop, BellSouth must also provide DSL service over that UNE loop. The provision of BellSouth's DSL service is governed by BellSouth's Special Access FCC Tariff No. 1, and that tariff states that BellSouth's provision of DSL requires the existence of an "in-service, Telephone Company [i.e., BellSouth] provided exchange line facility." F.C.C. Tariff No. 1, Section 7.2.17(A). A UNE loop is not an "in-service [BellSouth] provided exchange line facility."

Thus, if BellSouth were to place its tariffed DSL on a UNE loop, BellSouth would be in violation of its federal tariff. The Commission clearly has no jurisdiction to alter that FCC Tariff, and the Commission was careful to note in its Order that it is not asserting jurisdiction over DSL. See Order at 8-9. Accordingly, Section III of the Commission's Order clearly does not require BellSouth to provide FastAccess service over a UNE loop.

2. **e evidence shows that BellSouth would have to make extremely onerous and costly” changes to its systems in order to provision FastAccess service to an end user served by an ALEC using . JNE loop.**

Copper telephone loops have always carried analog voice telephone service using the “low frequency” portion of the spectrum over which transmission of information is possible, leaving the high frequency portion of the loops unused. As the D.C. Circuit pointed out last month, “[r]ecent technological development allows the provision of DSL high-speed internet access over the high-frequency . . . spectrum.” *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 421 (D.C. Cir. 2002). DSL connectivity was thus designed to take advantage of this unused capacity, and it was a significant breakthrough because it permitted telephone lines to be used simultaneously for voice service and data service. DSL was thus specifically engineered to utilize a working telephone line that also provides basic telephone service.⁶

BellSouth has developed and deployed ADSL in a way that recognizes this inherent feature of the technology. For example, in order for BellSouth to determine whether a telephone line is capable of providing DSL service, BellSouth has constructed a database of working telephone numbers that it queries to determine whether a particular telephone line has the physical characteristics that make it capable of supporting DSL service, and whether the appropriate electronics have been installed in a central office or in a remote terminal to provide DSL service over that line. As BellSouth witness Tommy Williams testified:

⁶ This is a distinguishing feature between ADSL service and dial-up Internet service, which precludes simultaneous usage for telephone calls.

Prior to provisioning ADSL over a given loop . . . BellSouth must determine whether that loop will accommodate ADSL service. 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.

(See Tr. at 283).

Similarly, once BellSouth is providing ADSL service over a line, it manages that service, and handles trouble issues, using the BellSouth-provided telephone number.

Again, Mr. Williams testified:

BellSouth cannot utilize mechanized maintenance and trouble isolation systems on such UNE loops for several reasons. First, all of these systems are based on telephone numbers, and the telephone numbers of ALECs like FDN are not included in the relevant databases. Second, many of the mechanized systems such as mechanized loop testing, or MLT are a function of the switch. And if the dial tone does not originate from a BellSouth switch, the mechanized maintenance and trouble isolation features are not available. These systems are critical in maintaining quality ADSL service.

(See Tr. at 316; 365).

If an ALEC obtains UNE loops or UNE-P service from BellSouth in order to provide telephone service to its end users, BellSouth simply lacks the tools it would need to provision and maintain ADSL service over that line. Mr. Williams testified that changing BellSouth's systems to accommodate the provisioning of FastAccess over a UNE loop would be "extremely costly and onerous." (See Tr. at 364. See also Tr. at 366). No evidence in the record refuted this testimony.

The Commission correctly rejected FDN's argument that BellSouth developed operation support systems ("OSS") "in response to the Act's requirements" and, therefore, should be required to develop systems necessary to provide FastAccess over a UNE loop regardless of the costs and burden associated with doing so. BellSouth is required to provide certain OSS that support interconnection, services, and network elements that are required by section 251 of the Act. BellSouth is not required to provide OSS systems – or any other systems for that matter – that support the provisioning of unregulated, non-telecommunications services such as FastAccess to customers of ALECs like FDN.

