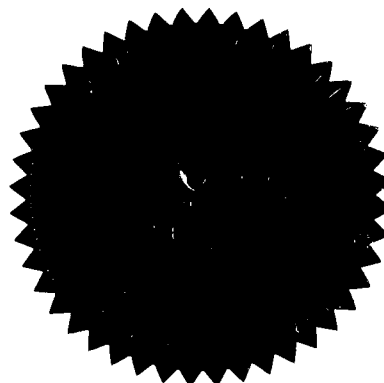


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 020507-TL

In the Matter of

COMPLAINT OF FLORIDA COMPETITIVE
CARRIERS ASSOCIATION AGAINST
BELLSOUTH TELECOMMUNICATIONS, INC.
REGARDING BELLSOUTH'S PRACTICE OF
REFUSING TO PROVIDE FASTACCESS
INTERNET SERVICE TO CUSTOMERS WHO
RECEIVE VOICE SERVICE FROM A
COMPETITIVE VOICE PROVIDER, AND
REQUEST FOR EXPEDITED RELIEF.



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VOLUME 1

Pages 1 Through 158

PROCEEDINGS: HEARING

BEFORE: CHAIRMAN LILA A. JABER
COMMISSIONER J. TERRY DEASON
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER RUDOLPH "RUDY" BRADLEY

DATE: Monday, July 21, 2003

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TIME: Commenced at 9:30 a.m.
Concluded at 5:07 p.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR, Chief
LINDA BOLES, RPR
TRICIA DeMARTE, RPR
Office of Hearing Reporter Services
FPSC Division of Commission Clerk and
Administrative Services
(850) 413-6732

1 APPEARANCES:

2 NANCY B. WHITE, MEREDITH MAYS and DOUGLASS LACKEY c/o
3 Nancy H. Sims, 150 South Monroe Street, Suite 400, Tallahassee,
4 Florida 32301-1556, appearing on behalf of BellSouth,
5 Telecommunications, Inc.

6 VICKI GORDON KAUFMAN, McWhirter, Reeves Law Firm, 117
7 South Gadsden Street, Tallahassee, Florida 32301, appearing on
8 behalf of the Florida Competitive Carriers Association.

9 JOSEPH A. McGLOTHLIN, McWhirter, Reeves Law Firm, 117
10 South Gadsden Street, Tallahassee, Florida 32301,
11 appearing on behalf of Access Integrated Networks, Inc.

12 RICHARD MELSON, Hopping Law Firm, 123 South Calhoun
13 Street, Tallahassee, Florida 32314, appearing on behalf of MCI.

14 DONNA C. McNULTY, 1203 Governors Square Boulevard,
15 Suite 201, Tallahassee, Florida 32301-2690, appearing on behalf
16 of MCI WorldCom Communications, Inc.

17 DULANEY O'ROARK, III, Six Concourse Parkway, Suite
18 3200, Atlanta, Georgia 30328, appearing on behalf of MCI metro
19 Access Transmission Services, LLC, and MCI World.

20 FLOYD R. SELF, Esquire, Messer Law Firm, Post Office
21 Box 1876, Tallahassee, Florida 32302-1876, and NANETTE S.
22 EDWARDS, 4092 South Memorial Parkway, Huntsville, Alabama
23 35802-4343, appearing on behalf of ITC^DeltaCom Communications,
24 Inc.

25

1 APPEARANCES CONTINUED:

2 PATRICIA A. CHRISTENSEN, Esquire, FPSC General
3 Counsel's Office, 2540 Shumard Oak Boulevard, Tallahassee,
4 Florida 32399-0850, appearing on behalf of the Commission
5 Staff.

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I N D E X

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NAME: PAGE NO.

JOSEPH GILLAN

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CHAIRMAN JABER: Good morning.

Counsel, let's go ahead and get this hearing started.

Do you have a notice to read?

MS. CHRISTENSEN: By notice issued July 7th, 2003, this time and place have been set for a hearing in Docket Number 020507, complaint of Florida Competitive Carriers Association against BellSouth Telecommunications, Inc. Regarding BellSouth's practice of refusing to provide FastAccess Internet Service to customers who receive voice service from a competitive voice provider and a request for expedited relief. The purpose of this hearing is as set forth in the notice.

CHAIRMAN JABER: Thank you, Ms. Christensen.

Let's take appearances.

MS. WHITE: Nancy White, Meredith Mays, and Doug Lackey for BellSouth Telecommunications, Inc.

MR. MELSON: Richard Melson of the law firm Hopping, Green & Sams on behalf of MCI.

MS. McNULTY: Donna McNulty and Dee O'Roark appearing on behalf of MCI.

MS. KAUFMAN: Vicki Gordon Kaufman of the McWhirter Reeves law firm on behalf of AT&T Communications of the Southern States, LLC, and also appearing will be Virginia Tate of AT&T.

1 MR. SELF: Floyd Self of the Messer Caparello & Self
2 law firm appearing on behalf of ITC^DeltaCom Communications,
3 Inc. Also appearing with me will be Nanette Edwards of
4 ITC^DeltaCom.

5 MR. McGLOTHLIN: Joe McGlothlin of the McWhirter
6 Reeves law firm. I appear for Access Integrated Networks, Inc.

7 MS. CHRISTENSEN: Patricia Christensen appearing on
8 behalf of the Commission.

9 CHAIRMAN JABER: Thank you.

10 Ms. Christensen, I understand there are some
11 preliminary matters, some motions that must be resolved.

12 MS. CHRISTENSEN: Yes, Commissioner. Staff would
13 like to take note that AT&T, MCI, AIN, ITC^DeltaCom filed a
14 voluntary dismissal of portions of the complaint which deal
15 with BellSouth's refusal to provide or continue to provide
16 FastAccess service to end users who are served by CLECs via
17 UNE-L. They are not dismissing the complaint regarding service
18 via the UNE platform.

19 This is important to note, because those parties have
20 also filed a motion in limine to preclude references by
21 BellSouth in its opening statement or witness summaries to
22 matters relating to the provision of FastAccess to end users
23 who are served by CLECs via UNE-L. Staff notes that the motion
24 does not request that portions of any testimony be stricken
25 based on this voluntary dismissal. Staff also notes that

1 BellSouth has filed a response in opposition to the motion in
2 limine.

3 CHAIRMAN JABER: I don't see the motion in limine
4 and the notice of partial dismissal being separate of each
5 other, if that makes sense. It seems like they are related.
6 And to the degree I allow argument on the motion in limine, I
7 should go ahead and leave the notice outstanding. The way it
8 is filed, it seems like I should just acknowledge the notice.
9 But I think that would be fundamentally wrong, since the motion
10 in limine references the notice.

11 MS. CHRISTENSEN: That is correct. BellSouth in
12 their response certainly raises an argument regarding whether
13 or not the notice should be with prejudice or without
14 prejudice, so that is correct. I believe that both should be
15 left outstanding and allow, at least for argument on both.

16 CHAIRMAN JABER: Okay. Commissioners, I will tell
17 you what I would like to do. This is a motion that has the
18 potential of limiting the scope of the hearing. If there is no
19 objection, I would like to hear a little bit of argument on the
20 motion in limine and the notice, and then ask for Commissioner
21 questions or a motion. All right. And the motion in limine,
22 Mr. Melson?

23 MR. MELSON: Good morning, Commissioners.

24 CHAIRMAN JABER: And let's all be brief. I'm not
25 establishing a time period or anything like that, but the

1 motions are fairly short.

2 MR. MELSON: I understand, and my comments are fairly
3 brief. I just want to give a little bit of context. The
4 original FCCA complaint in this docket asked you to rule on
5 Bell's practice of refusing to provide FastAccess service to
6 end users who take voice service from a CLEC over either UNE
7 loops, UNE-L, or the UNE platform, UNE-P.

8 In May you approved a settlement agreement under
9 which FCCA withdrew from this docket and AT&T, MCI, and AIN
10 were substituted in its place. Unlike the FCCA, which had
11 members that used both UNE-L and UNE-P, none of the CLECs who
12 took over the case really uses UNE loops as an important part
13 of its mass market strategy today. As we were preparing for
14 hearing it became apparent that since none of us was really
15 interested in UNE-L or in the UNE loop issues, having that in
16 the case simply made things more complicated and diluted the
17 focus on UNE-P, which is the method of entry that the CLECs
18 here today are using and that we are really concerned about.

19 Therefore, early last week we filed the notice of
20 partial dismissal withdrawing that part of the complaint
21 relating to UNE loops. And, Commissioner Jaber, my belief is
22 that a complainant has an absolute right to withdraw part of
23 its complaint, at least up until the time of the hearing. So
24 while it is certainly related to the motion in limine, I think
25 it really is a separate issue. In any event --

1 CHAIRMAN JABER: Mr. Melson, if I could interrupt
2 you. What about the question related to do you have the right
3 to try to dismiss this part of the complaint without prejudice?

4 MR. MELSON: I think we do. I think we can withdraw
5 a complaint at any time prior to hearing without prejudice. I
6 think the rule is if this were our second bite at the apple,
7 if this were the second complaint that MCI and these parties
8 had brought, the second dismissal might be with prejudice. But
9 I think a first dismissal is permitted without prejudice.

10 And as a follow-on to that withdrawal, we filed the
11 motion in limine that simply asked the Commission to restrict
12 BellSouth from referring in its opening statement or in its
13 witness summaries to the UNE loop. We figured that that would
14 keep the folks at the hearing on UNE-P. And to the extent that
15 there was a need in dealing with the testimony to deal with any
16 UNE-loop matters that are discussed, that could be handled on
17 cross-examination, if necessary.

18 But depending on the -- so long as that doesn't get
19 talked about in the summaries or the opening, I think we can
20 get through the hearing and keep the focus where it needs to
21 be, on the UNE platform. I will be happy to answer any
22 questions, but that is basically what I had to say.

23 CHAIRMAN JABER: And you are speaking for all the
24 parties, right, Mr. Melson?

25 MR. MELSON: Yes, ma'am.

1 CHAIRMAN JABER: Okay. Ms. White?

2 MS. WHITE: Yes. BellSouth opposed -- when Mr.
3 Melson called us to ask us what our position was on the motion
4 in limine and the dismissal, BellSouth said they could agree to
5 it if it was with prejudice, or if the parties would
6 acknowledge that BellSouth had no obligation to provide
7 FastAccess on a UNE-L. And we did that for a couple of
8 reasons. One is this case has been going on for a year. From
9 the beginning it has been about UNE-L, FastAccess on UNE-L and
10 UNE-P. Then less than ten days before the start of the
11 hearing, they want to change -- the other side wants to change
12 and wants to withdraw part of it which they say they are not
13 looking for it now. Well, what about two months from now or
14 six months from now?

15 I mean, I think for purposes of judicial efficiency,
16 why are we going to be back here trying this case again on
17 UNE-L? The testimony is filed, the parties are ready to try
18 it, and I think we just need to go forward with it.

19 CHAIRMAN JABER: Ms. White, one of the arguments Mr.
20 Melson made related to these companies that use UNE-L currently
21 as a strategy. Does that change your position at all or --

22 MS. WHITE: No, because the substitution of MCI and
23 AT&T, that was done back in May. I mean, they knew what FCCA
24 had filed. I mean, both MCI and AT&T are members of FCCA. I'm
25 sure that they were fully aware of this complaint from the

1 beginning and knew what was in it. So I think filing
2 something, you know, ten days before the hearing changing their
3 mind after they had been actually been substituted three or
4 four months earlier, I think it's just too late.

5 CHAIRMAN JABER: Commissioners, I'm going to ask for
6 Staff's recommendation. But do you have any questions at this
7 stage, or do we want to hear from Staff? Ms. Christensen.

8 MS. CHRISTENSEN: Staff recommends that the voluntary
9 dismissal is timely. If you refer to Rule 1.420 of the Civil
10 Rules of Procedure in Florida, it provides for voluntary
11 dismissals and you may take a voluntary dismissal prior to
12 hearing at least once without prejudice. So Mr. Melson is
13 correct, that you at least get one time to dismiss full
14 complaints or parts of your complaint without it being with
15 prejudice.

16 Staff further recommends that the motion in limine
17 does not meet the standard of a motion in limine where the mere
18 mention of UNE-L service would be prejudicial to the tribunal.
19 Staff is of the opinion that the Commission can certainly
20 distinguish between UNE-P and UNE-L, and certainly in its
21 rendering its decision, and that this does not meet that
22 standard.

23 COMMISSIONER DEASON: I have some questions for
24 Staff. You quoted the rule. Does that apply to dismissing a
25 complaint, the entire complaint, or does that also apply to a

1 situation where you are just wanting to dismiss part of the
2 complaint?

3 MS. CHRISTENSEN: The rule does not make a
4 distinction between partial dismissal and full dismissal. I
5 think -- the rule does not make that distinction, although I
6 think it would be reasonable to conclude that if you can
7 dismiss the whole complaint without prejudice you should be
8 logically able to dismiss a portion of the complaint, such as a
9 count that no longer you wish to pursue in a civil matter.

10 COMMISSIONER DEASON: But aren't there difficulties
11 involved in doing that? Where do you draw the line? Isn't
12 that putting a degree of difficulty that is not necessary?
13 Either we need to dismiss the entire thing and let's all go
14 home, or let's hear the entire thing and resolve this. It has
15 been going on for too long. Is this rule within our
16 discretion, or is this something you are saying we have to do?

17 MS. CHRISTENSEN: This is the rule that is set forth
18 in the Rules of Civil Procedure. There is not a rule that is
19 comparable under the Uniform Rules. However, it has been
20 adopted as the standard under case law. And in looking at it
21 with prejudice and without prejudice in the case law, it talks
22 about you have the absolute right to take a voluntary dismissal
23 up until it has been submitted to the tribunal for hearing.
24 Thereafter it would have to be with prejudice, or thereafter
25 the tribunal has the discretion of allowing you to dismiss or

1 not.

2 COMMISSIONER DEASON: Well, I am disappointed that we
3 are here arguing this the day of the hearing. This should have
4 been done as a part of the prehearing process months ago. We
5 have parties here who are ready to go forward, we have
6 witnesses I see sitting out there, we have testimony filed.
7 This Commission is ready to go forward. I am ready to go
8 forward, if that is within my discretion to do. Commissioners,
9 I am inclined to just deny it and let's go forward and hear the
10 issues and let's decide it.

11 CHAIRMAN JABER: Yes. I don't necessarily disagree
12 Commissioner Deason, but I think you asked a very excellent
13 question and I'm not sure we got a definitive answer. With
14 respect to the motion it seems like we can grant or deny. With
15 respect to the notice, I am still not clear what we can do.
16 Commissioner Deason's good question was is it within -- do I
17 deny a notice?

18 MS. CHRISTENSEN: I think once it is submitted to the
19 tribunal for hearing, I think that is within the court's
20 discretion. In reading the case law it looks like they have an
21 absolute right prior to it coming to hearing to take a
22 voluntary dismissal. The question then becomes is it with
23 prejudice or without prejudice, which means could they refile
24 at a later date.

25 CHAIRMAN JABER: Well, let me ask you this. Can we

1 then impose on the notice, which sounds like your
2 recommendation is within the ALEC's right to file, can we
3 impose on it a with prejudice?

4 MS. CHRISTENSEN: In looking at the case law, it
5 looks like they have got one opportunity, that if they do it
6 prior to a hearing they have one opportunity to do that without
7 prejudice as a right under the civil rules. And it looks like
8 by case law that that has been incorporated into administrative
9 proceedings.

10 CHAIRMAN JABER: Commissioners, what is your
11 pleasure? I have to tell you, philosophically I am right where
12 Commissioner Deason is. The only thing that is a potential
13 problem relates to what our discretion is with regard to the
14 notice. Any ideas? Any other questions?

15 COMMISSIONER DEASON: Well, being a non-lawyer, I can
16 speak my mind a little bit more freely, I suppose. And I guess
17 that is a luxury that I have. I can tell you how I feel about
18 it. It smacks me as what is fair, what we need to do with
19 judicial economy, the expense and the time that has been
20 devoted, it is too late. At some point you cross a line. It
21 is too late. And I think we have crossed the line, we are too
22 late. We need to hear these issues, we need to decide them.
23 That is just me and my personal preference and what I think is
24 appropriate.

25 COMMISSIONER BAEZ: I have a question, Madam

1 Chairman.

2 Ms. Christensen, you have used the phrase a couple of
3 times that once it has been submitted to hearing, I want to
4 know what that means exactly, or what you mean by that?

5 MS. CHRISTENSEN: In looking at the case law, it
6 mostly applies to DOAH hearings, I don't think it has been
7 addressed by this Commission before. And those are cases where
8 it has been heard by the DOAH officer, but prior to the agency
9 taking its final action, that is too late. So in making an
10 analogy, I would say any time before the first witness is sworn
11 in. Once the first witness is sworn in, under the case law it
12 appears to me that that would clearly be having submitted it to
13 the court for judgment on its merits.

14 CHAIRMAN JABER: Commissioner Baez.

15 COMMISSIONER BAEZ: You know, I sympathize with
16 Commissioner Deason's feelings and sense of frustration and all
17 of this, but I am torn between what is fair and what is legal,
18 and the twain sometimes don't meet.

19 CHAIRMAN JABER: We should pose our confusion to Mr.
20 Melson, since you created it. Mr. Melson --

21 MR. MELSON: I'm sorry.

22 CHAIRMAN JABER: In BellSouth's response, and I think
23 consistent with the level of frustration, what is wrong with
24 dismissing -- agreeing to the notice with regard to partial
25 dismissal but with prejudice? You acknowledged early on that

1 your clients collectively are not using the UNE-L strategy. It
2 does seem, from a judicial economy standpoint, it is all or
3 nothing.

4 MR. MELSON: Commissioner Jaber, let me respond to
5 that and make one other point. We are not using UNE-loop
6 today. We don't have a plan to. But if I take a dismissal
7 with prejudice and two years down the road the landscape has
8 changed, at that point it is possible my business plans have
9 changed. The problem with going forward to try the UNE loop
10 case is we don't have anybody here who is really interested in
11 that today. FDN has been through an arbitration. You have
12 made a ruling in the FDN case that other people can opt into
13 the FDN agreement, so there is a structure out there for those
14 people who want to use UNE loop. We are not among them.

