State of Florida

ORIGINAL

Public Service Commission

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

DATE: July 29, 2003
TO: Division of the Commission Clerk and Administrative Services
FROM: Samantha M. Cibula, Office of the General Counsel S.M.C.
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

Attached is a copy of BellSouth's Complaint filed in the United States District Court for the Northern District of Florida in the above-referenced matter to be included in the docket file.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff, v. FLORIDA DIGITAL NETWORK, INC.; THE FLORIDA PUBLIC SERVICE COMMISSION; LILA A. JABER, in her official capacity as Chairman of the Florida Public Service Commission, J. TERRY DEASON, in his official capacity as Commissioner of the Florida Public Service Commission; BRAULIO L. BAEZ, in his official capacity as Commissioner of the Florida Public Service Commission; MICHAEL A. PALECKI, in his official capacity as Commissioner of the Florida Public Service Commission, and RUDOLPH BRADLEY, in his official capacity as Commissioner of the Florida Public Service Commission Defendants.	Civil Action No. 4:03 CV 212-RH-4

COMPLAINT

Nature of the Action

1. Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") brings this action seeking declaratory and injunctive relief from a decision of the Florida Public Service Commission ("FPSC") that is contrary to, and preempted by, federal law.

2. This case involves a decision of the FPSC requiring BellSouth to provide its DSL-Based[1] High-Speed Internet Access Service to customers who obtain voice service from Florida Digital Network, Inc. ("FDN") over certain "unbundled network elements" or "UNEs." What BellSouth terms "DSL-Based High-Speed Internet Access" involves two components: (1) high-speed DSL transmission service, and (2) the data manipulation and processing capabilities used to offer Internet access.

3. The market for high-speed Internet access is highly competitive, and local exchange carriers such as BellSouth are decidedly secondary players in that market. The majority of consumers who purchase a high-speed Internet access product buy cable modem service from the cable companies. The provision of cable modem service is generally unregulated.

4. The question here is whether, consistent with federal law, the FPSC could impose a significant regulation on BellSouth that would impede BellSouth's choices as to how to offer its service in competition with the market-leading cable providers and others. More specifically, the issue is whether BellSouth can be required to provide DSL-Based High-Speed Internet Access Service to customers in Florida who are receiving voice service from FDN over leased UNE loops (the wires or equivalent facilities that connect a customer's premises to the public telecommunications network).

5. The FPSC may not do so for a series of independent reasons. First, the Federal Communications Commission ("FCC") has clearly stated on multiple occasions that BellSouth has no obligation to provide its DSL-Based High-Speed Internet Access Service over leased UNE loops.

6. Second, given the jurisdictionally interstate nature of DSL-Based High-Speed Internet Access Service and the action the FCC has taken to ensure that such "information services" remain unregulated, the FPSC lacks authority to require BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to customers who receive UNE-based voice service from a Competitive Local Exchange Carrier ("CLEC") such as FDN. The FPSC lacks authority to regulate interstate services, much less to regulate interstate information services, which as a matter of federal law are unregulated. For these reasons as well, the FPSC's decision is inconsistent with federal law, beyond its authority, and preempted.

7. Equally important, the FPSC's decision is contrary to BellSouth's filed federal tariff for DSL transmission and, for that reason as well, is unlawful and preempted.

8. For these and other reasons, the FPSC's decision compelling BellSouth to provide DSL-Based High-Speed Internet Access Service to FDN's customers receiving voice service over UNE loops violates the Federal Telecommunications Act of 1996 ("1996 Act" or "Act"); is inconsistent with and violates numerous FCC decisions implementing the requirements of the Act; is beyond the FPSC's authority; and is preempted by federal law. Moreover, the FPSC's decision is arbitrary and capricious,

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[1] DSL is an acronym for Digital Subscriber Line.

inconsistent with the agency record, and results from a failure to engage in reasoned decision-making. It should therefore be reversed and vacated and its enforcement enjoined.

Parties, Jurisdiction, and Venue

9. Plaintiff BellSouth is a Georgia corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida, and it is a Local Exchange Carrier under the Federal Telecommunications Act of 1996 ("1996 Act" or "Act").

10. Upon information and belief, Defendant FDN is a Florida corporation with its principal place of business in Florida and is a Competitive Local Exchange Carrier under the 1996 Act. FDN provides local phone service to businesses and other customers in Florida and Georgia.

11. Defendant FPSC is an agency of the State of Florida. The FPSC is a "State commission" within the meaning of the 1996 Act.

12. Defendant Lila A. Jaber is Chairman of the FPSC. Chairman Jaber is sued in her official capacity for declaratory and injunctive relief only.

13. Defendant J. Terry Deason is a Commissioner of the FPSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

14. Defendant Braulio L. Baez is a Commissioner of the FPSC. Commissioner Baez is sued in his official capacity for declaratory and injunctive relief only.

15. Defendant Michael A. Palecki is a Commissioner of the FPSC. Commissioner Palecki is sued in his official capacity for declaratory and injunctive relief only.

16. Defendant Rudolph Bradley is a Commissioner of the FPSC. Commissioner Bradley is sued in his official capacity for declaratory and injunctive relief only.

17. This Court has subject matter jurisdiction over the action pursuant to the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6), and pursuant to 28 U.S.C. § 1331. Although BellSouth believes that its claims arise under federal law, to the extent that state law is implicated, this Court has supplemental jurisdiction under 28 U.S.C. § 1367. The Court also has subject matter jurisdiction over the action pursuant to the Supremacy Clause of the U.S. Constitution and 28 U.S.C. § 1343(a)(3).

18. Venue is proper in this district under 28 U.S.C. § 1391. Venue is proper under section 1391(b)(1) because the Commission resides in this District. Venue is proper under section 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the FPSC sits.

Regulatory Background

19. Prior to the 1990s, local telephone service was generally provided in a particular geographic area by a single, heavily regulated company such as BellSouth that held an exclusive franchise to provide such service. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. *See* 47 U.S.C. §§ 251-253. As Congress explained, the 1996 Act creates a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf.

Rep. No. 104-230, at 113 (1996). To achieve that goal, Congress not only preempted all state and local exclusive franchise arrangements, *see* 47 U.S.C. § 253, but also placed certain affirmative duties on incumbent local exchange carriers ("incumbent LECs" or "ILECs") such as BellSouth to assist new entrants in the local market.

20. Among those duties is BellSouth's obligation to provide access to the piece-parts of its existing local exchange network to new market entrants such as FDN. Each of these piece-parts is called a "network element." The Act defines a "network element" to include "a facility or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29). Under the Act, BellSouth has a duty to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). Network elements subject to this requirement are called "Unbundled Network Elements" or "UNEs."

21. The Act directs the FCC to determine "what network elements should be made available" on an unbundled basis, *id.* § 251(d)(2), and articulates a clear limiting standard that the FCC must apply in carrying out that statutory role, *see id.*; *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366 (1999). According to the statute, ILECs are required to provide access to proprietary network elements only where such access is "necessary,"47 U.S.C. § 251(d)(2)(A). As to non-proprietary network elements, ILECs must furnish access only when the "failure to provide access . . . would impair" the ability of other carriers to provide service. *Id.* § 251(d)(2)(B).

22. The FCC has required ILECs to provide CLECs with access to, among other things, the local loop -- the basic copper wire or equivalent facility that connects each subscriber to BellSouth's network -- as a UNE. When a CLEC leases a local loop, it obtains exclusive control over that facility. See 47 C.F.R. § 51.309(c).

23. Within the relevant legal rules, an ILEC has no control over the services provided over a leased UNE loop facility and no legal obligation (or ability) to provide any service over that facility.

24. A CLEC that provides voice service via a UNE loop can provide a combination of both voice and DSL services over the same copper loop either individually or in conjunction with another carrier. This practice is known as "line splitting."

25. In addition, the FCC has required ILECs to engage in what is known as "line sharing." Line sharing obliged ILECs to offer CLECs high-speed data services such as DSL on the same local loop over which BellSouth offers voice services. To enable line sharing, the FCC required ILECs to make available as a UNE the "high frequency portion of the local loop" – that is, the portion of spectrum over which data services are provided. The D.C. Circuit has vacated and remanded the FCC's decision to require line-sharing because it was inconsistent with the robustly competitive nature of the broadband market. *See United States Telecom. Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002). In a February 20, 2003 Press Release, the FCC indicated that it would end ILEC's line sharing obligation. As of this date, however, the FCC has not released its order addressing that issue.

The Internet and the Nature of DSL-Based High-Speed Internet Access Service

26. The Internet is "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1). The Internet includes the now familiar World Wide Web.

27. DSL technology enables digital or data signals to be transmitted over the copper loop facilities used for ordinary telephone service, and at much higher speeds than can be reached using traditional dial-up modem service. DSL is one of several platforms – such as cable modem, wireless, and satellite services – used to provide high-speed access to the Internet. Cable modem is by far the market-leading technology. To provide high-speed Internet access, a provider combines (1) DSL transmission, cable modem service, or another form of high-speed transmission purchased at wholesale with (2) the information-processing functionalities provided by an Internet Service Provider ("ISP"), such as America Online or Earthlink.