3. It is the ALEC – and not BellSouth – that has the right to full use of the features and functions of a UNE loop.

Another reason that the Commission's decision not to require BellSouth to provide its retail FastAccess service over a UNE loop is correct is the fact that once an ALEC purchases a UNE loop from BellSouth, the ALEC has control over the loop, including the high-frequency portion of the loop. BellSouth has no right to use that loop for any purpose.⁷ (See Tr. at 284). There is no precedent for the Commission (or a court) ordering a company to provide a service over a facility controlled by another firm

⁷ If BellSouth wanted to use the high-frequency portion of the loop to provide ADSL or FastAccess, it would need to negotiate with the ALEC that purchased the loop from BellSouth. (See Tr. at 284). While this may seem trivial in the event that FDN wants BellSouth to use the high-frequency portion of the loop and will agree not to charge BellSouth for such use, there are hundreds of ALECs. In all likelihood, BellSouth could not establish any uniform agreement about the terms and conditions of using the high-frequency portion of the UNE loops that the ALECs lease from BellSouth. This would add tremendous complexity (not to mention time and expense) to the situation.

in order to provide a service to that other firm's customers, and there is no factual or legal basis for such an extreme requirement here. This would be the imposition of a very unusual affirmative obligation on BellSouth to assist a competitor. While the Act imposes certain affirmative obligations on BellSouth to assist competitors, this simply is not one of them.

B. Although it is Inefficient and Costly, and Although it is Unreasonable for BellSouth to be Required to do so, BellSouth Intends to Comply with Section III the Commission's Order by Installing a New Loop Facility at the Premises of any End User Addressed by this Order and by Providing its Retail FastAccess Service to that End User Over the New Loop Facility.

If the Commission does not amend its Order as a result of this Petition, and if the Order is not stayed pending appeal, BellSouth intends to comply with the Order by provisioning a new loop facility to FDN's end users that are addressed by the Order and providing FastAccess service over that new facility. The process BellSouth intends to use will be as follows.

When FDN wins a customer from BellSouth, FDN will notify BellSouth if DSL is on any of that end user's lines that FDN has won. If DSL is on any such lines, FDN will identify those lines to BellSouth, and BellSouth will determine whether BellSouth's retail FastAccess service is on any of those lines. If it is, BellSouth will install a new loop facility to serve the end user's location.⁸ Once that new facility is in place, BellSouth's FastAccess service will be moved from the loop that it currently is on to the new loop. BellSouth will then process the order to change the customer's lines over to FDN.

⁸ Unless the end user establishes local exchange service with BellSouth, this new loop will not provide voice service to the end user.

BellSouth will not charge FDN or the end user any nonrecurring charges associated with installation of the new loop facility. Once the new loop facility is in place and FastAccess is being provided over that new facility, BellSouth will charge the end user the standard rates for FastAccess plus an additional charge, not unlike the additional charge cable modem providers might charge customers who do not also purchase basic cable service from the cable company.

This approach clearly is inefficient and costly. Without a doubt, BellSouth will incur costs that it cannot reasonably expect to recover under this approach. This approach, however, is the lesser of all evils in that BellSouth would incur even more costs that it could not reasonably expect to recover if it were to perform the systems modifications that would be necessary to support the provisioning of FastAccess over a UNE loop. Additionally, this method of providing FastAccess over a separate facility avoids the issues that would inevitably arise if BellSouth were to attempt to use the high frequency portion of a UNE loop to provide FastAccess to an end user.

Although it is inefficient and costly for BellSouth, and although these inefficiencies and costs should not be imposed upon Bellsouth, this method of complying with the Order will accomplish the Commission's goal of ensuring that BellSouth end users that have FastAccess at the time they switch to FDN will not lose that service. At the same time, BellSouth's method avoids some (but by no means all) of the problems and expenses associated with provisioning FastAccess service over a UNE loop. Accordingly, if the Commission does not reconsider its Order as requested in Section II of this Petition, BellSouth respectfully requests that the Commission clarify

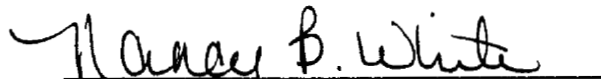
that BellSouth is not required to provide the FastAccess service over a UNE loop, but that instead, BellSouth may provide that service over a new loop that it installs to serve the end user's premises as set forth above.

III. THE COMMISSION SHOULD EXTEND THE TIME FOR THE PARTIES TO FILE A SIGNED INTERCONNECTION AGREEMENT WITH THE COMMISSION.

The Order requires the parties to "submit a signed agreement that complies with our decisions in this docket for approval within 30 days of issuance of this Order." See Order at 25. Since this Order was issued, both FDN and BellSouth have asked the Commission to reconsider or clarify Section III of the Order. The Commission, therefore, should extend the time for the parties to file a signed agreement that complies with its decisions in this docket until 30 days after the Commission rules on the pending motions for reconsideration or clarification. Such an extension would facilitate the parties' efforts to draft compliant contract language, and it may eliminate the need for the parties to submit best and final proposals for resolution by the Commission.

Respectfully submitted this 20th day of June, 2002.

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