15 It almost doesn't do the case justice to try an issue
16 when the parties that are in front of you, or at least half of
17 the parties that are in front of you don't really have an
18 incentive to put on that case.

19 CHAIRMAN JABER: It seems like there is a middle
20 ground here. BellSouth says they can agree to the notice of
21 partial dismissal with prejudice. If you recognize you are not
22 currently using UNE loops, can't we acknowledge that changed
23 circumstances might necessitate a further review. But it seems
24 as though the way the landscape exists now there is nothing
25 wrong with dismissing partial, the partial complaint with

1 prejudice. I don't see your point.

2 MR. MELSON: Commissioner Jaber, I can understand
3 that from the point of view of the bench. I think it would be
4 improper under the rules. And none of us has a plan to come
5 back and try to relitigate this case next month, if there has
6 not been a change. So allowing the dismissal without
7 prejudice, we could come back if circumstances change, and
8 without then having to fight potentially a year, two years down
9 the road about whether circumstances have changed enough.

10 CHAIRMAN JABER: Okay. Mr. Melson, you have helped
11 me tremendously then. I would rather make a decision on all of
12 these issues so that to the degree the appropriate signals are
13 out there, and our decision affects your business plan, then it
14 is responsible on our part to go forward.

15 COMMISSIONER DEASON: They will be put on notice as
16 to how to formulate their business plan.

17 CHAIRMAN JABER: Exactly. You were very helpful.
18 Not the outcome you wanted, but that is where I am.

19 COMMISSIONER BAEZ: Can I ask a question now?

20 CHAIRMAN JABER: Commission Baez. Yes.

21 COMMISSIONER BAEZ: Assuming for a moment that a
22 voluntary dismissal is recognized with prejudice, upon who
23 exactly is it binding? And I will put it to Staff.

24 MS. CHRISTENSEN: My understanding is it is binding
25 upon the parties that are parties to this lawsuit.

1 COMMISSIONER BAEZ: But we have had a substitution.

2 MS. CHRISTENSEN: It would be binding upon the
3 parties that are currently parties to the lawsuit. That would
4 be AT&T, AIN, MCI, DeltaCom, and BellSouth.

5 COMMISSIONER BAEZ: BellSouth, is that your
6 understanding?

7 MS. WHITE: Yes, sir.

8 COMMISSIONER BAEZ: Okay. Thank you.

9 CHAIRMAN JABER: Commissioners, is there a motion to
10 take up the notice and the motion in limine at the same time?

11 COMMISSIONER DEASON: Well, I believe the motion
12 would be to recognize the motion to dismiss -- sorry.

13 CHAIRMAN JABER: Refusing to recognize.

14 COMMISSIONER DEASON: What is it, the partial motion,
15 help me out here.

16 CHAIRMAN JABER: It is called a notice of partial
17 dismissal of complaint. I guess, Ms. Christensen -- we would
18 reject it. Would our motion be to reject the notice of partial
19 dismissal of complaint and deny the motion in limine?

20 MS. CHRISTENSEN: That would appear correct.

21 COMMISSIONER DEASON: So moved.

22 CHAIRMAN JABER: Does that make sense? Reject the
23 notice--

24 COMMISSIONER BAEZ: Well, I guess I'm not sure.
25 Commissioner Deason, your motion, what it is that you are

1 trying to accomplish?

2 COMMISSIONER DEASON: I'm trying to accomplish --
3 whatever the correct terminology is, I want to hear all issues
4 that the testimony has been prefiled, and I want the Commission
5 to have the discretion to do so and make a decision.

6 COMMISSIONER BAEZ: So we are past the question of
7 prejudice, whether to refile? Okay. I can second that.

8 COMMISSIONER DEASON: It doesn't matter whether it is
9 with prejudice. We are not granting it if we are going to hear
10 all issues.

11 COMMISSIONER BAEZ: Exactly. I can second it.

12 COMMISSIONER BRADLEY: Before we second it, I want to
13 clear up something in my mind. Does that mean, then, that UNE
14 loop will be included in any discussion that we are going to
15 have here today?

16 CHAIRMAN JABER: Whatever is in the testimony. It
17 means that whatever is in the testimony will be included in the
18 discussion today, that the hearing would not be limited in any
19 fashion. You know, to the degree that it is covered in
20 testimony. Nothing outside testimony will be introduced.

21 COMMISSIONER BRADLEY: Okay.

22 CHAIRMAN JABER: There is a motion and a second. All
23 those in favor say aye.

24 (Unanimous affirmative vote.)

25 CHAIRMAN JABER: The motion carries unanimously

1 today. And what is next, Ms. Christensen?

2 MS. CHRISTENSEN: Staff would like to note that the
3 motion to strike portions of the rebuttal testimony and
4 exhibits of W. Kenneth (sic) Milner has been withdrawn, and
5 thus Staff's recommendation on the motion to strike became moot
6 and was withdrawn.

7 CHAIRMAN JABER: And that is something I can just
8 acknowledge, the parties have agreed to that?

9 MS. CHRISTENSEN: Correct.

10 CHAIRMAN JABER: Okay. Notice of withdrawal of the
11 motion to strike portions of rebuttal testimony and exhibits of
12 Keith Milner is acknowledged.

13 MS. CHRISTENSEN: The next issue Staff would like to
14 address is there have been several stipulations that have been
15 agreed to by the parties. And at the Commission's discretion,
16 I would like to at this time go through all of those stipulated
17 exhibits.

18 CHAIRMAN JABER: Ms. Christensen, I should
19 probably -- because we did take a Commission vote, I should
20 probably for the record state that the vote was Baez, Jaber,
21 Deason, Bradley. Go ahead.

22 MS. CHRISTENSEN: At this time I would like to go
23 through the stipulations that the parties have agreed to. At
24 this point the parties have agreed to stipulate all the
25 interrogatory answers and depositions into the record. The

1 stipulations are grouped as follows: Stipulation 1 is
2 proffered by BellSouth, and it is all the responses to the
3 interrogatories propounded by BellSouth on FCCA, AT&T, MCI,
4 AIN, and ITC^DeltaCom.

5 CHAIRMAN JABER: Stipulation 1 shall be identified as
6 Hearing Exhibit 1.

7 MS. CHRISTENSEN: Stipulation 2 proffered by
8 BellSouth are the confidential portions of all the responses to
9 their interrogatories propounded by them on FCCA, AT&T, MCI,
10 AIN, ITC^DeltaCom.

11 CHAIRMAN JABER: Stipulation 2 will be identified as
12 Hearing Exhibit 2.

13 MS. CHRISTENSEN: Stipulation 3 proffered by AT&T are
14 all the responses to the interrogatories provided by FCCA and
15 AT&T on BellSouth.

16 CHAIRMAN JABER: Stipulation 3 is identified as
17 Hearing Exhibit 3.

18 MS. CHRISTENSEN: Stipulation 4 proffered by AT&T are
19 the confidential portions of all the responses to the
20 interrogatories propounded by FCCA and AT&T on BellSouth.

21 CHAIRMAN JABER: Stipulation 4 is identified as
22 Hearing Exhibit 4.

23 MS. CHRISTENSEN: Stipulation 5 propounded by MCI are
24 all the responses to interrogatories propounded by MCI on
25 BellSouth.

1 CHAIRMAN JABER: Stipulation 5 is identified as
2 Hearing Exhibit 5.

3 MS. CHRISTENSEN: Stipulation 6 is proffered by MCI,
4 and those are the confidential portions of all the responses to
5 interrogatories propounded by MCI on BellSouth.

6 CHAIRMAN JABER: Stipulation 6 is identified as
7 Hearing Exhibit 6.

8 MS. CHRISTENSEN: Stipulation 7 is proffered by
9 Staff, and those are all the responses to interrogatories
10 propounded by Staff on BellSouth, FCCA, AT&T, and MCI.

11 CHAIRMAN JABER: Stipulation 7 is identified as
12 Hearing Exhibit 7.

13 MS. CHRISTENSEN: Stipulation 8 is proffered by
14 Staff, the confidential portions of all responses to
15 interrogatories propounded by Staff on BellSouth, FCCA, AT&T,
16 and MCI.

17 CHAIRMAN JABER: Stipulation 8 is identified as
18 Hearing Exhibit 8.

19 MS. CHRISTENSEN: Stipulation 9 proffered by Staff
20 are depositions including exhibits for Witnesses Gillan, Fogle,
21 Bradbury, and Milner.

22 CHAIRMAN JABER: Stipulation 9 is identified as
23 Hearing Exhibit 9.

24 MS. CHRISTENSEN: Stipulation 10 is proffered by
25 Staff is the confidential portions of the depositions including

1 exhibits for Witnesses Gillan, Fogle, Bradbury, and Milner.

2 CHAIRMAN JABER: Stipulation 10 is identified as
3 Hearing Exhibit 10.

4 MS. CHRISTENSEN: Stipulation 11 is proffered by MCI
5 includes the depositions including exhibits for Witnesses
6 Ruscilli and Taylor.

7 CHAIRMAN JABER: Stipulation 11 is identified as
8 Hearing Exhibit 11.

9 MS. CHRISTENSEN: And the last stipulation is
10 Stipulation 12 proffered by MCI, and it is the confidential
11 portions of the depositions including exhibits for Witnesses
12 Ruscilli and Taylor.

13 CHAIRMAN JABER: Stipulation 12 is identified as
14 Hearing Exhibit 12. Without objection, Hearing Exhibits 1
15 through 12 are admitted into the record.

16 (Exhibits 1 through 12 marked for identification and
17 admitted into the record.)

18 MS. KAUFMAN: Chairman Jaber.

19 CHAIRMAN JABER: Yes. Who said that?

20 MS. KAUFMAN: That was me, I'm sorry.

21 CHAIRMAN JABER: Ms. Kaufman.

22 MS. KAUFMAN: I just wanted to make it clear, then,
23 in Exhibit Number 9, which is the depositions of some of the
24 witnesses that Mr. Gillan's errata sheet to his deposition has
25 been added without objection.

1 CHAIRMAN JABER: Thank you for acknowledging that for
2 the record.

3 MS. CHRISTENSEN: Staff would also like to note that
4 one copy of the confidential materials associated with each one
5 of the stipulations is going to be provided to the court
6 reporter.

7 CHAIRMAN JABER: Okay. Ms. Christensen.

8 MR. MELSON: Chairman Jaber.

9 CHAIRMAN JABER: Mr. Melson?

10 MR. MELSON: I note that the two, that MCI 11, which
11 is depositions, we actually had bound as two separate
12 documents. I understand that is now one composite exhibit.

13 CHAIRMAN JABER: Stipulation 11, depositions
14 including exhibits for Ruscilli and Taylor, are they one
15 document, Ms. Christensen?

16 MS. CHRISTENSEN: That is correct, that is what we
17 anticipated.

18 MR. MELSON: And I apologize, but I did not catch the
19 distinction between Exhibit 7 and Exhibit 8 which were Staff
20 interrogatory responses.

21 CHAIRMAN JABER: Confidential. Hearing Exhibit 7 is
22 all responses to interrogatories propounded by Staff on
23 BellSouth, FCCA, AT&T, and MCI. Hearing Exhibit 8 is the
24 confidential portion.

25 MR. MELSON: Thank you.

1 CHAIRMAN JABER: Any other questions?

2 MS. MAYS: Just one, Chairman Jaber. And I
3 apologize, but we also have erratas to depositions. If we
4 could have those included with the appropriate depositions, we
5 will provide those.

6 CHAIRMAN JABER: I am sure that is the case for
7 everyone. Would it be appropriate to just acknowledge that all
8 of the deposition exhibits may contain errata sheets?

9 MS. CHRISTENSEN: That is correct.

10 CHAIRMAN JABER: Okay. Are we ready to move forward?

11 MS. CHRISTENSEN: Yes, Commissioner.

12 CHAIRMAN JABER: What is next?

13 MS. CHRISTENSEN: Confidential matters, Staff notes
14 that there is one outstanding request for specified
15 confidential classification that has been filed, and Staff
16 would recommend that that be addressed by a separate order.

17 CHAIRMAN JABER: So noted.

18 MS. CHRISTENSEN: Staff would also like to note that
19 there are several outstanding claims and notices regarding
20 confidential treatment that were filed prior to the hearing.
21 Staff would like to remind the parties that they have 20 days
22 after the hearing to file any requests for confidential
23 treatment for those documents that are used in the hearing, if
24 they have not already filed such requests.

25 CHAIRMAN JABER: Parties are reminded.

1 MS. CHRISTENSEN: Staff would also like to take
2 notations of several of the changes that have occurred to the
3 prehearing order since it was issued. We have had several
4 intervening events since that time. In compliance with the
5 settlement order, AT&T filed its amended witness list on behalf
6 of the substitute parties noting the changes in the order of
7 witnesses and who those witnesses are proffered by as noted on
8 Page 6 of the prehearing order.

9 The order of the witnesses for AT&T, MCI, and AIN are
10 as follows: Witness Gillan is now proffered by AT&T, MCI, AIN,
11 and he will be addressing all issues, and he is the first
12 witness. Witness Lichtenberg is proffered by MCI. She will be
13 addressing Issues 2, 4, 5, 6A, and 6B, and she is proffering
14 only rebuttal testimony. Witness Bradbury is proffered by
15 AT&T, and he will be addressing Issues 2, 4, 5, 6A, and 6B, and
16 he will be addressing rebuttal testimony, as well.

17 CHAIRMAN JABER: Thank you, Ms. Christensen.
18 Anything else?

19 MS. CHRISTENSEN: Staff would just like to note that
20 there is no changes in the order of the BellSouth witnesses.
21 We would also like to note that the motions that were pending
22 as of the prehearing order have all been resolved pursuant to
23 the order that was issued approving the settlement, that is
24 Order Number PSC-03-0611-AS-TL. Staff would also like to note
25 that after the issuance of the prehearing order, BellSouth

1 filed a letter to add a case to the list of decisions that may
2 have impact on the resolution of the issues. That is Energy
3 Louisiana, Inc. vs. Louisiana Public Service Commission, Number
4 02-299, 2003 LEXIS, 4278 issued June 2nd, 2003. And that is
5 the last of the preliminary matters that Staff is aware of.

6 CHAIRMAN JABER: Thank you, Ms. Christensen.

7 All right. If I could ask all of the witnesses in
8 the room to please stand and raise your right hand.

9 (Witnesses collectively sworn.)

10 CHAIRMAN JABER: By my list, I've got Mr. Gillan is
11 the first witness, Ms. Christensen. Did you all agree on
12 opening statements?

13 MS. KAUFMAN: Yes, Chairman Jaber. I was just going
14 to suggest that. I think that we did agree on that.

15 CHAIRMAN JABER: Okay. Is Mr. Gillan the first
16 witness?

17 MS. KAUFMAN: He is, Madam Chairman.

18 CHAIRMAN JABER: Great. Did you agree on the order
19 of opening statements or are you consolidating them?

20 MS. KAUFMAN: We have consolidated. I will be doing
21 the opening statement for the CLECs.

22 CHAIRMAN JABER: And how long?

23 MS. KAUFMAN: Ten minutes is what was agreed to, I
24 believe.

25 CHAIRMAN JABER: Ms. White, who is doing yours?

1 MS. WHITE: I will, Madam Chairman.

2 CHAIRMAN JABER: Ms. Kaufman, go ahead.

3 MS. KAUFMAN: Thank you, Madam Chairman,

4 Commissioners. I am Vicki Gordon Kaufman, and I am here on
5 behalf of AT&T Communications of the Southern States. And as I
6 have said, I will make the opening statement on behalf of AT&T,
7 MCI, AIN, and ITC^DeltaCom.

8 Commissioners, the parties have brought this
9 complaint proceeding to ask you to remedy a situation that most
10 of you are somewhat familiar with already, and that's
11 BellSouth's refusal to provide FastAccess service to consumers
12 who want it. I want to try and simplify this case a little bit
13 by noting what you have already decided in regard to the
14 FastAccess issue. You have already decided in two prior cases
15 that Bell's practice of refusing to provide FastAccess service
16 to a current Bell customer who switches to a CLEC for voice
17 service is anticompetitive. And in the FDN decision you said,
18 and I will just quote you briefly, "This practice creates a
19 barrier to competition in the local telecommunications market
20 in that customers could be dissuaded by this practice from
21 choosing FDN or another ALEC as their voice service provider,"
22 close quotes.

23 You have also already decided in the FDN case that
24 the migration of customers with FastAccess to a CLEC for voice
25 must be seamless and that their service should not be altered.

1 And you have also already decided in the FDN case, the Supra
2 case, and in this case as well, that you have jurisdiction
3 under state law to remedy anticompetitive behavior that is
4 detrimental to the development of a competitive
5 telecommunications market. So that is what we think you have
6 already decided.

7 With that in mind, we simply ask in this case that
8 you extend the ruling in FDN and Supra to new customers who
9 want FastAccess, and we ask that you prohibit Bell from
10 requiring that FastAccess service be installed on a second
11 separate line so that the process will be seamless as you have
12 already ruled that it should be.

13 I just want to give you a bit of background before I
14 touch briefly on those two issues. In this case you are going
15 to hear the parties talk about FastAccess, which is a BellSouth
16 retail product that allows consumers to have high-speed
17 Internet access and local voice service on the same line, thus
18 making it a very efficient service and eliminating the need for
19 the unnecessary duplication of facilities. As you know, the
20 voice signal travels on the low frequency part of the line and
21 the data signal travels on the high frequency portion was line,
22 and at the central office the signals are split.

23 In Florida FastAccess has been a very fast growing
24 product for BellSouth. Though the specific Florida numbers are
25 confidential, and I think we will get into those in cross, Bell

1 has said itself in press releases that it has broken the one
2 million line mark region-wide for FastAccess. It is also
3 uncontroverted that BellSouth has the lion's share of DSL lines
4 in its service territory, over 99 percent of those lines. And
5 this is significant because Bell is using its FastAccess
6 service as a way to prevent local voice customers from
7 exercising choice in the local voice market.