28. When offered in this combination, DSL-Based High-Speed Internet Access Service is an unregulated, interstate "information service."[2] The 1996 Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). For more than thirty years, the FCC has consistently held that information services should remain free from federal and state regulation. The FCC has taken numerous steps to ensure that the information services market is unregulated, and its *Computer Inquiry* orders have expressly preempted state regulation of interstate information services. Federal courts have upheld this exercise of

[2] *See* 88 F.C.C.2d at 541, ¶ 83 n.34.

preemptive authority. For instance, in the *Computer II Further Reconsideration Order*,[3] the Commission made clear that its decisions served to preempt any state regulation of enhanced services (which are now known as information services). The D.C. Circuit upheld this exercise of preemptive authority, explaining that "[f]or the federal program of deregulation to work, state regulation of CPE [customer premises equipment, i.e., customer telephones] and enhanced services ha[s] to be circumscribed." *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982). *See also id.* at 214 (expressing agreement with FCC determination that preemption of state regulation is justified . . . because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE"). Accordingly, that court held, "state regulatory power must yield to the federal." *Id.* at 216; *see also People of California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) (recognizing that state regulation of interstate information services would "essentially negat[e] the FCC's goal").

The 1996 Act's Requirement that BellSouth Enter Into Interconnection Agreements

29. In addition to the requirement to sell unbundled network elements to CLECs, the 1996 Act also requires incumbent carriers to negotiate with CLECs in order to establish "the particular terms and conditions of agreements to fulfill" the other duties prescribed by section 251 of the Act. *See* 47 U.S.C. § 251(c)(1). If the parties are unable to reach an agreement voluntarily, either party may ask the state commission to arbitrate any open issues. *See id.* § 252(b)(1). The relevant state commission may then resolve the disagreements between the parties, "ensur[ing] that such resolution and conditions

[3] Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 FCC 2d 512, 541 ¶ 83 n.34 (1981) ("*Computer II Further Reconsideration Order*").

meet the requirements of section 251 of [the Act], including the regulations prescribed by the Commission pursuant to section 251." *See id.* § 252(c)(1).

30. Additionally, after the parties have reached a full agreement – whether through negotiation, arbitration, or both – the state commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. *Id.* § 252(e)(1)-(3). Any party aggrieved by a state commission determination has a statutory right to bring suit in a federal district court. 47 U.S.C. § 252(e)(6).

The FPSC Proceedings

31. On January 24, 2001, FDN filed in the FPSC a petition for arbitration to resolve outstanding issues with BellSouth related to a new interconnection agreement. BellSouth responded on February 19, 2001. Thereafter, FDN filed a Motion to Amend its arbitration petition on April 9, 2001. BellSouth filed its Response in Opposition to the Motion on April 16, 2001. FDN filed its Reply to BellSouth's Opposition on April 30, 2001. On May 22, 2001, the FPSC issued its order granting FDN's Motion to Amend its arbitration petition. *See* FPSC Order No. PSC-01-1168-PCO-TP (attached as Exhibit A). The parties resolved all issues but one prior to the Administrative Hearing on the petition for arbitration: whether BellSouth was required to continue to provide retail DSL-Based High-Speed Internet Access to customers who opted to switch their local phone companies and receive voice service from FDN over UNEs loops.

32. The FPSC held a hearing on August 15, 2001. On June 5, 2002, the FPSC issued its Final Order on Arbitration, in which it held that BellSouth must continue to provide DSL-Based High-Speed Internet Access to customers who receive FDN voice service over UNE loops. *See* FPSC Order No. PSC-02-0765-FOF-TP (attached as

Exhibit B). Upon both parties' request, the FPSC granted an extension of time in which to file an interconnection agreement. Additionally, both parties filed motions for reconsideration, which the FPSC denied on October 21, 2002. *See* FPSC Order No. PSC-02-1453-FOF-TP (attached as Exhibit C). On November 20, 2002, BellSouth filed its FDN interconnection agreement. That agreement was replaced on February 5, 2003 to reflect updated Florida rates for UNEs. The parties had some difficulty reaching agreement on the precise language to use in order to capture the FPSC's order that BellSouth continue to provide its DSL-Based High-Speed Internet Access Service to end users who obtain voice service from FDN over UNE loops. Briefs were exchanged on this issue before the FPSC. On March 21, 2003, the FPSC issued its decision resolving the disagreement, and the parties were instructed to file a final interconnection agreement within 30 days. *See* FPSC Order No. PSC-03-0395-FOF-TP (attached as Exhibit D).

33. After the parties filed the agreement, on June 9, 2003, the FPSC issued its final order, approving the interconnection agreement and its amendments. *See* FPSC order No. PSC-03-0690-FOF-TP (attached as Exhibit E).

The FPSC's Decision Is Contrary to Federal Law

34. The FPSC's decision is contrary to federal law. The retail DSL-Based High-Speed Internet Access Service that the FPSC ordered BellSouth to provide to FDN's voice customers is an interstate service that is beyond the FPSC's authority to regulate. Indeed, the service at issue is an interstate information service that, as a matter of federal law, must remain unregulated.

35. Because the FPSC has no authority to regulate interstate services -- much less interstate information services -- except to the extent provided by the 1996 Act, and

because the 1996 Act does not grant the FPSC any authority to enact the regulation at issue here, the FPSC lacked jurisdiction to order BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to its customers who receive voice service from FDN over UNE loops.

36. Moreover, the FPSC's decision is contrary to well-established FCC precedent making clear that ILECs are not required to provide DSL service over UNE loops. In numerous orders, the FCC has definitively and plainly stated that ILECs have no obligation to provide their wholesale DSL services over UNE loops. *See, e.g.*, Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18515, ¶ 324 (2000) ("*Texas Order*"). The FCC has specifically determined, moreover, that the BellSouth policy at issue here is not discriminatory *and* is consistent with federal law. *See* Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, 17 FCC Rcd 9018, 9100-01, ¶ 157 & n.562 (2002); Memorandum Opinion and Order, *Joint Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595, 17683, ¶ 164 (2002). Under the 1996 Act and standard principles of preemption, the FCC's unambiguous determinations in this regard preempt the FPSC's authority to make an inconsistent determination.

37. Additionally, BellSouth's federal wholesale DSL tariff establishes that BellSouth will only provide that service over loops over which it provides voice service. That tariff is violated when the FPSC requires BellSouth to provide service over UNE

loops leased by -- and thus under the control of -- FDN. The FPSC lacks the authority to add to or alter the terms of that federally filed tariff.

38. The FPSC's decision requiring BellSouth to provide DSL-Based High-Speed Internet Access Service to FDN's UNE voice customers is also unlawful because it effectively establishes a new UNE – the low frequency portion of the loop. Because the 1996 Act expressly grants to the FCC the authority to identify the network elements that must be unbundled, the FPSC has no authority under the statute to create a new UNE obligation that the FCC has expressly declined to mandate. The FPSC's decision here conflicts with the FCC's express determination that only the high-frequency portion of the spectrum used for DSL service should be treated as a separate network element. *See Texas Order*, 15 FCC Rcd at 18517-18, ¶ 330 (noting that the FCC has "unbundled the high frequency portion of the loop when the incumbent LEC provides voice service" but has "not unbundle[d] the low frequency portion of the loop and did not obligate incumbent LECs to provide xDSL service" where end-users received their voice service from CLECs). Moreover, not only is the FPSC's decision preempted, but also the provisions of state and federal law that it has cited in support of its ruling in fact provide no authority for the FPSC's ruling.

39. Even if the FPSC somehow did possess the authority to create additional UNE obligations, the FPSC nevertheless failed to undertake the "necessary and impair" analysis expressly required by the 1996 Act. *See* 47 U.S.C. § 251(d)(2). Accordingly, the FPSC's determination violates the plain language of the 1996 Act.

40. In addition, the FPSC's determination that BellSouth must provide DSL-Based High-Speed Internet Access to FDN's customers over UNE loops is arbitrary,

capricious, and otherwise unlawful. The FPSC based its decision in part on its belief that BellSouth's resistance to provisioning DSL-based High-Speed Internet Access on UNE loops controlled by CLECs is anticompetitive. The FPSC, however, ignored the evidence that BellSouth lacks market power in the market for high-speed Internet service. The majority of consumers receive their high speed internet service through other (unregulated) means: cable modem, predominantly, but also through wireless and satellite technologies. Because BellSouth lacks market power, as a matter of both law and economics, BellSouth cannot act anticompetitively by bundling its DSL-based high-speed Internet access with BellSouth voice service, offered either at retail or on a resold basis. Nonetheless, the FPSC did not address these issues and it cited no record evidence--because there was none--demonstrating any consumer harm as a result of BellSouth's practice. That lack of evidence and the failure to reasonably explain its conclusion on these issues independently render the FPSC's decision arbitrary and capricious and lacking in reasoned decision-making. The FPSC's decision is also arbitrary and capricious because it is internally contradictory.

41. Finally, BellSouth has designed its DSL-Based High-Speed Internet Access to be an overlay to its voice service. In order to comply with the FPSC's requirement that BellSouth make its DSL-Based High Speed Internet Service available to customers not receiving their voice service from BellSouth, BellSouth will incur substantial costs. Because the FPSC's order does not make any provision by which BellSouth may recoup those costs, BellSouth has suffered a taking of property without due process in violation of the Fifth and Fourteenth Amendments.

CLAIM FOR RELIEF

42. BellSouth incorporates the foregoing paragraphs of this Complaint as if set forth completely herein.

43. For all the reasons discussed above, the FPSC's and the Commissioner Defendants' decision directing BellSouth to provide DSL-Based High-Speed Internet Access Service to FDN UNE customers is contrary to, and preempted by, federal law. Additionally, the provisions of state and federal law cited by the FPSC do not support its determination. The FPSC's decision is also beyond its lawful authority, arbitrary and capricious, inconsistent with the evidence presented to the FPSC, internally inconsistent, and results from a failure to engage in reasoned decision-making.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BellSouth prays that the Court enter an order:

1. Declaring that the FPSC's decision is unlawful.

2. Enjoining all the Defendants, and all parties acting in concert therewith, from seeking to enforce that unlawful decision against BellSouth.

3. Granting BellSouth such further relief as the Court may deem just and reasonable.

Respectfully submitted,

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Counsel for BellSouth Telecommunications, Inc.

July 7th, 2003.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

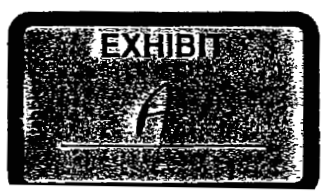
In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-01-1168-PCO-TP ISSUED: May 22, 2001

ORDER GRANTING MOTION TO AMEND ARBITRATION PETITION

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. An issue identification meeting was held for this docket on April 12, 2001. 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. This matter is currently set for an administrative hearing.

MOTION

In its Motion, FDN asserts that prior and subsequent to FDN's filing the Petition, FDN and BellSouth representatives had discussed in negotiations an unbundled network element (UNE) ordering issue that FDN did not include in its Petition. Prior to filing its Petition for Arbitration, FDN alleges that it believed that parties would be able to negotiate a mutually satisfactory resolution of this issue, proposed Issue 10 (See Attachment A). However, on February 21, 2001, BellSouth informed FDN that the issue could not be resolved in a satisfactory time frame. FDN states further that it has not received any information on the issue from BellSouth since that time, and no agreement has been reached.



FDN maintains that it should be allowed to amend its Petition to include the proposed Issue 10. FDN explains that the inclusion of this issue will not prejudice BellSouth's case since BellSouth has been aware of the issue for some time. The parties discussed the issue before and after the Petition was filed and FDN argues adding the issue will not necessitate any change in the established case schedule. Moreover, FDN contends that the arbitration process is designed to resolve issues such as the one presented here. FDN indicates that the parties' current interconnection agreement provides a vehicle for Commission resolution of such an issue, which is addressed in the Bona Fide Request Process and expedited Resolution Procedures. Whether in this case by amendment of the Petition or in a separate request for expedited dispute resolution, FDN asserts that the Commission will be asked to resolve this issue in roughly the same interval if the parties can not reach an agreement. Thus, FDN alleges that administrative economy supports permitting the requested amendment to avoid the inefficient and duplicative efforts inevitable in dual, simultaneous proceedings. Further, FDN states that pursuant to Rule 28-106.202, Florida Administrative Code, a petitioner may amend the petition after the designation of the presiding officer only upon order of the presiding officer. If the Motion is granted, FDN asserts that Section 1.190(c), Fla. R. Civ. Pro., provides that amendments to pleadings, where permitted by rule or order, "shall relate back to the date of the original pleading." Accordingly, FDN states that if the Motion is granted, it should be deemed filed on the date of the original Petition to arbitrate.

RESPONSE

In its Response, BellSouth asserts that the Act does not allow FDN to amend its pleading in order to add issues that were not presented in its Petition or in BellSouth's Response. BellSouth states that the Act establishes an explicit and streamlined timetable for the resolution of issues that remain unresolved after at least 135 days of good-faith negotiations over the terms and conditions of an interconnection agreement. BellSouth contends that even if the Act allows an amendment to the Petition, FDN has not met its burden of proving that its delay in filing the amendment was reasonable. BellSouth explains that the petitioning party is required to submit "all relevant documentation concerning the unresolved issues, the position of each of the parties with

respect to those issues, and any other issues discussed and resolved by parties. Section 252(b)(2)(A) of the Telecommunications of Act of 1996 (Act). BellSouth asserts that the petition and response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings.

BellSouth alleges that FDN's assertion that its Motion cures the fact that proposed Issue 10 does not appear in its Petition because amendments to pleadings "shall relate back to the date of the original pleading" is incorrect. BellSouth explains, however, that federal courts reviewing arbitration rulings in some other jurisdictions have ruled that state commissions have no authority to decide issues not raised in either the petition for arbitration or the response. BellSouth states that although FDN's Motion makes it clear that the proposed Issue 10 was identified during these negotiations and that it remained unresolved at the time that FDN filed its Petition, FDN failed to raise this unresolved issue in its Petition. BellSouth contends that FDN filed its Motion 47 days after FDN knew that proposed Issue 10 would not be resolved. Hence, BellSouth requests that the Commission deny FDN's Motion to Amend Petition because FDN has not provided a reasonable explanation for its delay in seeking leave to amend its Petition.

DECISION

Pursuant to Rule 28-106.202, the petitioner may amend its petition after the designation of the presiding officer only upon order of the presiding officer. Accordingly, it appears that the presiding officer has the authority to render a decision on a motion to amend petition. I note that FDN's Reply to BellSouth Opposition to Motion to Amend arbitration petition is not contemplated by Commission rules; therefore, it is not addressed herein. In its Response, BellSouth states that FDN's Motion should be denied because FDN failed to provide a reasonable explanation for why it had not filed Motion earlier. Although BellSouth asserts that the Act does not provide parties an allowance to amend a petition for arbitration, BellSouth has not presented a compelling argument that the Act requires that I deny FDN's Motion. I concur, nevertheless, with BellSouth in its assertion that the petition and response to the petition establish the exclusive list of issues that may be addressed during the arbitration proceedings.

However, in Docket No. 970730-TP, Petition for arbitration filed by Telenet, Telenet filed for a Motion to Accept Telenet's Amended Request for Relief. Having found that Telenet should be allowed to amend its request for relief, Order No. 98-0332-PCO-TP was issued granting Telenet's Motion to Accept Amended Request for Relief. In this Order, it was established that the Commission has broad discretion to allow amendment of pleadings and that the Commission should follow a policy of allowing pleadings to be freely amended, if the privilege to amend has not been abused, in order that disputes may be resolved on the merits. Although, it appears that FDN had an opportunity to amend its Petition earlier, there is no indication that FDN abused its privilege to amend its petition. In keeping with the notion of judicial economy, I believe that adding the proposed Issue 10 would allow parties to address the merits of their case in this proceeding. Further, it does not appear that BellSouth will be unduly prejudiced since it was aware that proposed Issue 10 had not resolved by parties. Accordingly, FDN's Motion to Amend Petition is hereby granted. BellSouth shall have seven days from the issuance date of this Order to file its Amended Response to proposed Issue 10 in FDN's Amended Petition for Arbitration.

Based on the foregoing,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Florida Digital Network, Inc.'s Motion to Amend Arbitration Petition, is hereby granted.

ORDERED that BellSouth Telecommunications, Inc. shall respond within seven days from the issuance date of this Order to Florida Digital Network, Inc.'s Amended Petition for Arbitration as set forth in the body of this Order.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 22nd Day of May, 2001.

J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

FRB

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060,

Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

ATTACHMENT A

PROPOSED ISSUE 10:	Should BellSouth be required to provide FDN a service order option for all voice-grade UNE loops (other than SL-1 and SL-2) whereby BellSouth will (1) design circuits served through an integrated subscriber loop carrier (SLC), where necessary and without additional requirements on FDN, (2) meet intervals at parity with retail service, (3) charge the SL-1 rate if there is no integrated SLC or the SL-2 rate if there is, and (4) offer the order coordination option?

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:

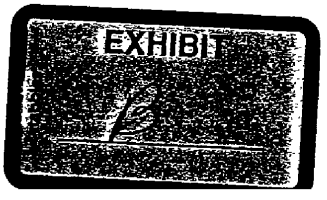
MATTHEW J. FEIL, ESQUIRE, 390 North Orange Avenue, Suite 2000, Orlando, Florida 32801-1640, and MICHAEL C. SLOAN, ESQUIRE, Swidler, Berlin, Shereff, & Friedman, LLP, 3000 K Street, Northwest, Suite 300, Washington, District of Columbia
On behalf of Florida Digital Network, Inc.