8 There is no dispute in this case that it is Bell's
9 practice to refuse to provide its FastAccess service to a Bell
10 customer who chooses a CLEC. Bell's practice of refusing to
11 provide FastAccess to an end user who wants it, and who will
12 pay for it is, I think, counterintuitive to what we would
13 expect. Bell will only provide that service to the end user if
14 the consumer also buys Bell voice. And even more remarkably,
15 if a current customer has Bell voice and FastAccess, Bell will
16 actually disconnect the FastAccess service.

17 So I guess we have to ask ourselves why in the world
18 would Bell engage in such a practice? And the only answer that
19 we have been able to come up with is that this practice
20 squelches local competition for customers who want FastAccess.
21 BellSouth knows that it is going to be inconvenient for
22 customers to switch. They may have to pay a termination fee,
23 they have to have a new service installed, they have to wait at
24 home for a technician to come, they may have to pay an
25 installation fee, and they are going to lose their e-mail

1 address.

2 This creates a competitive barrier and it frustrates
3 the goals of the competitive local communications market. And
4 I think most importantly, for your purposes as regulators, it
5 interferes with customer choice. Bell's practice of linking
6 FastAccess to local voice has and it will continue to have a
7 chilling effect on local voice competition.

8 Now, as I have already said in the context of current
9 customers, you have already decided it is anticompetitive for
10 Bell to refuse to provide FastAccess to a customer who has the
11 service and changes local providers. It is also
12 anticompetitive for Bell to refuse to provide that service to a
13 new customer who wants one provider for local and Bell for
14 FastAccess. Because the only way in that circumstance that the
15 customer can get FastAccess is to give up his choice of a
16 competitive voice provider. Both scenarios have the same
17 result. They inhibit customer choice in the local voice market
18 contrary to the policies that you have already articulated.

19 Now, when the witnesses get on the stand, I believe
20 you will hear BellSouth witness, Mr. Smith, he said in his
21 testimony already that Bell uses its local monopoly to create
22 what Bell characterizes as a complimentary service,
23 complimentary FastAccess. As I said, Bell has over 99 percent
24 of the DSL lines, and it is using FastAccess as a tool to
25 protect its large share of the voice market. Forcing a

1 customer to take local service from Bell in order to receive
2 FastAccess, or punishing a customer by going in and
3 affirmatively disconnecting a service I don't think is the sort
4 of activity that this Commission would want to sanction.

5 I think that you will also hear the BellSouth
6 witnesses tell you that all providers were in the same position
7 as BellSouth when DSL service first began to be developed.
8 This just is not the case. Bell is in a unique and
9 advantageous position because it is the only provider that has
10 a ubiquitous local network in place to serve every customer in
11 its territory, a network that the retail ratepayers paid for,
12 and a network that has the last mile loop to every single
13 subscriber. No CLEC could ever be in this position, and it
14 confers a tremendous advantage on BellSouth.

15 You will also hear testimony, I believe, from the
16 BellSouth witnesses telling you about the many alleged
17 technical problems that Bell would have in providing FastAccess
18 to a CLEC voice customer. In our view, this area is simply a
19 lot of smoke and mirrors. In the case of UNE-P, you will hear
20 Mr. Bradbury tell you there are no technical or network changes
21 needed to provide FastAccess to a consumer who has a CLEC voice
22 provider. Everything is there to provide the service.

23 Bell witnesses, I think, will tell you that there are
24 a myriad of insurmountable operational problems. They will
25 tell you they would have to make expensive and extensive

1 changes to many of their OSS systems to provide FastAccess. We
2 ask that you listen closely to Mr. Bradbury and to Ms.
3 Lichtenberg with whom I know you are very familiar. They have
4 extensive experience in the OSS area. They will tell you why
5 these claims are simply not the case.

6 Particularly in the case of UNE-P providers, Bell has
7 the consumer phone number because they are selling the port and
8 the loop, and the customer is served on the very same
9 facilities whether he is served by Bell or whether he is served
10 by the CLEC. That there are no technical problems is
11 demonstrated by the uncontroverted fact that Bell provided
12 FastAccess to end use consumers of the CLEC in the past.

13 CHAIRMAN JABER: Ms. Kaufman, you need to wrap it up.

14 MS. KAUFMAN: This happened over one line, and it
15 happened seamlessly, and only when Bell discovered that it had
16 done it in error did it insert edits in its OSS system to
17 prevent this from happening.

18 I would also point out to you that the Louisiana
19 Commission has recently heard all of these very same arguments
20 from BellSouth, has rejected every one of Bell's positions and
21 told them that they must continue to provide FastAccess to
22 current customers, and they must provide it to new customers,
23 as well. We think the technical reasons are simply excuses not
24 to provide the service. We also think, as I said, that you
25 should require them to provide it over one line so it is

1 seamless and so that the customer is not inconvenienced. Mr.
2 Bradbury will tell you no new network is required.

3 To continue to open local markets to competition and
4 to prohibit behavior that interferes with that goal, we ask you
5 to extend the decisions you have already made to new customers
6 and to ensure that the process is seamless, that service is not
7 altered by requiring it to be provided over a single line.

8 Thank you.

9 CHAIRMAN JABER: Ms. White.

10 MS. WHITE: Thank you.

11 CHAIRMAN JABER: Commissioner Bradley, do you have a
12 question?

13 COMMISSIONER BRADLEY: Yes. Ms. Kaufman, did I hear
14 you say that this was offered one time over one line?

15 MS. KAUFMAN: In regard to the customers where it had
16 occurred allegedly in error, sir, is that what you are
17 referring to?

18 COMMISSIONER BRADLEY: Yes.

19 MS. KAUFMAN: No, it was hundreds of customers. And
20 you will hear testimony about that.

21 CHAIRMAN JABER: Ms. White. Ten minutes.

22 MS. WHITE: Thank you, Madam Chair, Commissioners.

23 My name is Nancy White, I represent BellSouth in this
24 proceeding. The issues in this proceeding involve determining
25 whether the Commission can require BellSouth to provide an

1 unregulated service to anyone who requests that service. The
2 service in question is called FastAccess, and it is a
3 high-speed broadband service that using the upper spectrum band
4 on an ordinary telephone line to connect end users to their
5 Internet service provider while allowing the low spectrum band
6 on that telephone line to be used for ordinary phone service.
7 There is no dispute that this is an unregulated service. You
8 already concluded this in prior rulings and every witness will
9 admit that this is the case.

10 Now, we started down this road when two panels of
11 three Commissioners conducted proceedings involving FDN, a CLEC
12 here in Florida, and Supra, another CLEC. Those panels
13 determined incorrectly, we believe, that the concerns raised by
14 those CLECs, quote, raised valid concerns concerning possible
15 barriers to competition that could result from BellSouth's
16 practices, end quote. The panels required BellSouth to
17 continue to provide its unregulated FastAccess service when one
18 of its FastAccess customers decided to move his or her voice
19 service to a CLEC.

20 Since everyone admitted that FastAccess was not
21 subject to the jurisdiction of the Commission, the panels based
22 their decision on competitive barriers in the voice market.
23 Now the other shoe has dropped. We are here today with a group
24 of CLECs that are demanding that when one of their voice
25 customers who never had FastAccess service, let me repeat that,

1 one of their voice customers who never had FastAccess service
2 wakes up one morning and wants FastAccess, BellSouth has to
3 provide it.

4 According to the CLECs' witnesses, even though the
5 CLEC already has the customer's voice service, it is
6 anticompetitive for BellSouth to refuse to provide its
7 unregulated service to the customer that BellSouth has never
8 before served. This is where we are now.

9 BellSouth will address issues in this proceeding,
10 some of which the panel has already addressed. And as you hear
11 the testimony and review the evidence, we urge you to step back
12 and look at the decision those panels made. Because our
13 witnesses will explain how the CLECs have continued to grow
14 lines, there is simply no competitive barrier here. The
15 evidence there show you first that the CLECs are not going to
16 be able to prove their case.

17 When the hearing is over, I don't think you will find
18 out that there is any real concrete evidence that BellSouth's
19 FastAccess policy has had a measurable impact on voice
20 competition in Florida. Mr. Ruscilli will explain to you that
21 there are 149 operational CLECs in Florida serving 1.3 million
22 lines, 20 percent of the total lines. The growth in customers
23 served by CLECs has continued to grow by leaps and bounds while
24 this policy has been in effect.

25 We are going to ask the CLEC witnesses for the

1 evidence they have of the anticompetitive effect of this
2 policy, and we believe the evidence will show nothing that
3 proves that BellSouth policy has had an impact on voice
4 competition in this state.

5 The witnesses are not going to be able to tell you
6 how many customers refused to go to an ALEC or CLEC because of
7 the policy. The issue that you are being asked to resolve is
8 important enough for the CLECs to litigate it, and this case
9 has been pending for about a year, but no witness for any of
10 these parties here today can tell you how many potential
11 customers they actually lose because of the policy. It seems a
12 little strange for such an important issue.

13 I expect the evidence to show that particularly MCI
14 sales representatives are trained when they learn that a
15 customer has FastAccess to simply move on to the next mark. I
16 think the evidence will show that there are so many potential
17 customers for the CLECs out there that they have simply adopted
18 a policy of bypassing FastAccess customers. The CLECs have
19 simply concluded that it isn't worth their service rep's time
20 to try to convince a BellSouth FastAccess customer that the
21 CLEC's voice service warrants a move, irrespective of what
22 happens to FastAccess.

23 As I noted, and contrary to what you might think, the
24 evidence will show that the CLECs can and do win these
25 customers when they try. The CLECs have been able to win voice

1 customers who are FastAccess subscribers. They want to take
2 the easy route and simply have you fix their problem for them.
3 And there is going to be a lot of discussion around the
4 technical aspect of what they want you to do.

5 Now, let me make something perfectly clear up front.
6 Just about anything can be done if you throw enough money at
7 it, if you throw enough people at it, and if you throw enough
8 time at it. You will hear about how BellSouth is complying
9 with the FDN and the Supra proceeding orders while those
10 decisions are being appealed. BellSouth has used a stand-alone
11 method of providing service, but none of the CLECs in this case
12 have even tried to use that method.

13 Instead, they want BellSouth to make changes, and the
14 changes they want will cost money, but the CLECs want BellSouth
15 to pay for it. Can anybody quantify exactly what it is going
16 to take and what it is going to cost? No, not until you dig
17 down into it. But anybody with any kind of common sense knows
18 it is going to cost money. They just don't want to pay for it.

19 Something else you will hear today and you heard from
20 Ms. Kaufman is that the CLECs -- that BellSouth is a monopoly,
21 that we built our unregulated FastAccess service on the backs
22 of the regulated ratepayers. Well, I believe the evidence will
23 show that this isn't true. DSL technology was introduced
24 beginning in the late '90s, well after the passage of the '96
25 Telecommunications Act.

1 BellSouth, itself, has invested in Florida more than
2 \$390 million to bring FastAccess service to its customers. Why
3 should the CLECs invest anything if they know that BellSouth
4 will invest it for them and this Commission will simply make
5 BellSouth turn those unregulated services over to them? Does
6 BellSouth's development of FastAccess give it a competitive
7 advantage? We sure hope so, because we spent a lot of money
8 developing it. Does it close down competition in the voice
9 market? Absolutely not. If any witness makes that claim
10 today, the numbers will demonstrate the inaccuracy of that
11 position.

12 Can the CLEC provide their own broadband services?
13 Absolutely. The evidence will show that right now MCI is
14 providing DSL, and so is AT&T. But they don't want to have to
15 be creative in making more investment and competing across all
16 of Florida for DSL customers. Instead they want to offer their
17 package, or their bundle, or whatever similar service they have
18 and make BellSouth provide the complimentary broadband service.
19 I don't think that is real competition.

20 The last thing I would like to point out is that
21 there is broadband competition in Florida today. If you listen
22 to Ms. Kaufman's opening, you would swear that there is not a
23 cable company in Florida. However, the evidence will clearly
24 demonstrate that the largest provider of broadband service in
25 Florida and to Florida citizens are the cable companies. They

1 will show that the CLECs weren't the slightest bit concerned
2 about the state of broadband competition in Florida, or whether
3 the policy they are urging is good or bad for Florida as a
4 whole, but whether they can get the business.

5 The Commission's interest has to be broader than
6 that, and BellSouth will ask you to include in the record this
7 Commission's October 2002 broadband report. One sentence out
8 of that report is important. It's from Page 6 of the report,
9 and it says, quote, "Regulators must be careful not to hasten
10 to judgment and impose remedies for increasing deployment and
11 demand that would interfere with the growing and dynamic
12 broadband market," end quote.

13 As you listen to the evidence today, I would like to
14 ask you to keep another thought in mind. I started this by
15 noting that we had started down this road with two panel
16 decisions. As we examined the CLEC witnesses, I expect they
17 will try to contain the case. They are asking this is just the
18 next step, but they don't want you to look a little ways down
19 the road and see, well, what is the next step after this. As
20 you consider the evidence you are going to hear, I think you
21 ought to wonder what the next case you will hear will be.

22 We will attempt to be succinct in our presentations
23 today. We have instructed our witnesses to be responsive. But
24 this is a very, very important matter to BellSouth, and it has
25 serious consequences, not just for the state of voice

1 competition in Florida that is alive and well, but for
2 BellSouth's ability to offer new and innovative services in
3 this state. As you listen to the evidence, we urge you to keep
4 the larger picture that these issues raise squarely in your
5 sights. Thank you.

6 CHAIRMAN JABER: Ready for Mr. Gillan?

7 MS. KAUFMAN: Yes, Chairman Jaber.

8 MR. MCGLOTHLIN: Chairman Jaber, one more preliminary
9 matter. Due to my client's limited resources and so as not to
10 duplicate the efforts of our aligned parties I request
11 permission to be excused from the hearing.

12 CHAIRMAN JABER: So granted.

13 MR. MCGLOTHLIN: Thank you.

14 MS. KAUFMAN: Chairman Jaber, AT&T, MCI and AIN would
15 call Mr. Gillan. And Ms. McNulty is going to pass out a
16 revised sheet to Mr. Gillan's testimony that has already been
17 provided to the Commission and the parties, but just so
18 everyone has it.

19 CHAIRMAN JABER: Thank you, Ms. Kaufman.

20 We should note that direct and rebuttal will be taken
21 up at the same time.

22 MS. KAUFMAN: Yes, ma'am, that's my understanding.

23 CHAIRMAN JABER: Whenever you're ready, Ms. Kaufman.

24 JOSEPH GILLAN

25 was called as a witness on behalf of AT&T, MCI and AIN and,

1 having been duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MS. KAUFMAN:

4 Q Thank you. Would you state your name and address for
5 the record, Mr. Gillan, please?

6 A Joseph Gillan, P. O. Box 541038, Orlando, Florida
7 32854.

8 Q Mr. Gillan, did you cause 15 pages of direct
9 testimony to be filed in this case?

10 A Yes.

11 Q And do you have any changes or corrections to your
12 direct testimony?

13 A I have one change on Page 2, Line 8, to reflect the
14 substitution of parties. Where it currently says, "Florida
15 Competitive Carriers Association," it should say, "AT&T, MCI
16 and AIN."

17 Q With that correction, Mr. Gillan, is your testimony
18 true and complete to the best of your knowledge?

19 A Yes.

20 MS. KAUFMAN: Madam Chairman, we would ask that
21 Mr. Gillan's direct testimony be inserted into the record as
22 though read.

23 CHAIRMAN JABER: The prefiled direct testimony of
24 Joseph Gillan shall be inserted into the record as though read.

25 BY MS. KAUFMAN:

1 Q Mr. Gillan, did you have 20 pages of rebuttal
2 testimony?

3 A Yes.

4 Q And do you have any changes or corrections to that
5 testimony?

6 A Yes. Same type of change. On the first page of the
7 rebuttal testimony Line 6 continuing on to Line 7 and then
8 again on Line 8 where it refers to the "Florida Competitive
9 Carriers Association," those references should be struck and
10 the substitution should be "AT&T, MCI and AIN."

11 Q And do you have an additional change to your rebuttal
12 testimony?

13 A Yes. Page -- a revised Page 14 with updated numbers
14 was previously distributed.

15 MS. KAUFMAN: Commissioners, that's the page that Ms.
16 McNulty just provided with the updated chart.

17 BY MS. KAUFMAN:

18 Q And, Mr. Gillan, is your rebuttal testimony true and
19 correct to the best of your knowledge?

20 A Yes.

21 MS. KAUFMAN: Madam Chairman, I'd ask that
22 Mr. Gillan's rebuttal testimony be inserted into the record as
23 though read.

24 CHAIRMAN JABER: The prefiled rebuttal testimony of
25 Joseph Gillan shall be inserted into the record as though read

1 with the two modifications made.

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Testimony of Joseph Gillan
Florida Competitive Carriers Association
Docket No. 020507-TP
November 26, 2002

1 **Q. Please state your name, business address and occupation.**

2
3 A. My name is Joseph Gillan. My business address is P.O. Box 541038, Orlando,
4 Florida 32854. I am an economist with a consulting practice specializing in
5 telecommunications.

6
7 **Q. Please briefly outline your educational background and related experience.**

8
9 A. I am a graduate of the University of Wyoming where I received B.A. and M.A.
10 degrees in economics. From 1980 to 1985, I was on the staff of the Illinois
11 Commerce Commission where I had responsibility for the policy analysis of
12 issues created by the emergence of competition in regulated markets, in particular
13 the telecommunications industry. While at the Commission, I served on the staff
14 subcommittee for the NARUC Communications Committee and was appointed to
15 the Research Advisory Council overseeing the National Regulatory Research
16 Institute.

17
18 In 1985, I left the Commission to join U.S. Switch, a venture firm organized to
19 develop interexchange access networks in partnership with independent local
20 telephone companies. At the end of 1986, I resigned my position of Vice
21 President-Marketing/Strategic Planning to begin a consulting practice. Over the
22 past twenty years, I have provided testimony before more than 35 state

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1 commissions, five state legislatures, the Commerce Committee of the United
2 States Senate, and the Federal/State Joint Board on Separations Reform. I
3 currently serve on the Advisory Council to the New Mexico State University's
4 Center for Regulation.