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

FELICIA R. BANKS, ESQUIRE and JASON FUDGE, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
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, Chief
Bureau of Records and Hearing
Services

(S E A L)

FRB

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.

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-02-1453-FOF-TP ISSUED: October 21, 2002

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTIONS FOR RECONSIDERATION, CROSS-MOTION FOR RECONSIDERATION AND MOTION TO STRIKE

BY THE COMMISSION:

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.

Prior to the administrative hearing, the parties resolved all 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. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. BellSouth filed a Motion to Strike Cross-motion for Reconsideration, or in the Alternative, Response to FDN's Cross-motion on July 5, 2002.

We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3,2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.

This Order addresses FDN's and BellSouth's Motions for Reconsideration, as well as the Cross-Motion for Reconsideration and Motion to Strike.

JURISDICTION

We have jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, 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 as required. Further, while Section 252 (e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we should utilize discretion in the exercise of such authority. In addition, Section

120.80(13)(d), Florida Statutes, authorizes us to employ procedures necessary to implement the Act.

We retain jurisdiction of our post-hearing orders for purposes of addressing Motions for Reconsideration pursuant to Rule 25-22.060, Florida Administrative Code.

FDN'S MOTION FOR RECONSIDERATION

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

We believe that FDN has failed to demonstrate that the Commission made a mistake of fact or law in rendering its decision. Therefore, we believe that FDN's Motion should be denied.

FDN contends that the Order does not appear to explicitly address FDN's entire request, and the Commission appears to have overlooked a material aspect of the anticompetitive allegation. FDN states that the anticompetitive effects of BellSouth's alleged tying practice are the same whether the customer is presently a BellSouth customer, whom FDN cannot capture, or is presently a FDN customer, whom FDN will lose because of BellSouth's anticompetitive practice. FDN states that the Order specifically prohibits BellSouth from "disconnecting its FastAccess Internet Service when its customer changes to another voice provider." However, FDN argues that the Commission could not have intended to rule that Florida consumers may be unreasonably denied the ability to obtain voice and DSL-based services from the provider(s) of their choice

unless the consumers exercised rights at just one specific point in time, prior to porting to an ALEC voice provider. Consequently, FDN suggests that the Commission meant to adopt an across-the-board rule requiring BellSouth to provide FastAccess service to all qualified customers served by ALECs over BellSouth loops.

BellSouth responds that the Order states 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. BellSouth believes that the Commission did not intend to require BellSouth to provide retail FastAccess service to any and every FDN end user that may want to order FastAccess. Rather, BellSouth was to provide FastAccess only to those BellSouth end users who decided to change their voice provider. We agree.

Although FDN argues that we overlooked a material aspect of the anticompetitive allegation, it fails to demonstrate that a point of fact or law has been overlooked. In our decision, we determined in part that BellSouth's practice of disconnecting its FastAccess Service unreasonably penalizes customers who desire to have access to voice service from FDN and DSL from BellSouth. Order at 11. Further, we determined that this practice creates a barrier to competition in the local telecommunications market. Id. Consequently, we found that BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

We believe that we were clear in our decision requiring BellSouth to continue to provide FastAccess Service to those BellSouth customers who choose to switch their voice provider. Id. The Order clearly demonstrates that we considered the arguments raised by FDN. Thus, FDN's Motion is mere reargument, which is inappropriate for a motion for reconsideration. Thus, FDN's motion is denied.

BELLSOUTH'S MOTION FOR RECONSIDERATION

As stated previously, the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.

2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). We have applied this same standard in addressing BellSouth's motion.

We believe that BellSouth has failed to demonstrate that we made a mistake of fact or law in rendering our decision. Therefore, we deny BellSouth's Motion for reconsideration regarding this issue.

In its Motion, BellSouth states that we have improperly converted an arbitration under the Act into a state law complaint case. BellSouth argues that its FastAccess Internet Service is a nonregulated nontelecommuications DSL-based service. Thus, BellSouth concludes that it is not a service over which this Commission has jurisdiction. FDN responds that nothing precludes the Commission's independent consideration of state law issues in addition to its authority under Section 252 of the Act. We agree. Section 251(d)(3) of the 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 requirements of this section and the purposes of this part.

Order at 10. Further, we believe that pursuant to Section 364.01(4)(b), Florida Statutes, the Commission's purpose in promoting competition is to ensure "the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Order at 9.

BellSouth contends that the FCC determined that BellSouth's practice of not providing its federally-tariffed, wholesale ADSL telecommunications service on UNE loops is not discriminatory and therefore does not violate Section 202(a) of the Act. BellSouth states that the purpose of Section 706 of the Act is to encourage

the deployment of advanced services and that the Commission's decision does not seek to promote advanced services but to promote competition in the voice market. FDN responds that while it is true that one of the factors which prompted the Commission's decision was to promote competition in the local voice market, the Commission's Order supports deployment and adoption of advanced services as promoted by Section 706 of the Act, by removing significant barriers that limit consumer choice in the local voice market. We agree. As stated in the Order, we determined that Congress has clearly directed 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." Order at 9.

BellSouth maintains that it is efficient for BellSouth to provide its FastAccess DSL service when it is providing the basic telephone service. FDN responds that if a customer cannot obtain cable modem service and BellSouth is the sole provider of DSL, BellSouth is put in a position of competitive advantage over ALECs. As stated in our Order, the Florida statutes provide that we must encourage competition in the local exchange market. Specifically, as set forth in Section 364.01(4)(g), Florida Statutes, the Commission shall "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . . " Order at 9. As addressed in the Order, we found that BellSouth's practice of disconnecting its FastAccess service when a customer changes to another voice provider is a barrier to entry into the local exchange market. Order at 4,8.

Furthermore, although BellSouth indicates that the D.C. Circuit Court of Appeals vacated the FCC's *Line Sharing Order* because the FCC failed to consider the competition in the market for DSL service, we do not believe that the same rationale in that decision is applicable here because that decision did not address competitive issues arising under state law in which a specific finding was made that the disconnection of the service was a barrier to local competition. Thus, we do not believe BellSouth has identified a mistake of fact or law by the Commission's lack of reliance on that decision.

BellSouth also requests that the Commission clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over a new loop that it installs to serve the end user's premises. FDN responds that BellSouth's provisioning proposal would be harmful and undermine the Commission's intent. Further, FDN asserts that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant. Although the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service to FDN was not addressed in the Commission's Order, we believe that FDN's position is in line with the tenor of our decision. While the Order is silent on provisioning, we believe our decision envisioned that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers.

We indicated in our Order that our finding regarding FastAccess Internet Service should not be construed as an attempt to exercise jurisdiction over DSL service but as an exercise to promote competition in the local voice market. Order at 11. To the extent that BellSouth has requested that our decision be clarified in regards to the provisioning of its FastAccess Internet Service, we observe that the provisioning of BellSouth's FastAccess Internet Service was not specifically addressed by our decision. However, we contemplated that BellSouth would provide its FastAccess Internet Service in a manner so that the customer's service would not be altered. We note however, that there may be momentary disruptions in service when a customer changes to FDN's voice service. While we decline to impose how the FastAccess should be provisioned, we believe that the provision of the FastAccess should not impose an additional charge to the customer.

BellSouth asserts that for it to provision its FastAccess Internet Service over a UNE loop would be a violation of its FCC tariff. Although we acknowledge BellSouth's FCC tariff, we believe that we are not solely constrained by an FCC tariff. As indicated in our order, under Section 251(d) of the Act, we can impose additional requirements as long as they are not inconsistent with FCC rules, or Orders, or Federal statutes. We believe that BellSouth has failed to make a showing that our decision is contrary to any controlling law. Further, at the hearing, BellSouth's witness Williams testified that although it would be

costly, it would be feasible to track UNE loops. To the extent that these technical limitations can be overcome, we infer that it would be technically feasible to provision FastAccess on an FDN UNE loop.

In summary, although BellSouth has asserted that we overlooked a number of material facts, BellSouth has not identified a point of fact or law which was overlooked or which the we failed to consider in rendering our decision. Therefore, the motion for reconsideration shall be denied. However, we envisioned that BellSouth's migration of its FastAccess Internet Service to an FDN customer would be seamless. Consequently, we clarify that BellSouth's migration of its FastAccess Internet Service to an FDN customer shall be a seamless transition for a customer changing voice service from BellSouth to FDN in a manner that does not create an additional barrier to entry into the local voice market.

BELLSOUTH'S MOTION TO STRIKE

In its Motion, BellSouth seeks to strike FDN's Cross-Motion for Reconsideration because it believes it is an untimely motion for reconsideration. Rule 25-22.060(1)(b), Florida Administrative Code, provides for cross-motions for reconsideration. While Rule 25-22.060(1)(a), Florida Administrative Code, does limit certain types of motions for reconsideration, the limitation urged by BellSouth is not one of them.[1] Nor could it be reasonably implied, because the limitations enumerated in the rule restrict reconsideration of orders whose remedies have been exhausted or orders that are not ripe for review. More importantly, we have held that "[o]ur rules specifically provide for Cross-Motions for Reconsideration and the rules do not limit either the content or the subject matter of the cross motion." Order No. 15199, issued October 7, 1985, in Dockets Nos. 830489-TI and 830537-TL. Based on the foregoing, we find that BellSouth's Motion to Strike is denied.

[1]Rule 25-22.060(1)(a), Florida Administrative Code, prohibits motions for reconsideration of orders disposing of a motion for reconsideration and motions for reconsideration of PAA Orders.

FDN'S CROSS-MOTION FOR RECONSIDERATION

FDN believes that it faces a greater burden than BellSouth in the self-provisioning of DSL loops, because it faces higher costs, does not have the same access to capital, and would be unlikely to obtain transport back to the central office. FDN asserts that BellSouth has an advantage because it buys DSLAMs in bulk. However, witness Gallagher only testifies that when "you're buying a whole bunch of them, you can buy those, you know, you can buy those fairly cheap." FDN presented no evidence that BellSouth purchases DSLAMs in bulk or that BellSouth receives a discount on its purchase of DSLAMs. In fact late-filed Exhibits 12 and 13 indicate that the purchase prices for FDN and BellSouth are relatively the same.[2]

FDN also contends that the Commission overlooked evidence that even if the cost for DSLAMs were the same, FDN is impaired because as a smaller company it does not have the same access to capital as BellSouth. However, the only testimony presented was witness Gallagher's assertion that he does not have the same captive market and that he could not raise the money to collocate FDN's own DSLAM because "[t]he rates of return aren't there."

BellSouth responds that there is no evidence that BellSouth buys DSLAMS in bulk, nor is there support that BellSouth receives a bulk discount on DSLAMs or line cards. BellSouth contends that FDN's assertion that the Commission overlooked the FCC's guidance to consider the economies of scale in performing an impairment analysis is not correct. BellSouth states that FDN has failed to meet the impair standard and that the evidence shows that BellSouth has not deployed line cards in Florida that are capable of providing the broadband service FDN seeks to provide.

We believe that FDN has failed to show any evidence that we overlooked or failed to consider. We considered the arguments presented by FDN and found that "BellSouth's arguments regarding the impact on the ILEC's incentive to invest in technology developments to be most compelling." Order at 17. In so doing, we

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[2]BellSouth late-filed exhibit 12 shows that BellSouth can purchase an 8-port DSLAM for $6,095, while FDN late-filed exhibit 13 shows that FDN can obtain an 8-port DSLAM for $6,900.

also found that "the record reflects that the costs to install a DSLAM at a remote terminal are similar for both BellSouth and FDN." Id.

FDN also claims that we overlooked evidence that even if FDN were able to collocate a DSLAM it likely would not be able to obtain transport back to the central office. However, there was also evidence that BellSouth offers UNE subloops between the remote terminal and the central office, and that BellSouth would sell these UNE subloops at the rates established by us. Upon consideration of this competing evidence, we found that "there was evidence regarding several proposed alternatives of providing DSL to consumers served by DLC loops when an ALEC is the voice provider." Order at 16.

Finally, FDN asserts that we did not address FDN's ability to collocate xDSL line cards when BellSouth begins to deploy NGDLC in Florida. There was testimony that approximately seven percent of BellSouth's access lines were served by NGDLCs, but there was also testimony that combo cards were not used for BellSouth's xDSL service.

We did not overlook or fail to consider this issue, because the issue was not before us. While FDN does argue that it has met part three of the impair standard, it concludes by stating that "[t]herefore, the FCC's four-part test is satisfied, and BellSouth must be ordered to offer unbundled packet switching where it has deployed DLCs." However, FDN fails to point out that an ILEC is only required to "unbundle[] packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal." UNE Remand Order ¶313. Even if the impair analysis could be read to apply in cases where BellSouth has deployed combo cards instead of DSLAMs, the unbundling requirement is only designed to remedy an immediate harm. The harm alleged by FDN is prospective because "none of those NGDLCs and none of those NGDLC systems are capable of using combo cards that would also support data." Based on the foregoing, we believe that FDN has failed to identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order.

The parties shall be required to file their final interconnection agreement within 30 days after the issuance of this

Order conforming with Order No. PSC-02-0765-FOF-TP, in accordance with Order No. PSC-02-0884-PCO-TP, Order Granting Extension of Time to File Interconnection Agreement. Thereafter, this Docket should remain open pending approval by us of the filed agreement.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Digital Network, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that BellSouth Telecommunication's Inc.'s Motion to Strike is hereby denied. It is further

ORDERED that Florida Digital Network, Inc.'s Cross-Motion for Reconsideration is hereby denied.

ORDERED that the parties shall file an interconnection agreement as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open pending the approval of the interconnection agreement.

By ORDER of the Florida Public Service Commission this 21st Day of October, 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)

FRB

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.

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-03-0395-FOF-TP ISSUED: March 21, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON

ORDER RESOLVING PARTIES' DISPUTED LANGUAGE

BY THE COMMISSION:

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.

Prior to the administrative hearing, the parties resolved all 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. This docket was considered at the April 23, 2002,

Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

On June 17, 2002, FDN filed a Motion for Clarification, or Reconsideration. BellSouth filed its Response to this motion on June 24, 2002.

On June 20, 2002, BellSouth filed a Motion for Reconsideration, or in the Alternative, Clarification. FDN filed its Response/Opposition to this motion on June 27, 2002. On that same day, FDN also filed a Cross-Motion for Reconsideration. BellSouth filed a Motion to Strike Cross-Motion for Reconsideration, or in the Alternative, Response to FDN's Cross-Motion on July 5, 2002.

We note that in their pleadings both parties also had requested an extension of time to file an interconnection agreement. On July 3, 2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement. On October 21, 2002, Order No. PSC-02-1453-FOF-TP was issued Denying Motions for Reconsideration, Cross-Motion for Reconsideration and Motion to Strike.

On November 20, 2002, BellSouth filed its executed interconnection agreement with FDN. (On February 5, 2003 BellSouth filed a replacement agreement that contains updated Florida rates for unbundled network elements.) Although the parties were able to reach agreement on most points, disagreements remained as to the specific language that should be incorporated into the agreement to reflect the Commission's decision as to BellSouth's obligation " . . .to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." On this same date, BellSouth also submitted its Position in Support of its Proposed Contract Language (BellSouth Position), in which it sets forth its proposed language where there is a dispute; similarly, FDN's proposed language is contained in its Motion to Approve Interconnection Agreement filed contemporaneously (FDN Motion to Approve). On December 2, 2002, FDN filed a Response to BellSouth's Position in Support of Proposed Contract Language (FDN Response).

This Order addresses which language, where the parties are in disagreement, shall be included in the final executed interconnection agreement filed by BellSouth and FDN.

We are vested with jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes.

II. ANALYSIS

In its Position in Support of its Proposed Contract Language, BellSouth identifies seven major areas where the parties disagree as to the wording that should be reflected in their agreement. For ease of reference, we follow the format in BellSouth's filing, discussing the views and arguments of BellSouth and FDN on each area, and then provide separate findings as to language for each of the seven areas. Language in dispute will be underlined.

A. Section 2.10.1

BellSouth language:

> In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides BellSouth® FastAccess® Internet Service ("FastAccess") to an end-user and FDN submits an authorized request to provide voice service to that end-user, BellSouth shall continue to provide FastAccess to the end-user who obtains voice service from FDN over UNE loops.

FDN language:

> In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides xDSL services (as defined in this

> Section 2.10) to an end user and FDN submits an authorized request to provide voice service to that end user, BellSouth shall continue to provide xDSL services to the end user.

There are two aspects in dispute here.

1. FastAccess service v. xDSL services

BellSouth believes that we only ordered it to continue providing FastAccess, its high-speed Internet access service, when a customer migrates his voice service to FDN. FDN notes that other independent Internet service providers, such as Earthlink or AOL, can subscribe to BellSouth's tariffed interstate ADSL transport offering and offer a high-speed Internet access service in competition with BellSouth. FDN notes that under BellSouth's interpretation of our order, if a BellSouth voice customer who, e.g., receives AOL's high-speed Internet Access service switches his voice service to FDN, BellSouth would be allowed to discontinue the provision of the interstate ADSL service, thus eliminating the customer's AOL high-speed Internet access service. FDN asserts that we did not intend BellSouth's restrictive reading, which it believes is arbitrary, capricious, and unsupported by the record in this proceeding.