5
6 **Q. On whose behalf are you testifying?**

7
8 A. I am testifying on behalf of ^{AT&T, MCI and AIN} ~~the Florida Competitive Carriers Association (FCCA)~~,
9 an advocacy group formed to promote competition broadly throughout Florida.

10
11 **Q. What is the purpose of your testimony?**

12
13 A. My testimony addresses each of the listed issues in this proceeding. The purpose
14 of my testimony is to explain why the Commission should prohibit BellSouth
15 from refusing to provide FastAccess Internet Access Service (FastAccess) to any
16 customer that has chosen an alternative voice provider. BellSouth's actions in
17 this regard – affirmatively refusing to sell a customer one service unless the
18 customer agrees to purchase another – is a blatantly anticompetitive action that
19 this Commission is charged with prohibiting under state law. The Commission
20 should order BellSouth to immediately cease this anticompetitive practice and
21 require BellSouth to provide its FastAccess service to any customer requesting

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1 service, so long as the network facilities used to provide voice service to the
2 customer are provided by BellSouth (including facilities provided as UNE-P).

3
4 **Q. Please summarize your testimony.**

5
6 A. BellSouth's policy to deny FastAccess to any customer subscribing to an
7 alternative provider of voice service is contrary to both the spirit and the letter of
8 Florida law and explicitly violates Chapter 364's prohibitions on anticompetitive
9 behavior and discrimination. First, BellSouth's policy denies customers the
10 opportunity for basic self-determination as to what combination of providers best
11 meets their specific needs, thereby frustrating the fundamental legislative intent of
12 Chapter 364.01(3), Florida Statutes, to encourage competition because
13 competition provides "...customers with freedom of choice." Second,
14 BellSouth's conduct frustrates the achievement of an important state and national
15 goal – greater penetration of advanced services – solely for the purpose of further
16 entrenching BellSouth's voice monopoly and permitting it to leverage its
17 incumbent monopoly position. Third, BellSouth's conduct permits it to
18 discriminate between data customers based on their voice provider. Fourth, the
19 strategy represents a classic "tying arrangement," enabling BellSouth to cross-
20 leverage its market position between voice and data to foreclose competition. And
21 finally, the strategy results in a barrier to local competition, making it more
22 difficult for new entrants to compete with BellSouth.

23

1 **ISSUE 1: Does the Commission have jurisdiction to grant he**
2 **relief requested in the Complaint?**

3

4 **Q. Does the Commission have jurisdiction to grant the relief recommended by**
5 **your testimony?**

6

7 A. Absolutely. While discussion concerning the Commission's jurisdiction to order
8 the requested relief is most appropriately left to the legal briefs, I will make
9 several brief comments on this issue. First, the Commission has already found
10 that it has jurisdiction to grant the relief FCCA seeks. It denied BellSouth's
11 motion to dismiss the FCCA's Complaint in this case based on jurisdictional
12 arguments. In Order No. PSC-02-1464-FOF-TL, the Commission rejected
13 BellSouth's argument that the Commission has no jurisdiction in this matter and
14 said: "We, however, have determined that we have the authority to remedy anti-
15 competitive behavior that is detrimental to the development of a competitive
16 telecommunications market."

17

18 Second, the Commission has already ordered BellSouth to *partially* cease its
19 anticompetitive and discriminatory behavior in the arbitration between Florida
20 Digital Network and BellSouth (Order Nos. PSC-02-0765-FOF-TP and PSC-02-
21 1453-FOF-TP, Docket No. 010098-TP, "FDN Arbitration ") and in the arbitration
22 between BellSouth and Supra Telecommunications and Information Services

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1 (Order No. PSC-02-0878-FOF-TP). The FDN Arbitration (as clarified on
2 reconsideration) determined that the Commission had the jurisdiction under state
3 and federal law to address these issues and required BellSouth to continue to offer
4 FastAccess service to customers that choose to switch their voice provider.
5 Thus, the issue of the Commission's *authority* over the issues that are the subject
6 of this docket has been resolved no less than three times.

7
8 **ISSUE 2: What are BellSouth's practices regarding the
9 provisioning of its FastAccess Internet service to:**

- 10 a) a FastAccess customer who migrates from
11 BellSouth to a competitive voice service
12 provider; and
13 b) to all other ALEC customers.

14
15 **Q. Please describe FastAccess and BellSouth's current policy regarding its
16 availability.**

17
18 **A.** It is my intent to let BellSouth describe – and then attempt to justify – its current
19 practices regarding FastAccess. In summary form, however, BellSouth's current
20 policy is to refuse this service to any consumer (including business customers)
21 that obtains voice service from a provider other than BellSouth, even where the
22 exact same network facilities are involved. If a customer is currently a subscriber

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1 to FastAccess and seeks to transfer its voice service to an alternative provider,
2 then BellSouth will disconnect the customer's FastAccess service, forcing the
3 customer to find an alternative provider of DSL service as well. If the customer is
4 already the customer of an alternative voice provider using BellSouth's network
5 facilities, then BellSouth will refuse to provision FastAccess on those facilities if
6 the customer requests it.

7
8 **ISSUE 3: Do any of the practices identified in Issue 2 violate**
9 **state or federal law?**

10
11 **Q. Do BellSouth's practices regarding FastAccess that you have described above**
12 **violate state or federal law?**

13
14 **A.** Yes. BellSouth's practices clearly violate both state and federal law. As with
15 Issue 1, however, this is an issue most appropriate for legal briefs. However, in
16 the following section of my testimony, I will address how BellSouth's
17 anticompetitive practice is directly contrary to important policy inherent in the
18 legal requirements for which this Commission has responsibility.

19
20 **Q. Is BellSouth's refusal to provide FastAccess to customers that have chosen an**
21 **alternative provider of voice service competitively significant?**

22

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1 A. Yes. BellSouth's FastAccess customer base is growing rapidly. As recently as
2 year-end 2000, BellSouth had 215,500 FastAccess customers regionwide; by the
3 end of 2001, that total had increased to 620,500. As of the end of the third
4 quarter, BellSouth's DSL lines had grown to 924,000 regionwide. In the first
5 quarter, BellSouth's annual DSL growth rate was 141%, which (according to
6 BellSouth) was the fastest growth rate of any DSL provider in the nation. In
7 contrast, the total number of ALEC line-sharing arrangements added regionwide
8 by ALECs during the first half of 2002 was 2,903. In Florida, BellSouth
9 provisioned an average of 224 line-sharing arrangements (and 596 xDSL capable
10 loops) per month for the first nine months of 2002. BellSouth's estimated market
11 share for DSL service in Florida is roughly 99.3%, virtually a monopoly
12 BellSouth is quickly establishing a market position for DSL service that exceeds
13 even its market position for voice service.

14
15 **Q. Will this problem increase in the future?**

16
17 A. Yes. The problems created by BellSouth's refusal to provide FastAccess to
18 customers choosing alternative voice providers can only be expected to grow as
19 the number of FastAccess subscribers increases, and as entrants try to offer
20 competitive voice services to the mass-market. DSL is fundamentally a consumer
21 and small-business product, where local competition is just beginning to take root
22 via entry strategies such as UNE-P (i.e., unbundled loops purchased in

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1 combination with unbundled local switching). It can only be because BellSouth
2 hopes to frustrate such competition that it finds it advantageous to actually *refuse*
3 service to customers, *risking* their disconnection, but fully *expecting* to retain both
4 the DSL and voice service, in effect daring the customer to choose a competitive
5 voice provider. It is difficult to think of another business where an entity would
6 turn customers away or disconnect service for which they are paying.

7
8 **Q. Is BellSouth's practice consistent with the creation of a competitive**
9 **environment – a goal this Commission is charged to implement?**

10
11 A. No, it is the antithesis of it. A critical goal of a competitive market is consumer
12 empowerment – in a competitive market, the consumer is made sovereign because
13 it is the consumer (because of its ability to choose an alternative) that punishes
14 unresponsive firm behavior. BellSouth's policy turns this relationship on its head,
15 allowing BellSouth to dictate to consumers the choices they must make – take
16 BellSouth voice service or be refused FastAccess.

17
18 **Q. Why would BellSouth force consumers to make this choice?**

19
20 A. BellSouth recognizes that customers desiring DSL service are also likely to be the
21 “best” voice customers. That is, a DSL customer is more likely to purchase high-
22 margin vertical services. For instance, FastAccess customers are nearly twice as

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1 likely to subscribe to BellSouth's CompleteChoice service, with more than 60%
2 of FastAccess customers subscribing to this feature package. (BellSouth First
3 Quarter 2002 Earnings Release).

4
5 BellSouth also understands that FastAccess consumers are vested in its service
6 because it is the consumer that has undertaken the work to make the service
7 operational. According to BellSouth, over 95% of its residential customers "self-
8 installed" FastAccess (First Quarter, 2002). After having done the work to get its
9 service operational, why should BellSouth be permitted to jeopardize the
10 customer's service arrangement, threatening to disconnect the service simply
11 because the customer desires to use a different company for its voice service?

12
13 **Q. Is BellSouth's practice contrary to the policy goal of increased broadband**
14 **penetration?**

15
16 A. Absolutely. Not only does BellSouth's conduct violate Chapter 364's prohibition
17 against anticompetitive conduct and discrimination, as well as its mandate that
18 competition in the local telecommunications market be encouraged, it also
19 interferes with well-articulated national policies. Section 706 of the
20 Telecommunications Act charges the FCC and each state commission with
21 responsibility to encourage the deployment of advanced services. Yet here is a
22 company (BellSouth) whose policy is to use its advanced service offering as a

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1 hostage to try and retain its local voice dominance. This action violates *both*
2 goals of the federal Act by imposing a Hobson's choice on consumers – either the
3 consumer is discouraged from using a competitive voice provider, or it must
4 sacrifice its advanced service purchased from BellSouth.

5
6 BellSouth's policy is truly remarkable. BellSouth is refusing to provide – or,
7 even worse, where the customer is already a subscriber, BellSouth is threatening
8 to disconnect – a service that is seen as a national priority. The Commission
9 should use its authority and order that this practice cease immediately.

10
11 **Q. Is BellSouth's policy inherently discriminatory?**

12
13 A. Absolutely. Consider the situation of two customers currently subscribing to
14 FastAccess (which today also means they are part of BellSouth's voice
15 monopoly). One customer decides to subscribe to WorldCom's new residential
16 offering, the "Neighborhood," while the other intends to remain with BellSouth.
17 The same network facilities will be used to serve the customer choosing
18 WorldCom's voice service as are used today (or would be used to serve the
19 customer staying with BellSouth for local voice service). Thus, there can be no
20 question that the customers are similarly situated – they are each being served
21 over identical facilities. Yet, BellSouth would provide FastAccess to one (the
22 customer that stays with it) while affirmatively disconnecting the other (the

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1 customer that chooses a competitive alternative). No clearer example of
2 discrimination can be found.

3

4 **Q. What would be the effect of the Commission sanctioning such behavior?**

5

6 A. If the Commission approves such behavior, it would be sanctioning BellSouth's
7 erection of yet another barrier to local voice competition. As I indicated earlier,
8 BellSouth's policy effectively forecloses voice competition for those customers
9 desiring FastAccess service. It is clear that no provider is capable of creating a
10 DSL-footprint of comparable scale and scope as BellSouth. Forcing customers to
11 choose between FastAccess and local competition is unfair to the customer and it
12 forecloses an important customer segment (the 60% of the FastAccess customers
13 that desire local packages) from local competition. Entrants must either attempt
14 to duplicate BellSouth's DSL-footprint (which would be prohibitively expensive
15 if not impossible) or forego competing for customers desiring such services. The
16 effect is to create an additional barrier to competition by artificially constricting
17 the available market, particularly in the residential marketplace.

18

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1 **ISSUE 4: Should the Commission order that BellSouth may**
2 **not disconnect the FastAccess Internet service of an end user**
3 **who migrates his voice service to an alternative voice provider?**

4
5 **ISSUE 5: Should the Commission order BellSouth to provide**
6 **its FastAccess Internet service, where feasible, to any ALEC**
7 **end user that requests it?**

8
9 **Q. Is there any reason that the Commission's policy should differ between**
10 **customers that have already chosen a new voice provider (and are asking**
11 **that FastAccess be installed on a UNE line), and customers that are *migrating***
12 **to a new voice provider (but already have FastAccess)?**

13
14 A. No, there is no distinction – legally, technically or otherwise -- between these two
15 groups of customers. It is just as discriminatory and anticompetitive for
16 BellSouth to refuse service to customers that have *chosen* an alternative voice
17 provider as it is to refuse service to customers that are *choosing* an alternative (but
18 which already have FastAccess installed). The anomalous result from the FDN
19 Arbitration – that customers that already have FastAccess may continue to receive
20 it, but that customers that wish to receive the service may be refused – is a
21 distinction that undermines the Commission's fundamental policy that BellSouth
22 may not punish Florida consumers for their choice of voice provider.

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1
2 Each of the Commission's reasons, articulated in the FDN Arbitration, for
3 ordering BellSouth to continue as a FastAccess provider to its customers that
4 choose an alternative – *i.e.*, to do otherwise is discriminatory, anticompetitive and
5 inconsistent with encouraging voice competition and the deployment of advanced
6 services – is equally applicable to customers that already have a voice provider,
7 and now want to add FastAccess. Thus, the unqualified answer to both Issues 4
8 and 5 must be yes – BellSouth may not *refuse* service to a customer, whether the
9 customer has already purchased FastAccess, or is requesting the service as a new
10 customer.

11
12 **ISSUE 6(a): If the Commission orders that BellSouth may not**
13 **disconnect its FastAccess Internet service, where a customer**
14 **migrates his voice service to an ALEC and wishes to retain his**
15 **BellSouth FastAccess service, what changes to the rates, terms,**
16 **and condition of his service, if any, may BellSouth make?**

17
18 **ISSUE 6(b): If the Commission orders BellSouth to provide its**
19 **FastAccess service to any ALEC end user that requests it,**
20 **where feasible, then what rates, terms and conditions should**
21 **apply?**

22

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1 **Q. If the Commission orders that BellSouth may not disconnect its FastAccess**
2 **Internet service, where a customer migrates his voice service to an ALEC**
3 **and wishes to retain his BellSouth FastAccess service, what changes to the**
4 **rates, terms, and condition of his service, if any, may BellSouth make?**

5
6 A. BellSouth should not be permitted to make *any* changes to the customer's network
7 serving arrangement nor assess any additional charges to a migrating customer.
8 The same UNE-P loop/port combination that served the customer originally
9 should be used to provide voice service to the customer with BellSouth merely
10 establishing a new billing arrangement with the customer for its FastAccess
11 service (as it would if a reseller served the customer). BellSouth should not be
12 permitted to install new loop facilities, change the service to a different loop
13 arrangement, or make any other network change to the underlying service. And
14 in fact, the Commission has already decided just this in the FDN Arbitration
15 where it found that the transition must be seamless and at no additional cost.
16 (Order No. PSC-02-1453-TP).

17
18 **Q. If the Commission orders BellSouth to provide its FastAccess service to any**
19 **ALEC end user that requests it, where feasible, then what rates, terms and**
20 **conditions should apply?**

21

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1 A. BellSouth should be required to provide FastAccess service to any ALEC end
2 user (served by UNE-P), under the same terms, conditions and prices that
3 FastAccess service would be offered to its own end-users. BellSouth should not
4 be permitted to require the deployment of new facilities, different loops or make
5 other change (other than what would be needed if the end-user remained
6 BellSouth's end user such as, for instance, any necessary conditioning).

7

8 **Q. Does this conclude your direct testimony?**

9

10 A. Yes.

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION
REBUTTAL TESTIMONY OF JOSEPH GILLAN
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 020507-TL

December 23, 2002

Introduction

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17

Q. Please state your name, address and business affiliation.

A. My name is Joseph Gillan. My business address is P. O. Box 541038, Orlando, Florida 32854. I am filing rebuttal testimony on behalf of ~~the Florida Competitive Carriers Association (FCCA)~~ ^{AT&T, MCI and AIN}. I previously filed direct testimony in this proceeding on behalf of ~~the FCCA~~ ^{AT&T, MCI and AIN}.

Q. What is the purpose of your rebuttal testimony?

A. The purpose of my rebuttal testimony is to respond to BellSouth's "policy reasons" that it claims justify its refusal to provide FastAccess DSL service to any customer that has moved its voice service to an Alternative Local Exchange Company (ALEC) using UNE-P or UNE-L leased from BellSouth. In addition to my testimony, the FCCA is sponsoring the testimony of Mr. Jay Bradbury and Ms. Sherry Lichtenberg who address the operational issues raised by BellSouth.

**Rebuttal Testimony of Joseph Gillan
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1 **Q. Please summarize your rebuttal testimony.**

2

3 A. BellSouth offers three reasons why the Florida Commission should sanction its
4 refusal to provide DSL data service to those customers that choose an ALEC for
5 - voice service:

6

7 * The FCC has not ordered BellSouth to cease the practice;

8

9 * BellSouth's federal tariff -- or, at least, BellSouth's
10 *interpretation* of that tariff -- requires that it refuse service;
11 and,

12

13 * Competition -- and, even more remarkably, consumers --
14 *benefit* from BellSouth's refusal to provide service to
15 customers that have chosen an ALEC for voice service.

16

17 As I explain below, however, none of these explanations has merit. Although it is
18 true that FCC rules do not *prohibit* BellSouth's practice of restricting FastAccess
19 to its own voice customers, neither do they *sanction* this extreme behavior.
20 Moreover, the FCC is not the sole (nor necessarily, even the best) judge of
21 discrimination under the Telecommunications Act of 1996 ("Federal Act" or

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1 “Telecom Act”), nor has it addressed whether such conduct is appropriate under
2 Florida law.

3
4 The issue in this proceeding fundamentally is “when is it reasonable – if ever –
5 for BellSouth to refuse service to a customer?” BellSouth characterizes FCCA’s
6 Complaint as forcing BellSouth to serve the “ALEC’s customers” (Fogle, page 5),
7 but that characterization is misleading – these are BellSouth’s customers (or, with
8 respect to new requests for FastAccess, potential customers). FCCA’s Complaint
9 is that it is discriminatory and unlawful for BellSouth to refuse service to one of
10 BellSouth’s data customers as punishment for the customer choosing an ALEC
11 for voice service. It is against this remarkable action that the merit of BellSouth’s
12 claimed justifications – in a nutshell, “the FCC lets me do it,” “my tariff makes
13 me do it,” and “consumers benefit by my doing it” – must be balanced.

14
15 **Q. Before you address BellSouth’s policy arguments in detail, do you have any**
16 **preliminary comments?**

17
18 A. Yes. One of the issues in this proceeding concerns the Commission’s authority to
19 order the relief requested by the FCCA (Issue 1). It is frequently difficult in
20 regulatory proceedings to separate economic and policy testimony from legal
21 arguments. Although my rebuttal testimony does discuss a number of FCC
22 decisions and BellSouth’s interstate tariff (these discussions are necessitated by

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1 BellSouth's effort to hide behind these documents), the testimony does not
2 directly address the Commission's legal jurisdiction, which is an issue that will be
3 addressed in post-hearing brief. Let me just note that the issue of this
4 Commission's authority to take action in this case is one that has already been
5 decided multiple times by the Commission.

6
7 **The FCC Has Not Sanctioned BellSouth's Policy Restricting FastAccess**

8
9 **Q. BellSouth attempts to justify its FastAccess policy by claiming that the FCC**
10 **approves of it. (Ruscilli, page 3). Is this interpretation accurate?**

11
12 **A.** No. A cornerstone of BellSouth's claim that its FastAccess policy is lawful is its
13 assertion that the policy has been "sanctioned" by the FCC. BellSouth is so
14 convinced of this view, that not only does it claim that the FCC has sanctioned the
15 behavior, BellSouth claims that the FCC has preempted any other conclusion.
16 (Ruscilli, page 3).

17
18 **Q. Has the FCC been as "definitive" as on these issues as BellSouth claims?**

19
20 **A.** No. A complete review of FCC decisions regarding FastAccess (and other
21 FastAccess-like arrangements) reveals an FCC that is far more ambiguous than
22 the characterization BellSouth implies. BellSouth portrays the FCC as reaching

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1 definitive findings that its behavior is not discriminatory. However, a fair reading
2 of relevant FCC Orders shows that the FCC has generally deferred substantive
3 consideration of the discrimination question by finding only that its rules *as*
4 *written* do not require that BellSouth continue to offer DSL service to customers
5 served via UNEs (and UNE-P in particular).

6
7 Finding that a rule does not compel certain behavior is far different than finding
8 the behavior is lawful. The FCC itself made this distinction clear when it first
9 concluded that its rules were not written to require an ILEC to provide DSL
10 service to customers choosing voice service from another carrier (FCC Order 01-
11 26, CC Dockets No. 98-147 and CC Docket No. 96-98, January 16, 2001, ¶ 26):

12
13 As described above, we deny AT&T's request for clarification that
14 under the *Line Sharing Order*, incumbent LECs are not permitted
15 to deny their xDSL services to customers who obtain voice service
16 from a competing carrier where the competing carrier agrees to the
17 use of its loop for that purpose. Although the *Line Sharing Order*
18 obligates incumbent LECs to make the high frequency portion of
19 the loop separately available to competing carriers on loops where
20 incumbent LECs provide voice service, it does not require that
21 they provide xDSL service when they are not longer the voice
22 provider. We do not, however, consider in this Order whether, as

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1 AT&T alleges, this situation is a violation of sections 201 and/or
2 202 of the Act.

3
4 In effect, the FCC decided not to decide – acknowledging that existing rules did
5 not require an ILEC to offer its xDSL services to customers served via network
6 elements, while leaving for another day whether such action would be
7 unreasonable. This approach was carried forward to a series of Section 271
8 proceedings that judged compliance with existing rules. BellSouth relies heavily
9 on such Section 271 decisions, but without ever acknowledging the critical
10 context provided by the decision’s reference to existing rules (FCC Order No. 02-
11 147, CC Docket No. 02-35, May 15, 2002, ¶157 (Georgia/Louisiana 271 Order),
12 emphasis added):

13
14 We reject these claims [regarding FastAccess] because, under our
15 rules, the incumbent LEC has no obligation to provide DSL service
16 over the competitive LEC’s leased facilities.

17
18 This theme continued into the FCC’s review of BellSouth’s “5 State Application”
19 (FCC Order No. 02-260, WC Docket No. 02-150, September 18, 2002, ¶164,
20 emphasis added):

21

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1 As we stated in the Georgia/Louisiana Order, an incumbent LEC
2 has no obligation, under our rules, to provide DSL service over the
3 competitive LEC's lease facilities.
4

5 There is no question that the FCC's existing rules do not require the relief sought
6 by the FCCA – obviously, if the existing rules did so, then this proceeding would
7 be unnecessary. This “admission” does not, however, change the question before
8 the Florida Commission: What resolution is appropriate for Florida consumers,
9 given the Federal Act's prohibition on discrimination and the provisions in
10 Florida law concerning anticompetitive conduct?
11

12 **Q. Has the FCC previously indicated that it expected the states to investigate**
13 **(and prevent) discrimination problems, such as those presented here?**
14

15 A. Yes. Although federal rules define a national framework and establish minimum
16 requirements, the FCC clearly expected that the states would “drill down” to
17 adopt more detailed discrimination protections and address other issues as they
18 arose (FCC Order 96-235, CC Docket No. 96-98, August 8, 1996, ¶ 310,
19 emphasis added):
20

21 We [the FCC] expect that the states will implement the general
22 nondiscrimination rules set forth herein by adopting, *inter alia*,

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1 specific rules determining the timing in which incumbent LECs
2 must provision certain elements, and any other specific conditions
3 they deem necessary to provide new entrants, including small
4 competitors, with a meaningful opportunity to compete in local
5 exchange markets.

6
7 The FCC thus recognized that the states would be addressing specific problems as
8 they arose.

9
10 **Q. Is it appropriate for the Florida Commission to exercise its authority to**
11 **prevent discrimination in this case?**

12
13 A. Yes. Although the detailed discussion of the Commission's legal authority is best
14 left to the post-hearing brief, the focus of this case is the discriminatory impact of
15 BellSouth's policy on the Florida voice market, over which the Commission
16 unquestionably has jurisdiction.

17
18 **Q. Does BellSouth acknowledge the interrelationship between its FastAccess**
19 **service and its unique position as the incumbent voice provider?**

20
21 A. Yes. Even BellSouth acknowledges that its FastAccess position is a direct result
22 of its inherited voice monopoly (Smith, page 5, emphasis added):

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1

2

By only investing in areas where BellSouth believed that it could successfully market DSL service as a compliment to its existing voice service and thereby realize a favorable return on its investment, BellSouth was able to increase deployment and investment in later years as its DSL offerings became more popular.

3

4

5

6

7

8

9

BellSouth used its voice monopoly to create its DSL service and is now using its DSL service to further entrench its voice monopoly. This cycle must be broken.

10

11

12

BellSouth's Federal Tariff Does Not Excuse its Behavior

13

14

Q. BellSouth claims that continuing to offer xDSL services to customers that obtain voice service from another carrier using UNEs would “violate” its federal tariff. (Ruscilli, page 11). Assuming the statement is true, should the Commission defer to BellSouth’s federal tariff?

15

16

17

18

19

A. No. Assuming that BellSouth’s interpretation of its federal tariff is plausible -- an issue I will return to in a moment -- tariffs are intended to reflect policy, not create it. BellSouth’s tariff (at least with respect to the issue here) was drafted and filed by BellSouth and thus is entirely within BellSouth’s discretion. Using the tariff as

20

21

22

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1 an excuse for its behavior is no different than simply saying that BellSouth
2 refuses service “because it wants to.” The Commission should decide what is
3 appropriate for Florida and if that requires that BellSouth modify its tariff to
4 comply with Florida law, then BellSouth is free to do so.

5
6 **Q. Is BellSouth’s interpretation of its federal tariff reasonable?**

7
8 **A.** No. First, the most important point is the one above – BellSouth should not be
9 able to “justify” anticompetitive and discriminatory conduct by claiming that its
10 federal tariff permits or requires it. But even if it were reasonable to use a tariff in
11 such a manner, there is nothing in BellSouth’s federal tariff that could reasonably
12 be read as compelling its behavior.

13
14 BellSouth claims that FCC Tariff No. 1, Section 7.2.17(A) requires that it refuse
15 service to any customer served by a UNE arrangement because that section of the
16 tariff indicates that DSL service will be provided to an “in-service, Telephone
17 Company provided exchange line facility.” (Ruscilli, page 11). But the tariff goes
18 on to define an “in-service exchange line facility” in the following manner (FCC
19 Tariff No. 1, 6th Revised Page 7-58.12, Section 7.2.17(A)):

20
21 An in-service exchange line facility, as referred to in association
22 with BellSouth ADSL service, is the serving Central Office line

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1 equipment and all the plant facilities up to and including the
2 Telephone Company-provided Network Interface Device.

3
4 Although BellSouth continuously *states* that UNEs are not an “in-service
5 exchange line facility” (see Ruscilli, page 11), there is nothing in the above
6 definition that *supports* the claim – UNE loops include the Central Office line
7 equipment and all the plant facilities “up to and including” a BellSouth-provided
8 Network Interface Device. These conditions are satisfied as much by UNEs as by
9 a resold line, or line used to support a BellSouth retail service.

10
11 **The Effect of BellSouth’s Policy on Local Competition**
12 **and Florida Consumers**

13
14 **Q. In addition to its “legal” (i.e., jurisdictional and tariff-based) arguments,**
15 **does BellSouth offer any other explanations for its behavior?**

16
17 **A.** Yes. BellSouth also argues that it should be allowed to refuse service to
18 customers. BellSouth claims that this policy does not adversely affect customers
19 because:

20
21 (a) The policy can be rectified by ALECs reselling BellSouth voice
22 service or building their own DSL network (Ruscilli, page 13);

23

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1 (b) The Florida market is already competitive (Ruscilli, page 15); and

2
3 (c) Broadband competition is promoted by BellSouth's refusal to serve
4 some customers (Ruscilli, page 19).

5
6 **Q. Can ALECs "simply" resell BellSouth's voice service or establish their own**
7 **DSL networks?**

8
9 A. No. Before addressing what options are plausibly available to an ALEC,
10 however, it is useful to again point out that the fundamental issue here is whether
11 it is reasonable for BellSouth to refuse to provide service to its own customers,
12 not whether ALECs have other options. Even if ALECs had other options (a
13 claim I dispute below), that would not justify BellSouth's actions, it would only
14 lessen the potential impact of those actions on the ALEC.

15
16 As to the ALEC's ability to "resell" BellSouth's services, that proposition ignores
17 one of the first lessons of the post-Telecom Act environment – resale is not
18 viable. Among other failings, resale does not enable competitors to introduce
19 innovative new services such as MCI's Neighborhood offering, which require that
20 MCI become the access provider to its customers in order to offer unlimited toll
21 services. BellSouth's Form 477 local competition reports to the FCC show that

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1 resale lines in Florida declined by more than 50% in just the first six months of
2 2002, hardly evidence that the option is viable.

3
4 Equally problematic is the idea that any company is in a position to duplicate
5 BellSouth's DSL footprint. As I noted earlier, BellSouth admits that its DSL
6 footprint is the result of its starting position as the incumbent voice provider.
7 (Smith, page 5). That advantage is not available to any other provider. Moreover,
8 even if an ALEC could establish a DSL footprint equal to that of BellSouth, that
9 would not justify forcing customers to change DSL service so as to change their
10 voice provider. Difficulties in establishing a working DSL arrangement are
11 legendary. Why should a customer be forced to risk a problem with its DSL
12 service just because it wants to subscribe to a better voice product?

13
14 **Q. Is there *any* useful conclusion that can be drawn from BellSouth's testimony**
15 **that it is willing to offer FastAccess on a resold line?**

16
17 A. Yes. The testimony directly contradicts BellSouth's assertion that it is costly and
18 difficult to arrange for FastAccess provision on UNEs because BellSouth would
19 need to "negotiate" rates, terms and conditions for provisioning with each ALEC.
20 There is no reason that the "UNE-negotiations" needed to implement a
21 Commission order would be any more difficult than the "resale-negotiations" that
22 its current policy accommodates.

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1

2 **Q. BellSouth points to penetration statistics for Florida to support its claim that**
3 **competition in the local market is flourishing. (Ruscilli, page 16). Does this**
4 **respond to the argument that its policy is anticompetitive?**

5

6 A. No. Overall penetration statistics say nothing about discrimination in particular
7 market segments, nor about BellSouth's attempt to retain voice customers by
8 threatening to disconnect DSL service.

9

10 **Q. Why is it so important that BellSouth be prohibited from discriminating**
11 **against UNEs (and UNE-P in particular) by refusing to provide FastAccess to**
12 **customers being served under such arrangements?**

13

14 A. Evidence continues to demonstrate that the only practical hope for mass market
15 competition for residential and smaller business customers is UNE-P. The
16 following table (based on BellSouth's Form 477 Local Competition Reports filed
17 with the FCC) demonstrates the importance of UNE-P to local competition.

18

19

Table 1: Local Market Conditions in Florida

Entry Strategy	December 2001	June 2002	Change
Resale	277,335	132,630	(144,705)
UNE-P (loops with switching)	135,719	428,326	292,607
UNE-L (loops without switching)	167,048	167,027	(21)
	580,102	727,983	

20

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1 Contrary to BellSouth's theory, the growth in UNE-P does not mean that voice
2 competition is unharmed by its discriminatory refusal to provide FastAccess on
3 such lines – it is only evidence that voice competition cannot be precluded by the
4 policy (which, given the relatively low penetration rates of DSL service should
5 not be a surprise). The relative growth of UNE-P and resale does demonstrate,
6 however, why BellSouth insists on punishing customers migrating to a successful
7 entry strategy, while “offering” to provide FastAccess to customers migrating to a
8 strategy in total decay.

9
10 **Q. BellSouth (for reasons that are, quite frankly, not clear) also claims that a**
11 **favorable ruling on the FCCA Complaint would not promote local voice**
12 **competition in rural Florida. (Ruscilli, page 18). Do you agree?**

13
14 A. No. Although I do not understand how it would make discriminating against
15 urban and suburban customers acceptable *assuming* ALECs were not serving rural
16 areas, the data supplied by BellSouth demonstrates that ALECs are using UNE-P
17 to compete for rural customers. BellSouth's testimony indicates that “only” 2%
18 of the UNE-P lines are in (the presumably rural) Zone 3. However, only 3.5% of
19 the switched lines are in Zone 3. Although these statistics suggest that
20 competition is proportionally higher in the non-rural areas, the difference would
21 not seem to warrant the point that BellSouth is attempting to make (whatever it
22 is). Perhaps even more telling, on December 18 2002, BellSouth filed

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1 information with the FCC's Wireline Competition Bureau indicating that it had
2 discovered an error in a comparable federal filing and provided updated (and
3 corrected) information to the FCC (BellSouth's Ex Parte Letter is attached as
4 Exhibit No. ___, JPG-1). This corrected data reveals a UNE-P distribution for
5 Florida quite different than that claimed by Mr. Ruscilli.

Table 2: BellSouth's Corrected UNE-P Data
(UNE-P Lines as of September 30, 2002)

	Corrected BellSouth Data		Ruscilli Testimony
	UNE-P Lines	Percent	
Zone 1	136,004	29%	64%
Zone 2	304,545	64%	34%
Zone 3	34,955	7%	2%
	475,504		

9
10 I would note that the above statistics continue to demonstrate the power of UNE-P
11 to bring competitive choice to residential and smaller business customers
12 throughout Florida, with nearly 50,000 new UNE-P lines being added in the third
13 quarter of 2002 (comparing Table 2 to Table 1).

14
15 **Q. Do you believe that prohibiting BellSouth from refusing to offer FastAccess**
16 **service will promote broadband competition?**

17
18 **A.** Yes. The policy enhances customer choice and, therefore, enhances competition.
19 BellSouth adopts the counter-intuitive position that allowing it to refuse service

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1 promotes competition. Moreover, BellSouth argues that requiring it to cease the
2 practice would harm broadband competition in three ways (Ruscilli, page 19):

- 3
- 4 i) By “saddling economic burdens” on BellSouth that could
5 adversely impact BellSouth’s DSL deployment;
- 6
- 7 ii) By discouraging ALECs to deploy DSL networks of their
8 own; and
- 9
- 10 iii) By discouraging ALECs to offer competing DSL services
11 through line splitting.

12

13 None are these claims are true. First, as discussed by Mr. Bradbury and Ms.
14 Lichtenberg, BellSouth’s claimed “economic burdens” are never quantified, much
15 less shown to be significant. In fact, BellSouth has "mistakenly" provided DSL
16 service on UNE-P lines in the past, a circumstance that directly challenges the
17 claim that it is difficult or costly to accommodate. (A copy of BellSouth’s letter
18 to ALECs demanding that the lines be shifted to resale or the service will be
19 disconnected is attached as Exhibit No. ____, JPG-2).

20

21 Second, ALECs would have the same incentive to offer DSL in the future as they
22 have today – to be able to win the customer as a DSL customer. The FCCA is not

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1 asking that ALECs replace BellSouth as the DSL provider using BellSouth
2 equipment – BellSouth would continue to serve its customers as before (albeit
3 without retaining the customer’s voice service). ALECs would still have an
4 incentive to become a DSL provider in order to win DSL customers.

5
6 Finally, ALECs would still have an opportunity to partner with competing DSL
7 providers where that strategy made sense. The only difference is that in the
8 meantime, for those customers that want the ALEC’s voice service, BellSouth
9 would not be permitted to refuse to provide it merely because the customer no
10 longer wanted BellSouth’s voice service as well.

11
12 **Q. BellSouth also claims that the relief FCCA seeks would harm its competitive**
13 **position. Does this make sense?**

14
15 A. No. BellSouth’s testimony on “competitive harm” borders on the bizarre. For
16 instance, BellSouth implies that the FCCA is weakening its ability to offer
17 packages (Smith, page 5):

18
19 The ability to offer such a package (mixing voice and DSL) is
20 essential for BellSouth to competitive successfully against those,
21 such as cable providers, that also offer a full suite of

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1 telecommunications products and services, including local service,
2 long distance and Internet access.