Finding

In the FDN order, we concluded: "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 purpose of the new interconnection agreement, BellSouth shall continue to provide its FastAccess Internet Access Service to end users who obtain voice service from FDN over UNE loops." (emphasis added) FDN contends that BellSouth bases its interpretation on "occasional" uses of the term "FastAccess" in our order. We note that FDN cites to nowhere in the record where we raised similar concerns pertaining to other ISPs.

We believe that the occurrence of the term "FastAccess Internet Access Service" in the ordering statement unequivocally supports BellSouth's language. Therefore, we find that BellSouth's language shall be adopted as set forth.

2. UNE loops v. UNE-P

BellSouth interprets our order narrowly, as only requiring them to continue providing FastAccess over a FDN UNE loop, but not over a UNE-P, if FDN were to subscribe to one. BellSouth asserts that the issue in the arbitration only dealt with FastAccess on UNE loops and that there is no record evidence regarding UNE-P. Moreover, BellSouth notes that as a facilities-based provider, FDN purchases UNE loops from BellSouth.

FDN disputes BellSouth's view of our FDN order, initially noting that BellSouth's position is absurd because a UNE-P is a type of UNE loop. In its Response FDN states:

> Shortly after the Commission issued its award in the FDN arbitration, the Commission permitted Supra Telecom to incorporate the FDN arbitration award into its own interconnection agreement. The relief the Commission provided Supra, which was based on the FDN award and on the record from the FDN arbitration, expressly obligated BellSouth to continue providing its DSL service when an end-user converts its voice service to Supra utilizing a UNE-P line. It would make no sense at all for the Commission to sanction an inconsistent result here, as BellSouth requests.

Finding

We agree that in some sense a UNE-P is a form of loop, as argued by FDN. We also note that we concluded on reconsideration in Docket No. 001305-TP (Supra/BellSouth arbitration) that BellSouth was obligated to continue providing FastAccess when a customer converts his voice service to Supra using a UNE-P line. However, we believe the two proceedings are distinguishable. In the Supra docket, Supra, who currently is a UNE-P provider, expressly complained that BellSouth was disconnecting FastAccess when Supra migrated a FastAccess customer to UNE-P. In fact, the approved language in the Supra/BellSouth agreement implementing this provision is limited to UNE-P:

> 2.16.7 Where a BellSouth voice customer who is subscribing to BellSouth FastAccess internet

> service converts its voice service to Supra utilizing a UNE-P line, BellSouth will continue to provide Fast Access service to that end user.

In contrast, as noted by BellSouth, there is no mention in the FDN proceeding of continuing FastAccess in conjunction with UNE-P because FDN represented itself as not being a UNE-P provider; rather, they obtain UNE loops from BellSouth, not UNE-P.

We find that BellSouth's language, which references UNE loops, shall be adopted.

B. Section 2.10.1.2

BellSouth language: None

FDN language:

> For purposes of this subsection 2.10, BellSouth xDSL services include, but are not limited to, (i) the xDSL telecommunications services sold to information services providers on a wholesale basis and/or other customers pursuant to any BellSouth contract or tariff, and (ii) retail information services provided by BellSouth that utilize xDSL telecommunications provided by BellSouth.

We find that BellSouth's obligation to continue providing high-speed Internet access service is limited to its FastAccess information service.

C. BellSouth Section 2.10.1.5; FDN Section 2.10.1.5.1 and 2.10.1.5.2

BellSouth language:

> 2.10.1.5 BellSouth may not impose an additional charge to the end-user associated with the provision of FastAccess on a second loop. <u>Notwithstanding the foregoing, the end-user shall not be entitled to any discounts on FastAccess associated with the purchase of</u>

other BellSouth products, e.g., the Complete Choice discount.

FDN language:

2.10.1.5.1 BellSouth may not impose any additional charges on FDN, FDN's customers, or BellSouth's xDSL customer related to the implementation of this Section 2.10.

2.10.1.5.2 The contractual or tariffed rates, terms and conditions under which BellSouth xDSL services are provided will not make any distinction based upon the type, or volume of voice or any other services provided to the customer location.

In its Position BellSouth indicates that it currently provides a $4.95 Complete Choice discount to its retail voice customers who subscribe to both Complete Choice and FastAccess. It objects to FDN's proposed language because it presumably would require BellSouth to offer this discount to FDN's voice customers who subscribe to the stand-alone FastAccess service. BellSouth contends nothing in federal or state law mandates that it ". . .pass on a combined offering discount to customers who fail to meet the conditions for the combined offer." It notes that anomalous discrimination could occur. For example, a BellSouth FastAccess business customer who did not also subscribe to Complete Choice would pay $79.95 per month. However, under FDN's theory, a FDN FastAccess business customer, who also did not have BellSouth's Complete Choice, would instead pay $75.00. BellSouth observes that its proposed language is consistent with the comments of two of the Commissioners who participated in the agenda conference dealing with the parties' motions for reconsideration, where they stated that there may be justification for affording a BellSouth customer a discount when multiple services are provided in conjunction with FastAccess. Finally, BellSouth asserts that FDN's language effectively requires the stand-alone FastAccess offering to be identical to BellSouth's standard retail FastAccess service. However, the stand-alone product BellSouth proposes to offer will not have a back-up dial-up account, and will be billed only to a credit card.

FDN considers its proposed language to be non-discrimination provisions that are necessary in order to achieve the goal of our FDN arbitration order. FDN alleges that its §2.10.1.5.2 ". . .simply requires BellSouth to provide its xDSL service on a stand-alone basis without regard to other services that BellSouth may provide the end-user. FDN is particularly concerned about the impact of product "bundles" of voice and data services in which an excessive share of the "cost" of the bundled services is inappropriately imputed to the xDSL services that end-users acquire an [sic] individual basis." FDN further argues that we must reject BellSouth's proposed language in its §2.10.1.5, which disqualifies FDN voice customers who retain their FastAccess from receiving discounts associated with purchasing other BellSouth products. FDN states that BellSouth's linking of discounts on FastAccess to a customer's buying BellSouth voice products ". . .would constitute virtually the same type of tying arrangement that the Commission found unlawful in the first place."

Finding

As noted by BellSouth, this issue was debated by the presiding panel at the October 1, 2002, Agenda Conference. After much discussion, there was agreement that there could be legitimate justification for discounts for those customers that obtain all of their services from BellSouth, such as a package price.

Accordingly, we believe that there could be circumstances where a customer is entitled to a discount that need not be made available to a customer who subscribed only to FastAccess. As such, we find that BellSouth's proposed language shall be adopted, while excluding FDN's proposed language.

D. BellSouth Section 2.10.1.6; FDN Section 2.10.1.5.4

BellSouth language:

2.10.1.6 BellSouth shall bill the end user for FastAccess via a credit card. In the event the end user does not have a credit card or does not agree to any conditions associated with Standalone FastAccess, BellSouth shall be relieved of its obligations to continue to provide

FastAccess to end users who obtain voice service from FDN over UNE loops.

FDN language:

2.10.1.5.4 BellSouth will continue to provide end users receiving FDN voice service and BellSouth xDSL service the same billing options for xDSL service as before, or the parties will collaborate on the development of a billing system that will permit FDN to provide billing services to end-users that receive BellSouth xDSL services.

BellSouth states that it bills its end users for FastAccess either on their bill for BellSouth voice services or on a credit card, and notes that its billing systems currently can only generate a bill where the end user is a retail voice customer. Accordingly, since the FastAccess end user will be a FDN voice customer rather than a BellSouth voice customer, BellSouth opines that its only option is to bill such FastAccess customers to a credit card. Further, BellSouth asserts that if the customer declines to pay by credit card, BellSouth should no longer be obligated to provide FastAccess to the customer.

BellSouth also notes that in order to provision the FastAccess on a second loop, there may be occasions where BellSouth will need to re-wire the end user's jacks. Where this occurs, the customer will need to approve the re-wiring and provide BellSouth access to the premises. Here too, if the customer objects to the re-wiring or providing BellSouth access, BellSouth believes it should be relieved of its obligation to provide FastAccess.

FDN objects to BellSouth's proposed language in Section 2.10.1.6. In its Motion to Approve, FDN contends that BellSouth has provided no justification for why, when a FastAccess customer does not take his voice service from BellSouth, he must provide a credit card for billing. FDN believes that such a practice would inconvenience and annoy many customers. As an alternative, FDN proposes that FDN and BellSouth arrive at a mutually acceptable arrangement whereby FDN could bill customers for BellSouth-provisioned FastAccess. FDN asserts that "[i]t is not reasonable for BellSouth to incur the additional expense of provisioning xDSL

on an expensive stand alone loop but then claim that it is too expensive to send a paper bill to the customer for that service." Moreover, FDN believes that "BellSouth's alleged billing problems should not serve as an excuse relieving BellSouth of its obligation to provide ALEC voice end users xDSL service, thereby suppressing competition in the voice market."