3
4 Leaving aside the fact that there are precious few cable providers offering full
5 suites of local, long distance and Internet access in Florida, there is nothing about
6 the FCCA Complaint that would stop BellSouth from continuing to offer DSL
7 services alongside its local (and long distance, now that it has approval) services.
8 The FCCA Complaint addresses BellSouth's refusal to sell FastAccess when
9 customers decide to obtain voice service elsewhere, the Complaint does not
10 prevent BellSouth from continuing to offer FastAccess to customers that it retains.
11 It is simply implausible that BellSouth's *DSL* competitive position is harmed
12 because it would no longer be permitted to refuse to sell the service, although
13 such an order would (as it should) diminish its *voice* dominance.

14
15 **Q. Finally, BellSouth claims that it cannot offer FastAccess on a “stand alone”**
16 **basis. (Smith, page 6). Is this accurate?**

17
18 A. No. BellSouth points to other DSL efforts (such as Covad and Rhythms),
19 claiming that these companies prove that DSL service cannot be offered on a
20 “stand alone” basis. Importantly, BellSouth would never be providing DSL on a
21 stand-alone basis in the manner these companies attempted. First, BellSouth
22 would only be required to sell DSL service in situations where it is also providing

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1 UNEs. Consequently, the DSL service would never be provided on a stand-alone
2 basis from a technology point-of-view. In addition, the service would remain a
3 part of the overall family of BellSouth services that collectively produced \$ 4.7
4 billion in revenue in Florida last year (ARMIS 43-01 2001 – Total Florida
5 Operating Revenues). Any comparison of this type of “joint-provisioning” to the
6 “stand-alone” efforts of other providers is simply misleading.

7
8 **Q. Does this conclude your rebuttal testimony?**

9
10 **A. Yes.**

1 BY MS. KAUFMAN:

2 Q Mr. Gillan, you have two exhibits to your rebuttal
3 testimony?

4 A Yes.

5 MS. KAUFMAN: Madam Chairman, if I could have a
6 number for those.

7 CHAIRMAN JABER: JPG-1 and JPG-2 will be identified
8 as composite Exhibit 13.

9 (Exhibit 13 marked for identification.)

10 BY MS. KAUFMAN:

11 Q Do you have any changes or corrections to those
12 exhibits?

13 A No.

14 Q Mr. Gillan, do you have a summary of your direct and
15 your rebuttal testimony?

16 A Yes.

17 Q If you would give that, please.

18 A I have a brief summary of both the direct and
19 rebuttal.

20 The direct -- my summary of my direct testimony is,
21 is short and direct, and the reason is quite simply that the
22 Commission has already decided the foundational issue in this
23 proceeding. This is not a case really to answer whether or not
24 ~~BellSouth's practice to refuse to sell service to customers who~~
25 have the temerity to select voice service from a competitor is

1 an unreasonable, anticompetitive and discriminatory act. The
2 Commission has twice decided that and affirmed it on
3 reconsideration. This is not a fourth bite of the apple for
4 BellSouth; rather, the complaint is merely a housekeeping
5 complaint to deal with three situations.

6 First, in an effort to prevent the Commission from
7 becoming Bill Murray in Groundhog Day, having the same issues
8 cycle before it always in every arbitration, we have brought a
9 complaint so that you have an administratively simple tool to
10 extend or apply the decisions you have already reached to other
11 carriers in similar circumstances.

12 Two, we do believe that it is just as
13 anticompetitive, discriminatory and unreasonable for BellSouth
14 to refuse service to a customer who has already chosen a voice
15 provider as it is for them to refuse and disconnect service to
16 a customer that is moving to a voice provider. Customers don't
17 go to voice providers forever. If a customer wants FastAccess
18 and BellSouth tells them, I will refuse to sell you that
19 product unless you return to me for your voice service, that's
20 just as unreasonable, anticompetitive and discriminatory as if
21 the customer was a FastAccess customer and considering moving.

22 Third, there's an issue under what terms and
23 conditions BellSouth should offer FastAccess under your
24 existing decisions. You've already said that the transition
25 should be seamless and without affecting the service, and it is

1 our position that for the mass market that means they can't go
2 disrupt the customer service, they can't do rearrangements,
3 they can't tear it down and try and put it up on a different
4 facility. That type of activity is antithetical to mass market
5 competition.

6 My rebuttal testimony addresses three, BellSouth's
7 three main, in their direct testimony, explanations as to why
8 their practice is reasonable. First, the FCC has never told me
9 to stop doing this. Second, I filed a federal tariff that
10 tells me I'm allowed to do this. And, third, consumers would
11 be better off if we refuse to sell them service.

12 As to the first two of these it's very simple. It is
13 true the FCC has not told them to stop this practice. They
14 have not said it's okay, but they have not told them to stop
15 it. You've told them to stop it on three separate occasions.
16 So the fact that the FCC hasn't decided on this seems to me at
17 most irrelevant because the question here really is, is it
18 anticompetitive and unlawful under Chapter 364, a question the
19 FCC wouldn't address in any event.

20 Second, BellSouth's claim that their tariff, their
21 federal tariff sanctions this behavior. First, it's not true.
22 Their tariff in no way suggests that they have to be the voice
23 provider for customers who obtain FastAccess. That's just
24 simply not a fair reading of their tariff. But even if it was,
25 it's their tariff. It's up to you to decide what the policy

1 should be and then they should conform their tariffs to comply
2 with the law, not tell you that their tariffs define the law.

3 Three, customers are better off when they're refused
4 service. Well, that's a remarkable claim. In our view there
5 is no way that these, that BellSouth's customers are made
6 better off when BellSouth refuses to sell them service. This
7 is not a question of BellSouth being forced to sell to ALEC
8 customers. These are BellSouth customers, this is BellSouth
9 FastAccess service, and all we're saying is that BellSouth
10 cannot use its FastAccess service and refuse to serve customers
11 that it's selling to or customers that want that product from
12 them as punishment for them choosing a voice provider. There
13 is no reason this company would engage in this behavior except
14 they know that when they play chicken with their customers, the
15 customer will blink and the customer will either return to them
16 for voice service or the customer will not go to a CLEC for
17 voice service.

18 This is about BellSouth abusing its market position
19 pure and simple. It's a decision you've reached several times
20 already. It's not a decision that we're asking you to change
21 in our complaint. We're merely asking that some housekeeping
22 details be cleaned up to make the transition actually seamless
23 and so that new customers, customers who are now being told in
24 order to get FastAccess you must first abandon your CLEC,
25 aren't put into that Hobson's choice.

1 Q Mr. Gillan, if I understand the prehearing order of
2 the Commission, you're addressing all six of the issues in this
3 proceeding; is that correct?

4 A Yes.

5 Q Do you have a copy of the issues in front of you?

6 A Yes.

7 Q Can you turn to Issue 2? Are you there?

8 A Yes.

9 Q Now I'm paraphrasing, but doesn't Issue 2 ask what
10 BellSouth's practices are regarding a FastAccess customer who
11 migrates from BellSouth to a competitive voice service
12 provider?

13 A Yes.

14 Q And look at Issue 3. Doesn't Issue 3 ask, "Do any of
15 the practices identified in Issue 2 violate state or federal
16 law?"

17 A Yes.

18 Q And with regard to Issue 4, could you turn to that?
19 I'm sorry. Issue 5. Doesn't Issue 5 ask whether BellSouth has
20 to provide its FastAccess service to an ALEC subscriber who has
21 never been essentially a BellSouth FastAccess customer?

22 A Yes. That would be the new customer question that
23 we, that I mentioned.

24 Q Now the Commission has to decide in this proceeding
25 Issues 2 and 3 as well as the rest of the issues, doesn't it?

1 A Yes.

2 Q And, in fact, when you -- and I don't mean any
3 disrespect by this question, Commissioners. With regard to
4 your claim that the Commission has already decided this issue,
5 in fact, panels of this Commission have decided issues or
6 issues similar to 2 and 3; isn't that correct?

7 A Yes. That's my understanding. My understanding as
8 well though is that panels act as the full Commission or act in
9 the shoes of the full Commission.

10 Q You didn't mean to suggest that all five members of
11 this Commission have looked at this particular issue and have
12 reached a decision with regard to Issues 2 and 3, did you?

13 A No. That all five of these members have? No.

14 Q Now, Mr. Gillan, you will agree that BellSouth's
15 FastAccess service is an enhanced, nonregulated,
16 nontelecommunications service; correct?

17 A Yes, with the caveat, with a caveat that I'm not
18 entirely sure what the tran -- what the regulatory status of
19 the transport function in that service is. But I don't know
20 that that's -- that's not material to my testimony.

21 Q Well, stated another way, you'll agree that this
22 Commission does not directly regulate FastAccess in Florida;
23 correct?

24 A That's correct.

25 Q And your position is that the Commission has

1 ancillary jurisdiction over the provision of FastAccess in
2 order to protect the markets that the Commission does have
3 regulatory authority over, i.e., the voice market; is that
4 correct?

5 A Speaking as a nonlawyer, yes. And I'm aware that the
6 Commission has already found it has jurisdiction to order the
7 relief that it has already ordered again twice already, plus
8 once on reconsideration.

9 Q Now is it your -- I'm sorry. Were you done? I --
10 okay. Is it your position that BellSouth's refusal to provide
11 a nonregulated service to an end user who has moved his voice
12 service to a competitor, local exchange provider, a CLEC, is
13 always anticompetitive?

14 A No. My focus was on their refusal to provide it to a
15 CLEC using a BellSouth loop and being required to provide
16 access to that loop to BellSouth at no cost. There was a
17 caveat that the CLEC must accommodate Bell's ability to provide
18 service to that customer and that the loop itself was a
19 BellSouth loop. Under those circumstances I believe any
20 refusal by BellSouth to deal with that customer is
21 anticompetitive, yes.

22 Q I'm sorry. I'm sure you asked my -- answered my
23 question, but I -- let me ask you a follow-up, if I can.

24 ~~Is inside wire maintenance a nonregulated service in~~
25 Florida?

1 A Yes, that's my understanding.

2 Q If BellSouth refuses to provide its inside wire
3 maintenance service, a nonregulated service, to customers who
4 migrate their voice service to a CLEC, is BellSouth acting in
5 an anticompetitive manner?

6 A They could be. They might not be. I've put no
7 thought into that particular scenario.

8 Q Well, that was sort of the question you were asked
9 last January in your deposition, wasn't it?

10 A Yes.

11 Q You've not given it any thought since January?

12 A It's not an issue in this proceeding. The only issue
13 in this proceeding that I'm aware of is whether or not it's
14 unreasonable for you to refuse to continue to sell or offer
15 service to a customer when you have the absolute technical
16 ability to do so, in most instances you already were doing so,
17 and the CLEC is willing to provide you access to that facility
18 free of charge, thereby preserving for you, in effect, all the
19 economic advantages of serving that customer. Under those
20 circumstances your actions, I think, are patently
21 anticompetitive. Inside wire, we don't -- I have no idea what
22 the circumstances would be that would cause you to refuse to
23 serve a customer.

24 Q Well, don't you think this Commission ought to act on
25 principle?

1 A Yes. But I don't think this Commission should be
2 misled by an effort to take a tangible example of
3 anticompetitive conduct, blow it into an example of something
4 that isn't before it that would require a bunch of facts that
5 we don't even know what they would have been in an effort
6 basically to confuse the issue basically, I think, in effect
7 telling the Commission unless you can figure out a principle
8 that you can apply to every situation without facts and be
9 assured of the correct outcome, you should take no action.
10 That's the problem I have with this line of questioning.

11 Q Well, let's look at another nonregulated service. Is
12 Memory Call regulated in Florida?

13 A Not to my knowledge.

14 Q Well, if BellSouth refuses to let a subscriber of
15 BellSouth who chooses to take their voice service to a
16 competitor to keep their voice mail, has BellSouth acted in an
17 anticompetitive manner?

18 A All my answers would be the same ones that I gave for
19 inside wiring. You would have to look at the specific
20 circumstances, you'd have to look at the motivations, you'd
21 have to look at whether the refusal to deal was reasonable or
22 patently unreasonable. I have no idea based on your question
23 whether any of those conditions apply. I only know about this
24 one that we're talking about today.

25 Q But, again, you were asked about this in your

1 deposition seven months ago; right?

2 A Yes.

3 Q And indeed you were asked about this in this similar
4 case that was held in Georgia recently; correct?

5 A Subject to check, I'll, I'll agree with that, if I
6 was. It's not an issue in this case. It wasn't an issue in
7 the Georgia case. I have not put thought into it. And for the
8 very reason that unless you can look at the specific
9 application, it's very difficult to determine whether the
10 conduct is reasonable or anticompetitive. I think in this case
11 it's clearly and unequivocally anticompetitive given the facts
12 we have at hand.

13 Q All right. Well, let's talk about that for a moment
14 then. Is your position that in order to determine that
15 BellSouth's refusal to provide a nonregulated service to a
16 voice provider who chooses to move, I'm sorry, a voice customer
17 who chooses to move his service to a competitor, you have to
18 look at the facts and see whether there's actually any
19 anticompetitive impact?

20 A I was thinking more in terms of anticompetitive
21 intent would be sufficient for me. But we could also look at
22 impact.

23 Q Well, intent is subjective, isn't it?

24 A I think most of life is subjective.

25 Q Well, that's profound. Don't you usually prove

1 intent by fact?

2 A If you would like to discuss some facts that I think
3 support my conclusion that your behavior has anticompetitive
4 intent behind it, I'd be glad to do so.

5 Q I'm still after the principle. I mean, if we can't
6 agree that there's a principle that the provision of non -- the
7 refusal to provide nonregulated services is inherently
8 anticompetitive, we must be able to agree that in a situation
9 where it might be anticompetitive you have to have facts to
10 prove it. Can't we at least agree to that?

11 A In lay terms, yes. I don't know whether or not that
12 actually meets some standard of proof test by the law. But,
13 yes, in lay terms.

14 Q Okay. That's fine. Let me talk to you about the
15 provision of broadband service in Florida. It is not your
16 position that BellSouth has a monopoly on the provision of
17 broadband service to end users in Florida, is it?

18 A No. They're, they're engaged effectively in an
19 oligopoly with a cable company in some circumstances. In other
20 circumstances they may have an effect of monopoly. I think
21 certainly after the customer has chosen you, you have market
22 power very close to being a monopoly.

23 Q I want to come back to that. But before I go there,
24 let's take a situation, let's assume that in Dade County,
25 Florida, 60 percent of the broadband customers take service

1 from cable and 40 percent take it from the telephone company.
2 I'm not asking you to accept those numbers. I'm just asking
3 you to take them as a hypothetical for the purpose of my
4 question. Is that all right?

5 A Yes.

6 Q All right. And let's assume that every subscriber in
7 Dade County has equal access to both cable and to DSL. If MCI
8 or AT&T has a new customer that just moved into Florida who
9 never has taken service from BellSouth in any shape, no local
10 service, no toll service, no FastAccess service, but is an MCI
11 or an AT&T customer, has a choice between taking cable service
12 and DSL service, is BellSouth's refusal to provide the DSL
13 service anticompetitive?

14 A Yes, I believe so. If that's the service that the
15 customer wants, I believe that that's the case. In a situation
16 where AT&T or MCI would be willing to provide you the use of
17 the facility to reach that customer free of charge, your
18 refusal to provide that service and forgo that roughly \$600 a
19 year in revenue is anticompetitive.

20 Q Okay. So even though the customer has clear choices,
21 our simple refusal to provide service to that customer, if the
22 customer asks for it, I guess it's consumer choice, is
23 anticompetitive; is that correct?

24 A Yes. Because what is occurring there is the customer
25 -- if the customer wants FastAccess, your position to that

1 customer is I will not sell you this product unless you agree
2 to buy voice service from me. If you choose to obtain voice
3 service from AT&T or MCI or some other provider, I'm going to
4 refuse to provide you this service. I find that action
5 anticompetitive.

6 Q Okay.

7 A And obviously if the customer prefers FastAccess,
8 then while you may say that he has, quote, the choice between
9 FastAccess and DSL, there's something -- or between FastAccess
10 and a cable modem service, there's something about that
11 customer or at least that customer perceives that that choice
12 is not equivalent.

13 Q It could be as simple as the DSL service was \$5 a
14 month less than the cable service; correct?

15 A And it could be something as complicated as he lives
16 in a building where the cable provider -- service quality is
17 suspect and so he doesn't want to get Internet from them, it
18 could be that he's worried about security concerns, it could be
19 because he doesn't have easy access to his cable for inside
20 wire and doesn't want to put his computer in the living room
21 next to the color television. It could be for a variety of
22 reasons. I'm not asking the Commission to try and judge what
23 the consumers' reasons were for preferring FastAccess. I'm
24 only asking that we look at what is your reason for refusing to
25 sell them a product.

1 Q Okay. Turn to Page -- I'm going to come back to
2 that, too. But turn to Page 8, and I want to frame this next
3 discussion with your language on Page 8 of your direct
4 testimony, Lines 5 and 6. Let me know when you're at Page 8,
5 please. Are you there?

6 A Yes.

7 Q I'm looking at Lines 5 and 6. And to make sure we're
8 on the same page and line, my copy says, "It is difficult to
9 think of another business where an entity would turn customers
10 away or disconnect service for which they are paying." Is that
11 what your Page 8, Lines 5 and 6 say?

12 A Yes.

13 Q Okay. And do you recall whether the panel that was
14 taking up the FDN case was troubled by that very issue that you
15 raised there: Why would a company turn away customers or
16 disconnect a service for which the customers are paying?
17 Perhaps you don't know. You may not have been there.

18 A I cannot recall.

19 Q Okay. Have you reviewed all of your client MCI's
20 discovery responses?

21 A The answer to that, no, I wouldn't know that to be
22 the case. I have reviewed a number of them. I'm not sure
23 whether I reviewed them all or not.

24 MR. LACKEY: Well, they've all been stipulated. And,
25 Madam Chair, I'm sorry, I wrote down all the numbers and

1 everything, but I'm not sure I'm going to get them all in the
2 right order, so this may be a bit of an issue. I'll try to do
3 my best.

4 BY MR. LACKEY:

5 Q But what I want to do is I want to look at MCI's
6 responses to BellSouth's first set of interrogatories,
7 Interrogatory Number 3, which I believe is hearing Exhibit 1.
8 Do you have a copy of these exhibits?

9 A No.

10 MR. LACKEY: Vicki, are you going to give him a set?
11 I'm going to talk about a number of those.

12 None of the questions I'm going to ask are coming out
13 of the proprietary versions.

14 CHAIRMAN JABER: Thank you, Mr. Lackey.

15 MR. LACKEY: I have tried not to look at the
16 proprietary versions because I tend to blurt out numbers in my
17 old age.

18 CHAIRMAN JABER: Thank you, Mr. Lackey.

19 MS. KAUFMAN: Mr. Lackey, I don't believe Mr. Gillan
20 has the proprietary version. I'm sorry.

21 MR. LACKEY: That's what I said. I said I'm not
22 going to the proprietary version because I don't --

23 MS. KAUFMAN: Okay. I misunderstood you.

24 MR. LACKEY: -- I don't trust myself not to blurt out
25 the proprietary numbers, so I didn't look at them.

1 THE WITNESS: Mr. Lackey, did you direct me to a
2 specific one yet?

3 BY MR. LACKEY:

4 Q Yes. Interrogatory Number 3. It's MCI's responses
5 and objections to BellSouth Telecommunications, Inc.'s, first
6 set of interrogatories numbers 1 to 5, and this is stipulated
7 hearing exhibit or this is hearing Exhibit Number 1. And it's
8 on Page 3 of that document, I believe, at least in the copy I
9 picked up from the desk.

10 The interrogatory starts out, "For the purposes of
11 this interrogatory please assume that MCI has a customer, which
12 customer has subscribed to an MCI" --

13 A I'm looking for request number 3.

14 Q You haven't found it yet?

15 A No.

16 MR. LACKEY: Madam Chair, may I just walk down and
17 show him my copy?

18 THE WITNESS: All right. I've got it.

19 MR. LACKEY: All right. Apparently he has it.

20 That's fine.

21 BY MR. LACKEY:

22 Q I'm going to be asking questions about five or six of
23 these interrogatories. They were all in the package and I'll
24 try to send you to the right page number.

25 CHAIRMAN JABER: Thank you, Mr. Lackey.

1 BY MR. LACKEY:

2 Q Are you there, Mr. Gillan?

3 A Yes.

4 Q And I was trying to make sure we were looking at the
5 same one, so I read the interrogatory that said, "For the
6 purposes of this interrogatory please assume that MCI has a
7 customer, which customer has subscribed to an MCI consumer
8 product offering such as the Neighborhood." Is that the
9 question you have in front of you?

10 A Yes.

11 Q And do you see the answer to that interrogatory?

12 A Yes.

13 Q And doesn't that interrogatory state that -- well,
14 first of all, let me ask you, do you understand that a MCI
15 customer who subscribes to MCI's neighborhood gets in that
16 package unlimited long distance service?

17 A Effectively, yes.

18 Q And do you understand that in response to this or as
19 it says in this interrogatory answer that if MCI's customer
20 decides to drop their Neighborhood product, the unlimited flat
21 rate long distance service is no longer available to the
22 customer?

23 A Yes.

24 Q And presumably MCI has a very good reason for not
25 letting that customer have the flat rate unlimited service.

1 A Yes. Because unlimited long distance service cannot
2 be offered where you're paying another carrier access charges
3 to reach the customer. So you have to have in effect free
4 access to that loop for the long distance calling in order for
5 that product to make sense. That is why in my testimony I
6 recommend that you only be required to provide FastAccess to
7 customers where the carrier purchasing that loop from you has
8 agreed to allow you its use for free so that the economic
9 characteristics of you offering service to that customer are
10 the same whether they stayed with you for local voice or they
11 left for a UNE-P provider.

12 Q Well, do you know that your other client, AT&T, does
13 have an unlimited flat rate offer that's not tied to its local
14 service?

15 A I don't believe that if you read the entire offering
16 that that's actually a correct statement.

17 Q Really? What do you think the conditions that AT&T
18 imposes on that offering are?

19 A I suspect that there's a cap.

20 Q You don't trust AT&T either, I see.

21 CHAIRMAN JABER: Mr. Lackey --

22 MR. LACKEY: I'm sorry.

23 CHAIRMAN JABER: -- I think you need to withdraw
24 that; right?

25 MR. LACKEY: I withdraw it. And I apologize to AT&T

1 for my remarks and to the Commission for having made them.

2 CHAIRMAN JABER: Thank you. And I appreciate your
3 apology. We just don't do things that way here.

4 MR. LACKEY: I won't. I know. I know better than
5 that.

6 CHAIRMAN JABER: That's all right. Let's move on.

7 MR. LACKEY: I'm trying, I'm trying to get sent home.

8 CHAIRMAN JABER: It's not all right, but I'm ready to
9 move on.

10 MR. LACKEY: Will you send me home? That's what I'm
11 trying to do.

12 CHAIRMAN JABER: Well, I think that's all in all of
13 your hands. Let's move forward.

14 MR. LACKEY: I'm sorry.

15 BY MR. LACKEY:

16 Q Mr. Gillan, let me try this again. Do you understand
17 that AT&T represents that it has an unlimited, unlimited usage
18 toll offering for a flat rate?

19 A I'm generally aware of it. I'm not very aware of the
20 specifics. I just know that the Neighborhood product is priced
21 in a way that reflects ownership of the loop in terms of no
22 additional cost for long distance usage on that facility.
23 Ownership of the loop and, quite frankly, the switch port as
24 well.

25 Q But when a Neighborhood customer leaves MCI's

1 Neighborhood, it has to leave its flat rate toll service
2 behind, doesn't it?

3 A Well, it's actually not two separate products. It is
4 a single all distance calling package that reflects MCI's
5 access to those local facilities. Again, the access you need
6 to provide FastAccess to the customers in question in this
7 proceeding, part of my recommendation is that the CLEC be
8 required to give it to you for free.

9 Q Let me, let me try the question slightly differently.
10 If a customer wants unlimited dialing from MCI for a flat rate,
11 it has to subscribe to MCI's local service as well, doesn't it?

12 A The product is both combined, yes.

13 Q Okay. Now do you realize that MCI offers a variety
14 of DSL products in Florida?

15 A In some exchanges, yes.

16 Q I want you to look at, and again this is in hearing
17 Exhibit 1, MCI's response to Interrogatory Number 11, which was
18 dated June 11th or served June 11th, 2003. And just to keep
19 the record straight, there's also a supplement served five days
20 ago. Can you see if you can find those?

21 A Number 11?

22 Q Yes. It's in two places. It is, it is in a
23 June 2nd, 2003, package, which you should have, and it's also
24 in a July 16th, 2003, amended package that you ought to have.

25 A What was the second one, the July 16th?

1 Q Yes. They're both, they're both packages of
2 interrogatories. The first one is MCI's, I guess, original
3 response, and then the one on July 16th was an amended response
4 from the same interrogatory. I just want to make sure you've
5 got both in front of you. I don't want to mislead anyone. Do
6 you have them? Can I --

7 A No. I'm just -- I have -- there's two MCI 11s, which
8 is what's confusing me.

9 CHAIRMAN JABER: Mr. Lackey, why don't you walk over
10 and make sure you're looking at the same page.

11 MR. LACKEY: I'm sorry for the confusion.

12 BY MR. LACKEY:

13 Q Do you have them now, Mr. Gillan?

14 A Yes. Yes. Let me --

15 Q And just to make sure we're talking about the same
16 thing, Interrogatory Number 11 says, "If," and I've got "MCI"
17 in parentheses, "provides broadband service and/or DSL
18 service," and then I've got in parentheses "in the BellSouth
19 region," close paren, "will it provide such service to an end
20 user customer irrespective of whether that customer also
21 purchased telecommunication service from MCI?" Is that, is
22 that the question you have?

23 A Yes.

24 Q Okay. I want to look at the answer. The answer on
25 the June 2nd response says, does it not, "Yes, with the

1 exception of the DSL service MCI provides to UNE-P customers,
2 MCI provides stand-alone DSL service. For customers to whom
3 MCI provides UNE-P service, MCI does not offer DSL service on a
4 stand-alone basis." Do you see that?

5 A Yes.

6 Q Did you know that when you did your testimony?

7 A Which part? The first part or the -- well, I knew
8 both sentences.

9 Q Did you know that where MCI provides voice service to
10 an end user using UNE-P and that customer leaves -- that
11 customer receives DSL from MCI and that customer leaves MCI's
12 voice service, they lose their DSL service? Did you know that?

13 A No. At the time -- did I know that at the time I
14 wrote my testimony?

15 Q Did you know that at any time before I just showed it
16 to you?

17 A Yes.

18 Q When did you learn it?

19 A In discussions with Ms. Lichtenberg.

20 Q I'm sorry?

21 A In discussions with Ms. Lichtenberg.

22 Q And when did that occur?

23 A The last couple of weeks.

24 Q Now in that same package that you have you have a
25 response to request to produce number 1 an interrogatory

1 second, number 7.I, which is in small print at the back of the
2 package. Apparently it's a document that MCI produced. Would
3 you turn to that and let me know when you're there?

4 A You're sending me the response, to the response to
5 7.I and 10.I; is that correct?

6 Q There is a document attached to the back of the
7 package that you have that is a document that MCI produced
8 that's in very small print.

9 A Oh, I got it.

10 Q It is captioned, "These are terms and conditions of
11 your DSL Internet access. Please read them carefully." Do you
12 see that document?

13 A Yes.

14 Q I want you to turn to Page -- to paragraph six of
15 that document.

16 Now first a general question. Do you understand
17 these to be the terms and conditions upon which a, an MCL,
18 MCL -- MCI voice customer receiving DSL service has to take the
19 service; these are the terms and conditions?

20 A I'll accept your representation that that's what
21 these are.

22 Q Well, it says its terms and conditions of your DSL
23 Internet service, doesn't it?

24 A Well, yes. But I'm sure that MCI has a variety of
25 Internet services. I mean, I don't know what this document is.

1 I'll be glad to accept your characterization and answer
2 whatever questions you have. I'm just not going to be the one
3 to verify this document.

4 Q Well, the only characterization, Madam Chair, I can
5 make of it is it's a document that was produced by MCI and was
6 attached to discovery that's already been stipulated into the
7 record here. I'm sorry. I can't clarify any more than that.
8 And I assume it speaks for itself in that regard.

9 Would you turn to paragraph six of the document
10 captioned DSL Service, and let me know when you're there?

11 A Yes.

12 Q Would you read the first paragraph under the number
13 six, DSL Service?

14 A Yes.

15 Q Would you read it out loud? I'm sorry.

16 A "To receive DSL service, DSL service must be
17 available to your location. You must also keep your telephone
18 service active for the DSL service to work. Your local phone
19 company must be MCI for you to receive DSL service."

20 Q All right. For its UNE-P customers, according to the
21 instructions or the terms and conditions, for the MCI customer
22 to keep their DSL service, they have to be an MCI voice
23 customer, don't they?

24 A Yes. And that, that wouldn't surprise me because
25 they would need to have, MCI would have to have access to the

1 loop facilities to provide the service. In the case we're
2 disputing, discussing here, however, you continue on as the
3 network provider even when the customer shifts to UNE-P. So
4 the conditions that you have with a CLEC are, enable you to
5 continue to provide without interruption FastAccess service to
6 the customer.

7 That is not true for all MCI customers. When a
8 customer leaves MCI voice, MCI is no longer the underlying
9 network provider to reach that customer. They are no longer in
10 a position to support DSL service to that customer. It's a
11 fundamentally different position. Not to mention which that
12 your market share in DSL is north of 95 percent by a
13 significant amount and MCI's market share is, you know,
14 insignificant. So even that would cause me to have different
15 approaches here. But there's a fundamental network difference.
16 You're still the network vendor. You can still do it. There's
17 nothing stopping you but fear itself or something.

18 Q So you think, you think the reason that MCI is not
19 doing it is because of the network issues that, that you just
20 discussed?

21 A If they're not the voice provider to that customer,
22 then they do not have the voice network that goes to that
23 customer.

24 Q I guess you need to look at the amended response to
25 that Interrogatory 11 then, which is the second document dated

1 July 16th. This is the one we received five days ago.

2 Doesn't MCI say in that amended answer that they are
3 willing to provide stand-alone DSL service to residential and
4 small business customers, provided that the processes and
5 systems are in place for MCI and the voice carrier to jointly
6 provision service on the customer line and the parties have
7 agreed to appropriate terms and conditions?

8 A Let me read it.

9 Q Okay.

10 A Yes. But that's consistent. It says that MCI will
11 continue to provide the DSL assuming, okay, that they can
12 create arrangements made with the voice carrier, which is the
13 guy who ends up as the network provider. If the guy who ends
14 up as the network provider is willing to continue to supply the
15 network functionality to MCI that they need, then they will
16 stand ready to continue to provide DSL service. In other
17 words, if you would treat MCI, I suppose, but you should ask
18 Ms. Lichtenberg, quite frankly, if you would treat them the way
19 we're offering to treat you, continue to make sure that the
20 network functionality is available to support the service on a
21 seamless, uninterrupted and cost-free basis, they would
22 continue to be the DSL provider. I don't find anything unusual
23 in that. And the standard circumstance would be, of course,
24 that when they lose the voice, they don't have that
25 arrangement. This just says if someone gives them that

1 arrangement, they'd be willing to offer the product.

2 Q How long has this case been going on?

3 A I was young. About a year.

4 Q Okay. You did read the last sentence of the section,
5 the answer that said, "Currently these arrangements have not
6 been made with any voice carrier, but MCI stands willing to
7 enter into negotiations for such arrangements"; right?

8 A Yes.

9 Q Now if you're an MCI --

10 A But, I mean, as a practical matter that's what --
11 this is how I became aware of this issue. Ms. Lichtenberg
12 informed me that this was something that MCI would be willing
13 to do. As a practical matter, since you have more than
14 95 percent of the DSL lines in Florida, they don't have very
15 many lines for which a carrier is going to express interest in
16 doing this negotiation yet, but they're not trying to use it as
17 a market barrier.

18 Q If you were an MCI customer and you went to their web
19 page and looked up the terms and conditions associated with
20 your DSL service, you would learn today that if you change
21 voice providers, you're going to lose your DSL service,
22 wouldn't you?

23 A Yes.

24 Q Now do you think that one reason that MCI may have
25 taken this position was simply that it wanted to offer a bundle

1 of services to its end users?

2 A No, I don't believe that to be the primary reason. I
3 think the primary reason has to do with the fact that you have
4 to have access to that network functionality.

5 Q Well --

6 A Which means as a practical matter DSL in effect has
7 to be offered as part of a bundle with the network but not
8 necessarily the retail service, which is our point. We'll
9 continue to give you access to that network, you'll continue to
10 have the opportunity to bundle it on that network
11 functionality.

12 Q Let me ask the question a slightly different way.
13 Does MCI bundle its services?

14 A Yes. Many of their services are bundled.

15 Q Okay. Is it anticompetitive to bundle services?

16 A Not necessarily.

17 Q Okay. And when I asked you about whether one of the
18 reasons MCI may have done this was to protect its bundle, if
19 you will, you said not primarily. Does that mean that some
20 part of the -- some portion of the reason why MCI takes this
21 position might be that it wants to have its customers continue
22 to stay with it, take its package?

23 A It, it might be. But even so, their market share
24 particularly in the DSL market is -- well, it has to grow to
25 trivial. It's not a question of -- you know, their incentives,

1 their market position wouldn't justify this docket even if they
2 were behaving anticompetitively like you are. They're not, you
3 are and that's why we're having this case.

4 Q Well, we're going to get to that and see whether
5 there are any facts that support that in a minute, but let's
6 stay with where we are right now.

7 Didn't you say earlier that one of the important
8 drivers was consumer choice? I think I've heard you say that
9 in years gone by.

10 A Yes.

11 Q But in the case of DSL, MCI has decided that the
12 consumer doesn't get any choice. If they want MCI's DSL, they
13 have to take MCI's voice; right?

14 A There are technical reasons for that to be the case,
15 technical reasons that wouldn't apply to you under the terms
16 that we're offering you access to those facilities.

17 Q Okay. Let's shift gears to pricing for a moment. In
18 the event that this Commission doesn't change the prior panel's
19 decisions, is it your position that BellSouth has to provide,
20 has to provide FastAccess to customers who receive voice
21 service at the exact same price that that customer would have
22 paid for FastAccess if he'd been a BellSouth voice customer?

23 A No, not necessarily. There are times when FastAccess
24 would be discounted as part of a BellSouth bundle. The purpose
25 of the complaint is not to prevent you from offering the

1 customer bundles, simply to prevent you from disconnecting the
2 customer. As I explained to you in my deposition, I think --

3 Q Okay.

4 A -- you offer FastAccess to customers who are
5 obtaining voice from somebody using resale. So long as you
6 offer FastAccess to customers obtaining voice and using UNE-P
7 under those exact same terms and conditions, I think we would
8 leave for -- you know, assuming that you then don't behave
9 anticompetitively, I'm not giving you a carte blanche here, but
10 under the basis that you have a price out there, you sell
11 FastAccess to customers who buy only FastAccess from you but
12 get voice from a CLEC using resale, as long as you make that
13 same price available to the FastAccess customers that switched
14 to a voice provider using UNE-P, I think that would be a
15 reasonable arrangement.

16 Q Okay. So if we have a customer who was reselling, if
17 we had a CLEC who was reselling CompleteChoice and FastAccess,
18 we could charge one price for FastAccess, and if we had a
19 reseller who was just selling a 1FR and FastAccess, we could
20 charge a different price for FastAccess; is that correct?