Finding

Unfortunately, neither of our two prior orders in this proceeding nor the discussion at the reconsideration agenda conference provide unequivocal direction as to this implementation matter. We believe it is reasonable and is not discriminatory for BellSouth to request FDN FastAccess customers to be billed to a credit card, because this is an option available to BellSouth's own customers. However, we do not believe that BellSouth discontinuing a customer's FastAccess service merely because he declines to offer up a credit card for billing comports with the intent of our prior decisions. To the contrary, we believe it is incumbent upon the parties to remedy any billing problems. We agree with BellSouth that where a FastAccess customer does not provide access to his premises to perform any needed re-wiring, BellSouth should be relieved of its obligation to offer FastAccess. Because the parties have agreed that a FastAccess customer who migrates his voice service to FDN will have his FastAccess provisioned on a standalone loop, then it appears to us that situations like this may arise where it is technically infeasible for BellSouth to provide service. We believe that neither party's language is precisely on point, though FDN's comes closest.

We find that FDN's language should be modified to reflect that: (a) BellSouth may request that service be billed to a credit card but cannot discontinue service if this request is declined; (b) BellSouth may discontinue FastAccess service if access to the customer's premises to perform any necessary re-wiring is denied; and (c) where a customer declines credit card billing, it is incumbent on the parties to arrive at an alternative way to bill the customer. Accordingly, the following language shall be adopted for inclusion in the parties' agreement, while noting that the parties are free to negotiate alternative language that comports with this Order:

> 2.10.1.6 BellSouth may request that the end user's FastAccess service be billed to a credit card. If the end user does not provide a credit card number to BellSouth for billing purposes, the parties shall cooperatively determine an alternative means to bill the end user. If the end user refuses to allow BellSouth access to his premises where necessary to perform any re-wiring, BellSouth may discontinue the provision of FastAccess service to the end user.

We note further that if parties are unable to reach an agreement on an alternative means to billing the end user, parties may petition the Commission for relief as appropriate regarding the dispute.

E. BellSouth Section 2.10.2.5; no comparable FDN language

BellSouth language:

> If the end user does not have FastAccess but has some other DSL service, BellSouth shall remove the DSL service associated USOC and process the FDN LSR for the UNE loop.

As noted by BellSouth, this issue again pertains to whether we ordered BellSouth to continue providing its interstate tariffed DSL transport service, or its retail FastAccess Internet access service. As discussed above, we believe we were quite clear that our decision pertained solely to the provision of FastAccess Internet access service, not the interstate DLS transport offering.

Accordingly, we find that BellSouth's language shall be adopted.

F. BellSouth Section 2.10.2.6; FDN Section 2.10.2.4

BellSouth language:

> If the end user receives FastAccess service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligations under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall

> have three days to make the election as to which line FastAccess service will be provisioned on as set forth in 2.10.2.7 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current and future FastAccess services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's FDN services.
>
> FDN language:
>
> If the end user receives xDSL service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligation under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall have three days to make the election as to which line xDSL service will be provisioned on as set forth in 2.10.2.5 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current xDSL services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's services.

BellSouth states that its addition of "and future" is intended to indicate that it is permitted to discuss with the end user how his FastAccess service would be provisioned prospectively, including

> (e.g. if a new loop is to be used, how the rewiring would be performed); how it would be billed (e.g. if the customer currently has a multiservice discount, how the billing would change); and any other necessary information the customer would need in order to proceed with the transition to FDN voice services. (BellSouth Position, p. 10)

BellSouth argues that prohibiting it from discussing such matters with the end user could undermine the transition being a seamless one; moreover, failure by BellSouth to disclose such pertinent information could subject BellSouth to customer complaints. Similarly, BellSouth's insertion of the word "FDN" in the last sentence is designed to clarify that customer referrals to FDN should only pertain to FDN-provided services; BellSouth believes that inquiries about FastAccess, a BellSouth-provided service, should be handled by BellSouth, not FDN.

FDN contends that if BellSouth must contact FDN's voice customer, such contact should be restricted to ". . .discussing and validating *current* facilities and services." Fundamentally, it appears FDN is concerned that during such customer contacts BellSouth will demean the FastAccess service that will be received by the customer due to his switching to FDN's voice service. FDN believes such contacts are a "license for mischief."

Finding

It is unclear as to what FDN means by "current facilities and services," in that it has agreed to BellSouth's proposal to provision FastAccess for customers who migrate to FDN voice on a separate, stand-alone loop. It appears inevitable that a FastAccess customer will experience a change to his current service, because the line on which the FastAccess is to be provisioned will no longer also have voice capabilities. Contrary to FDN's view, we believe that BellSouth would be negligent if it failed to inform the customer of any potential change in his service. However, we note that BellSouth's use of the phrase "and future" does not render the sentence in which it appears completely clear and unambiguous to us; nevertheless, we accept BellSouth's representation that customer contacts will be for the limited purposes described in its Position. We acknowledge FDN's concerns and trust that BellSouth's customer contact when service is modified would be minimized and competitively neutral.

Accordingly, we find that BellSouth's language shall be adopted.

G. BellSouth Section 2.10.2.8; no comparable FDN language

BellSouth language:

> If a second facility is not available for either the Standalone Service or the newly ordered UNE loop, then BellSouth shall be relieved from its obligation to continue to provide FastAccess service, provided that the number of locations where facilities are not available does not exceed 10% of total UNE orders with FastAccess.

BellSouth again argues that providing its FastAccess service on a standalone basis is the only way it can satisfy our decision without violating various federal orders. It asserts that if it were to put BellSouth's high-speed Internet access service on a UNE loop,

> BellSouth would be providing its tariffed DSL service for itself in a way that is different from how it would be providing it for other ISPs. This would put BellSouth in violation of the FCC's orders in the Computer Inquiry III cases; in violation of the FCC's Open Network Architecture orders; and in violation of its own federally filed CEI plan.

Moreover, BellSouth contends that if it put FastAccess on FDN's UNE loops, other ISPs would argue that BellSouth was obligated to make its interstate DSL offering available to them on UNE loops, too. As a compromise, BellSouth offers that if it is unable to provision standalone FastAccess on more than 10% of UNE orders, it would ". . .have to figure out for itself some other way of meeting its obligation to continue to provide FastAccess." (Position, p.11)

FDN objects vehemently to BellSouth's proposal, stating that it is ". . .unsupportable and would eviscerate the Commission's Arbitration Order." FDN states that the record in this proceeding provides no basis for BellSouth being excused even a single time from complying with this Commission's decision, let alone 10% of the time.

Finding

We note that BellSouth argued on reconsideration that to put its FastAccess service on a UNE loop would be a violation of its

FCC tariff. In the Reconsideration Order, we determined that we were not constrained by a FCC tariff and that under Section 251(d) we can impose additional requirements as long as they are not inconsistent with FCC rules, orders, or federal statutes. We concluded that BellSouth had not shown that our decision was in conflict with any controlling law and thus dismissed BellSouth's argument.

Our decision states that "BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." We have found no basis in our orders or deliberations in this proceeding to carve out an exception, whether it be for a single customer or 10% of FDN's UNE orders. Accordingly, BellSouth must comply with our specific decision.

We find that Section 2.10.2.8 shall not be included in the parties' agreement. However, if BellSouth believes that it is important and correct to continue to provide FastAccess over a separate facility and such facilities are not available and the parties can not reach an agreement about how the Fast Access would be provisioned, parties can file a petition seeking relief as appropriate.

Accordingly, the parties shall file the final interconnection agreement in accordance with the specific findings as set forth in this Order within 30 days from the issuance date of the Order resolving the disputed contract language.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the parties shall file the final interconnection in accordance with the specific findings as set forth in this Order. It is further

ORDERED that the parties shall file the final interconnection agreement within 30 days from the issuance date of this Order resolving the disputed contract language. It is further

ORDERED that this docket shall remain open in order that the parties may file a final interconnection agreement.

By ORDER of the Florida Public Service Commission this 21st day of March, 2003.

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

(S E A L)

FRB

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.

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-03-0690-FOF-TP ISSUED: June 9, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON

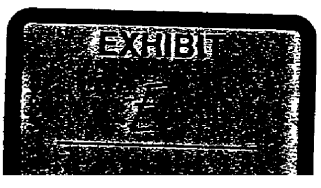
ORDER APPROVING INTERCONNECTION AGREEMENT

BY THE COMMISSION:

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.

Prior to the administrative hearing, the parties resolved all issues except one. An administrative hearing was held on August 15, 2001. This docket was considered at the April 23, 2002, Agenda Conference. On June 5, 2002, Order No. PSC-02-0765-FOF-TP, Final Order on Arbitration, was issued.

Both parties requested an extension of time to file an interconnection agreement. On July 3, 2002, Order No. PSC-02-0884-PCO-TP was issued granting BellSouth's request for extension of time to file an interconnection agreement.



On November 20, 2002, BellSouth filed its executed interconnection agreement with FDN. On February 5, 2003, BellSouth filed a replacement agreement that contains updated Florida rates for unbundled network elements. Although the parties were able to reach agreement on most points, disagreements remained as to the specific language that should be incorporated into the agreement to reflect the Commission's decision as to BellSouth's obligation " . . .to continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops." On this same date, BellSouth also submitted its Position in Support of its Proposed Contract Language, in which it set forth its proposed language where there was a dispute; Similarly, FDN's proposed language was contained in its Motion to Approve Interconnection Agreement filed contemporaneously. On December 2, 2002, FDN filed a Response to BellSouth's Position in Support of Proposed Contract Language.

On March 21, 2003, we issued Order No. PSC-03-0395-FOF-TP, in which we resolved the issues pertaining to what language should be contained in the parties' agreement to memorialize the FastAccess-related decisions. The parties were directed to file a final interconnection agreement incorporating the Commission's decision within 30 days.

We are vested with jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes.

On April 17, 2003, BellSouth and FDN filed for approval of their final executed amendment to their Interconnection Agreement, pursuant to Order No. PSC-03-395-FOF-TP; the amendment is in Attachment A to this Order, and is incorporated by reference into this Order. We have reviewed the agreement and amendment, and find that they comply with our decisions in the aforementioned Order, as well as the Act.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the arbitrated interconnection agreement between Florida Digital Network, Inc. and BellSouth Telecommunications, Inc. is hereby approved. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 9th Day of June, 2003.

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

AMENDMENT
TO THE
AGREEMENT BETWEEN
FLORIDA DIGITAL NETWORK, INC.
AND
BELLSOUTH TELECOMMUNICATIONS, INC.
DATED FEBRUARY 5, 2003

Pursuant to this Amendment, (the "Amendment"), Florida Digital Network, Inc. ("FDN"), and BellSouth Telecommunications, Inc. ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated February 5, 2003 ("Agreement") to be effective on the date of the last signature executing the Amendment.

WHEREAS, BellSouth and FDN entered into the Agreement on February 5, 2003 and;

WHEREAS, The Florida Public Service Commission has issued it's order in Docket 010098-TP resolving the parties disputed language for the BellSouth/Florida Digital Network Interconnection Agreement;

NOW, THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. The Parties agree to add a new Section 2.10 to Attachment 2 of the Agreement, titled Continued Provision of FastAccess to FDN End User. Section 2.10 is set forth in Exhibit 1 of this Amendment, attached hereto and incorporated herein by this reference.

2. This Amendment shall be deemed effective on the date of the last signature of both Parties ("Effective Date").

3. All of the other provisions of the Agreement, dated February 5, 2003 shall remain in full force and effect.

4. Either or both of the Parties is authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

Florida Digital Network, Inc.	BellSouth Telecommunications, Inc.
By: [signature]	By: [signature]
Name: Michael J Gallagher	Name: Elizabeth R.S. Shiroishi
Title: CEO	Title: Director
Date: 4/15/03	Date: 4/16/03

Exhibit 1

2.10 Continued Provision of FastAccess to FDN End Users

2.10.1. In order to comply with the Florida Public Service Commission's Order in Docket No. 010098-TP, and notwithstanding any contrary provisions in this Agreement, BellSouth Tariff F.C.C. Number 1, or any other agreements or tariffs of BellSouth, in cases in which BellSouth provides BellSouth® FastAccess® Internet Service ("FastAccess") to an end-user and FDN submits an authorized request to provide voice service to that end-user, BellSouth shall continue to provide FastAccess to the end-user who obtains voice service from FDN over UNE loops.

2.10.1.1 BellSouth may not evade any of its obligations under this subsection 2.10 by offering or providing any of the services or component services under this subsection through any affiliate, including, but not limited to, BellSouth.net, Inc. or successor by corporate merger.

2.10.1.2 Regardless of how BellSouth provisions its FastAccess to an end-user, when an end-user switches to FDN voice service, BellSouth's FastAccess will not be terminated, suspended or interrupted, except as may be expressly provided for herein, and BellSouth's continuation of its FastAccess to the end-user switching to FDN voice service shall be a seamless or transparent transition for the end user such that there shall be no more than a momentary disruption of FastAccess and voice services.

2.10.1.3 Where BellSouth's FastAccess could be provisioned over the high-frequency portion of a loop coexistent with FDN circuit-switched voice services on the same loop, BellSouth may elect to maintain the BellSouth FastAccess on the same loop such that the FastAccess is not altered when the end-user switches to FDN's voice service.

2.10.1.4 BellSouth may satisfy its obligations under this Section 2.10 by providing FastAccess on a BellSouth owned and maintained loop, ("Standalone FastAccess"), that is separate and distinct from the line FDN uses for voice services. Where feasible, and where a loop is available for FDN voice services that satisfies all of the standards set forth in this Agreement, BellSouth may elect to maintain FastAccess on the extant loop and FDN voice services will be provisioned over a second loop.

2.10.1.5 BellSouth may not impose an additional charge to the end-user associated with the provision of FastAccess on a second loop. Notwithstanding the foregoing, the end-user shall not be entitled to any discounts on FastAccess associated with the purchase of other BellSouth products, e.g., the Complete Choice discount.

2.10.1.6 BellSouth may request that the End User's FastAccess service be billed to a credit card. If the End User does not provide a credit card number to BellSouth for billing purposes, the parties shall cooperatively determine an alternative means to bill the End User. If the End User refuses to allow BellSouth access to his premises where necessary to perform any re-wiring, BellSouth may discontinue the provision of FastAccess service to the End User.

2.10.1.7 If the Parties are unable to reach agreement on an alternative means to billing the end user, the Parties may petition the Commission for relief as appropriate regarding the dispute.

2.10.1.8 In implementing the Commission's Order in Docket No. 010098-TP, BellSouth shall not create any additional barriers to FDN's ability to compete in the local exchange services market.

2.10.1.9 Nothing in this Section 2.10 shall require BellSouth to continue providing FastAccess to an end-user who fails to pay all charges associated with FastAccess or otherwise fails to comply with the end-user's Service Agreement with BellSouth or the applicable Acceptable Use policies for FastAccess.

2.10.1.10 In the event BellSouth elects to comply with this Section 2.10 by providing FastAccess on an FDN UNE Loop, FDN shall make available to BellSouth at no charge the high frequency spectrum on such UNE Loop for purposes of providing the underlying DSL transport.

2.10.2 Provisioning

2.10.2.1 FDN and BellSouth shall each establish a single point of contact ("SPOC") for purposes of the provision of FastAccess pursuant to this Section 2.10.

2.10.2.2 When FDN submits an LSR for a UNE loop, and there is a DSL USOC on the end-user's service record, the LCSC will auto-clarify the order.

2.10.2.3 Upon receiving the auto-clarified order, FDN shall notify the BellSouth SPOC, and the BellSouth SPOC shall determine whether the end-user is a FastAccess customer.

2.10.2.4 FDN and BellSouth will develop processes to promptly correct problems with or disconnections of FastAccess service to FDN voice end users.

2.10.2.5 If the end user does not have FastAccess but has some other DSL service, BellSouth shall remove the DSL service associated USOC and process the FDN LSR for the UNE loop.

2.10.2.6 If the end user receives FastAccess service, FDN shall forward to the SPOC end user contact information (i.e. telephone number or email address) in order for BellSouth to perform its obligations under this Section 2.10. FDN may include such contact information on the LSR. After receipt of contact information from FDN, BellSouth shall have three days to make the election as to which line FastAccess service will be provisioned on as set forth in 2.10.2.7 and to notify FDN of that election. If BellSouth contacts the end user during this process, BellSouth may do so only to validate the end user's current and future FastAccess services and facilities. During such contact, BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user's FDN services.

2.10.2.7 After election by BellSouth as to which line FastAccess will be provisioned on (either the existing loop, or on a second facility) FDN will submit a revised LSR for the

conversion of the voice service to a UNE loop. If BellSouth elects to move the FastAccess to a new Standalone loop, FDN will submit an LSR with a due date 14 calendar days from submission to allow BellSouth sufficient time to transition the FastAccess service to the second line. If BellSouth elects to keep the FastAccess service on the current facilities and provision FDN voice services on the same or separate facilities, FDN will submit a revised LSR for voice service on such facilities using standard processes and intervals, and allow the FastAccess service to remain on the current facilities.

2.10.2.8 If BellSouth believes that it is important and correct to continue to provide Fast Access over a separate facility and such facilities are not available and the parties cannot reach an agreement about how the Fast Access would be provisioned, the Parties can file a petition with the Commission seeking relief as appropriate.

2.10.2.9 FDN authorizes BellSouth to access the entire UNE loop for testing purposes.

2.10.2.10 FDN and BellSouth agree that after the initial 90 days (and every 90 days thereafter) of provisioning FastAccess service in accordance with this Section 2.10, FDN and BellSouth will meet to discuss and negotiate in good faith any means for improving and streamlining the provisioning process.