21 A No. That's not -- my understanding is you sell
22 FastAccess to the customer for, I guess, \$49.95. You don't ask
23 the customer, by the way, what are you buying from that
24 reseller? You don't tie the price in a FastAccess to what the
25 reseller is selling that customer. You're not in a joint

1 marketing agreement with that reseller. You're simply selling
2 it to customers who have chosen an entry strategy that you deem
3 nonthreatening.

4 Q Well, is it okay, is it okay if I roll out a
5 FastAccess offering that says, if you're a BellSouth subscriber
6 and all you purchase is a 1FR from BellSouth together with your
7 FastAccess, your FastAccess will be \$100 a month; however, if
8 you buy CompleteChoice and FastAccess from BellSouth, I'll sell
9 you the service for \$45; is that okay?

10 A Based on that limited information, I don't have a
11 problem with you, for that type of pricing, assuming that
12 you're still selling it to customers who have left you for
13 other voice providers using resale at \$49.95 and you're still
14 allowing UNE-P providers or customers that select voice service
15 from a carrier using UNE-P as their entry strategy to obtain
16 FastAccess at \$49.95.

17 Q Well, if a customer has left us, is not taking voice
18 service from us anymore, all we're getting is the equivalent of
19 a UNE-P rate, a 1FR rate from the CLEC that purchased that
20 line; right?

21 A I would quibble with the phrase, "all you're
22 getting."

23 Q Well, what --

24 A But that's what you're receiving. You've already
25 made the decision that you'll sell FastAccess to people who

1 don't buy voice service from you at \$49.95. This is only a
2 question about whether or not the carriers that serve those
3 customers can use successful entry strategies or must use a
4 failed entry strategy.

5 Q Are there CLECs in Florida who have as their business
6 the provision of DSL using their own facilities?

7 A There's one left. I presume that there's probably a
8 few more. Clearly looking at the numbers, you know, after
9 however many years they've been struggling in this marketplace
10 and they're under three percent or under five percent.

11 Q Well, did you -- I'm sorry. I didn't mean to
12 interrupt you. Who is the one you're talking about?

13 A I was thinking in terms of Covad.

14 Q Okay. Is FDN still doing it?

15 A In some market segments.

16 Q Okay. Are either one of them clients of yours?

17 A Covad is derivatively, I guess. They're certainly a
18 member of CompSouth. I can't recall if they're members of the
19 FCCA or not.

20 Q If the Commission were to force BellSouth to provide
21 DSL to a voice customer, that removes an opportunity for Covad
22 or FDN to be able to provide DSL to that customer, doesn't it?

23 A No. Their opportunity is the same opportunity they
24 had before. They have to win the customer.

25 Q Well --

1 A You wouldn't be doing this if you actually thought
2 the customer would leave you and go to Covad. I mean, you
3 would never tell a customer I don't want your \$600 a year, I
4 want nothing. You're only saying that because you're pretty
5 convinced they're not going to leave you.

6 Q Now you're ascribing intent to BellSouth, aren't you,
7 Mr. Gillan?

8 A Yes.

9 Q Okay. So my question is if the Commission didn't
10 force BellSouth to allow the customer to take FastAccess, that
11 would increase the opportunity for Covad and FDN and
12 facility-based providers to provide FastAccess to those
13 customers, wouldn't it?

14 A No, not necessarily. They would have the same
15 opportunity they had before. If they could convince the
16 customer that they should get DSL service from them instead of
17 from you, they could win them.

18 I mean, the customer has three choices: Never go to
19 the voice CLEC, you know, and stay with BellSouth or go to the
20 voice CLEC and go out and get their DSL service. I guess
21 that's two choices. They still have the same opportunity. The
22 fact that the Commission isn't letting you punish those
23 customers I don't think materially changes their opportunity.
24 Certainly they must not think so because they've never
25 expressed -- I mean, FDN was the first company to come here to

1 you and tell you about this anticompetitive practice and asked
2 the Commission to order BellSouth to continue to provide
3 FastAccess to its customers. So by definition we know FDN
4 doesn't perceive this to be causing it a loss of commercial
5 opportunity and Covad is certainly well aware of this
6 proceeding and is nowhere in this room.

7 Q Are either one of those -- that's a good question.
8 Are either one of those carriers in this room?

9 A No.

10 Q Okay. Now let's suppose that a carrier provides DSL
11 service to some of its customers but wants to have BellSouth
12 provide FastAccess to other customers. Is that a possible
13 scenario if the Commission's panel's view prevails in this
14 case?

15 A That's a possible scenario today under the
16 Commission's rules and decisions as they exist and under the
17 interconnection agreements that you're required to offer and
18 allow carriers to enter into. Yes. I mean, I will not draw
19 the distinction between panel and Commission the way your
20 question infers. So with that caveat, so we don't have to
21 continue to have that debate, that's one of the outcomes.

22 Q Can a customer who is taking voice service from a
23 CLEC that provides its own DSL service, can a customer come to
24 BellSouth, under your theory, demand that BellSouth provide
25 FastAccess and cause that CLEC that wants to provide its own

1 DSL service to give up the upper or give up the high frequency
2 spectrum on the line?

3 A No. My recommendation is only that where CLECs have
4 agreed to give you the upper frequency for free, that under
5 those circumstances you would be obligated to not deny or
6 refuse FastAccess to that customer segment. CLECs that did not
7 want to grant you right of access to their facilities for free
8 would not be able to impose upon you that obligation.

9 Q Okay. But at the same time that CLEC would have the
10 ability to prevent the customer from making that choice by
11 denying BellSouth access to the spectrum it would need to
12 provide FastAccess; correct?

13 A That CLEC would have, would be in a position of
14 risking that customer to return back to the monopoly because
15 it's refusing to provide it, give it, allow it to receive the
16 service that it wants, yes.

17 Q Do you have any idea how BellSouth is going to keep
18 track of which subscribers that CLEC wants to allow BellSouth,
19 where BellSouth -- let me -- I got confused in my own question,
20 Madam Chair. Can I try it again?

21 CHAIRMAN JABER: Yeah, you may. And, Mr. Lackey, can
22 you give me an idea of how much more time you need with this
23 witness?

24 MR. LACKEY: Maybe 15 minutes at the most.

25 CHAIRMAN JABER: Go right ahead.

1 MR. LACKEY: If you'd like to take a break, I could
2 probably --

3 CHAIRMAN JABER: No. I'd like for you to finish and
4 then we'll take a break.

5 MR. LACKEY: I know I'm boring. I can't help it.

6 CHAIRMAN JABER: I'm not bored. I would just like
7 for you to finish and then we'll take a break, so keep going.

8 MR. LACKEY: What I was trying to ask you --

9 CHAIRMAN JABER: I'm never bored.

10 MR. LACKEY: Then I envy you.

11 THE WITNESS: Yeah. Could we have some?

12 CHAIRMAN JABER: Go ahead, Mr. Lackey.

13 BY MR. LACKEY:

14 Q What I was trying to ask you, Mr. Gillan, is we have
15 a CLEC who for some of its subscribers it wants to allow
16 BellSouth to use the upper frequency to provide DSL service and
17 for others of, other of its subscribers it wants to deny
18 BellSouth that right so that the customer will buy DSL from
19 that CLEC.

20 Do you have any idea how BellSouth is supposed to
21 keep track of which of the CLEC's customers it has permission
22 to use the loop on and which it doesn't?

23 A You know, that's not actually the scenario that I
24 thought we were discussing. I was discussing a scenario where
25 the CLEC would go to you and sign the, the Louisiana contract

1 amendment, the one that you're already doing, that says, hey,
2 for my UNE-P customers I'm going to grant you access to these
3 customers over the facilities without charge. You're going to
4 continue to provide FastAccess. That -- my understanding, that
5 contract amendment does not contemplate some
6 customer-by-customer segmentation and that wasn't -- that isn't
7 what I was proposing. In fact, all I'm suggesting is you just
8 offer in Florida what you offer in Louisiana. That's it. That
9 simple. Two-page contract amendment and do all the
10 implementation steps here that you're going to have to do
11 there.

12 Q Do you happen to know whether the Louisiana order is
13 under appeal?

14 A Yes.

15 Q Well, let's go back to the scenario then because I
16 thought we had it down. I've got a CLEC who offers its own DSL
17 service to some of its customers and doesn't to other
18 customers. It has new customers coming into the State of
19 Florida. When that customer, that new customer coming into the
20 State of Florida taking that CLEC's voice service calls
21 BellSouth and asks for BellSouth's FastAccess service, how is
22 BellSouth going to know whether that's one of the CLEC
23 customers whose loop they can use or whether it's one of the
24 customers where the CLEC doesn't want BellSouth to use it so
25 they can provide their own service?

1 A Okay. And I was envisioning in my answer that when
2 you said they had different customers, I was thinking in terms
3 of customer segments. They would have some large business
4 customers for whom they are purchasing multiple loops, perhaps
5 DS1 loops from you to provide service to those customers and
6 most likely DS1s for those customers. And in those instances
7 they are intending to provide the high speed data to those
8 customers.

9 With respect to the class of customers served by
10 UNE-P, I'm not suggesting that there be any ability to draw a
11 distinction on a customer-by-customer basis. It's an all or
12 nothing proposition. If they give you -- if you -- if the
13 Commission just follows through with what it's already been
14 doing, grants the complaint and requires that you continue to
15 provide FastAccess to your customers and make it available to
16 customers that want to purchase it from you without regard to
17 the customer selection of a voice provider, so long as they're
18 UNE-P, you'd get the access for all the customers or you don't.
19 It's that simple.

20 Q Okay. So just to make sure the record is clear, your
21 position is that a CLEC has to say, either any of my customers
22 that come to you can take DSL from you and you can use the high
23 frequency spectrum whether I want them to come to you or not,
24 or none of them can?

25 A For UNE-P, yes.

1 Q Okay. All right.

2 A It's a mass-market solution up or down.

3 Q All right. Let's look at Page 14, amended 14 of your
4 direct testimony.

5 CHAIRMAN JABER: Rebuttal?

6 MR. LACKEY: Direct testimony.

7 CHAIRMAN JABER: Rebuttal testimony. Page 14; right?

8 MR. LACKEY: I'm sorry.

9 CHAIRMAN JABER: That's all right.

10 MR. LACKEY: I've got it sitting in the direct
11 testimony. It's rebuttal testimony. It's the one he handed
12 out with the chart on it.

13 CHAIRMAN JABER: Thank you.

14 BY MR. LACKEY:

15 Q Clearly -- would you agree that the number of end
16 users served by CLECs in Florida grew substantially between
17 December 2001 and December 2002?

18 A Yes.

19 Q Do you happen to know what the corresponding number
20 is for December 2003?

21 A The growth rate is cut in about half.

22 Q I'm sorry?

23 A The growth rate is cut significantly. For June of
24 2003, the total number of UNE-P loops is now 591,970, which is
25 a gain of about 100,000 in 6 months. So last year, it was

1 about 350,000 over the year, which is roughly 175,000 every
2 6-month window, and now, it's under 100,000 in the
3 first 6 months of 2003. Resale declined by about 40,000 in the
4 first 6 months of 2003 to 69,000 remaining resale lines in the
5 state of Florida. I don't have the statistics for the number
6 of loops.

7 Q All right. So you can't give me a number comparable
8 to the 767,297 that's shown on Page 14 of your rebuttal
9 testimony for June of 2003?

10 A Not completely, no. One of the lines is not
11 available.

12 Q Let me come at it a different way. You don't dispute
13 that the number of lines that competitors are providing to
14 customers in Florida continues to grow, do you?

15 A No.

16 Q Now, do you happen to know what percentage of
17 BellSouth's access lines in Florida actually have FastAccess on
18 them?

19 A Roughly.

20 Q Pardon me?

21 A Roughly, yes.

22 Q Can you tell us what that number is?

23 A It's confidential.

24 Q Well, let's do it a different way then because I've
25 got a number that's not confidential.

1 A Well, then I'll accept it subject to check.

2 Q No, no. I don't want to do that. Go to
3 Interrogatory Number 59, and this is BellSouth's response to
4 staff interrogatories, so we believe it's Hearing
5 Exhibit Number 7. It's the one that's got Docket Number
6 020507-TP on the front, and the very first one is FCCA's
7 response to staff interrogatory --

8 MR. MELSON: What page number, Mr. Lackey?

9 MR. LACKEY: It is going to be Page Number 000053.

10 BY MR. LACKEY:

11 Q Are you there?

12 A Yes.

13 Q All right. Now, I don't believe, unless somebody
14 made a serious error, that this is a proprietary document.
15 Does it appear to be to you? I don't think it is, but --

16 A It's fine with me. It's your number.

17 Q Yeah, well, hey, I've made mistakes here all morning
18 today.

19 CHAIRMAN JABER: Wait a minute. Wait. You said this
20 was Hearing Exhibit 8?

21 MR. LACKEY: No, it's 7.

22 CHAIRMAN JABER: Okay. Hearing Exhibit 7 is not
23 confidential.

24 BY MR. LACKEY:

25 Q Now, looking at that document, does it state that

1 less than 6 percent of the total access lines in Florida have
2 FastAccess?

3 A Yes.

4 Q So that means that 94 percent of BellSouth's access
5 lines in Florida don't have FastAccess and are available to
6 competitors; is that correct?

7 A Yes. I mean, there's no dispute that people that
8 don't have FastAccess and don't want FastAccess are not
9 adversely affected by your policy to use FastAccess in an
10 anticompetitive way. The issue is whether or not the people
11 that either have it or want it are harmed and is competition
12 harmed in that customer segment.

13 Now, what this statistic doesn't tell us is that
14 60 percent are your FastAccess customers in the residential
15 market also happen to be CompleteChoice customers. They're the
16 best of the best. So when we look at FastAccess numbers, yes,
17 it's a relatively small percentage of the total market today,
18 but it is growing, and it is a very high percentage of the best
19 customers. And in that customer segment, there's absolutely no
20 question that your policy is adversely affecting competition.
21 And in proof of that, if you would go to the Staff
22 Interrogatory Number 24, those statistics which do give us a
23 chance of what is the impact on people who were going to switch
24 but this policy frustrated, that indicates that it's highly
25 effective, in excess of 80 percent easily.

1 Q I'm sorry, I didn't understand that, but let me ask
2 you a different question. Look at Interrogatory Number 88 in
3 that same package.

4 CHAIRMAN JABER: Mr. Lackey, what number did you say?

5 MR. LACKEY: I'm sorry. Interrogatory 88 in that
6 same package, which is not a proprietary document.

7 THE WITNESS: Hold on one moment because you're
8 assuming that in my package Interrogatory 88 is in here.

9 MR. LACKEY: It's the same hearing exhibit that the
10 staff --

11 CHAIRMAN JABER: Page 116, Mr. Lackey?

12 MR. LACKEY: Oh, I'm sorry. Page Number 000116. I
13 have to apologize one more time, Madam Chair. I'm going to be
14 out. I would have to leave. It's like five fouls, out of the
15 game.

16 CHAIRMAN JABER: It's still morning, Mr. Lackey. I'm
17 still patient. It's Commissioner Deason you have to worry
18 about if he doesn't eat.

19 (Laughter.)

20 BY MR. LACKEY:

21 Q Does that interrogatory indicate that 235,000
22 FastAccess customers that have disconnected their FastAccess
23 service continued to subscribe to BellSouth voice service?

24 A That's what this says.

25 Q Do you have any reason to disbelieve it?

1 A Well, first of all, is this a regional number, or is
2 this a Florida number? Because I couldn't tell looking at it.

3 Q Well, I certainly don't know, but we are in Florida.
4 That's what it says, doesn't it? 235,000 have
5 disconnected while --

6 A Yeah, but that's total disconnections over four years
7 over the BellSouth nine-state region.

8 Q I'm informed it's Florida, but I can't testify to
9 that, of course. Let's just assume --

10 A I'll tell you what, I'm sure not testifying to it as
11 being for Florida.

12 Q Well, you don't have to, it's already been stipulated
13 into the record. All I'm saying is that indicates that
14 FastAccess customers leave their FastAccess service behind.

15 A Well, it clearly indicates that some do, but that
16 doesn't necessarily mean -- but on the other hand, this just
17 says that some people disconnect FastAccess and stay with
18 BellSouth. It still doesn't tell you what action -- what is
19 the effect of this policy on taking someone who wanted to leave
20 but decided that they were going to give up their competitive
21 voice provider rather than lose their FastAccess. For that you
22 have to go to Staff Interrogatory Number 24 that shows that
23 you've got about -- at least an 80 percent effective rate going
24 here from this conduct. That's the only one that answers the
25 relevant question: Does this prevent people from exercising

1 their choice of a voice provider?

2 Q Well, that's your interpretation of Item Number 24;
3 correct? It doesn't actually say what you just represented it
4 to do, does it?

5 A It says nothing but. Okay. All you know is that you
6 had some people who got FastAccess, decided they didn't like
7 it, got rid of it, but stayed with you. It doesn't tell us
8 anything about the customers' choice of other providers. All
9 we know is they got rid of their FastAccess, which over
10 again -- that's over almost four years of selling this product.

11 Q All right. Final questions. Can you tell me then
12 what survey or what research or what analysis you have done of
13 the BellSouth FastAccess customers to determine what percentage
14 or how many of BellSouth's FastAccess customers have actually
15 refused to move to a competitor because of this policy?

16 A The only hard -- the hard data that I'm aware of is
17 the data that I referred to earlier in Item 24 of the staff's
18 interrogatory.

19 Q This case has been going on for a year; correct?
20 Since you were young; right?

21 A To be truth (sic), I wasn't that young a year ago,
22 but, yes, it's been going on a year.

23 Q And during that past year, to your knowledge, nobody
24 or at least, to your knowledge, nobody has done any kind of a
25 survey or analysis to actually determine whether customers in

1 any significant numbers are being deterred from moving because
2 of this policy?

3 A Well, there is this interrogatory which gives us
4 facts, but even if we didn't have this that shows how effective
5 it is, we're in a situation where you're -- on the one hand,
6 you've already incurred customer acquisition cost, you've
7 already incurred the cost to set up the customer, you're
8 getting \$600 a year in pure revenue from a customer if you just
9 agree to continue to sell them FastAccess, and you're choosing
10 instead to play chicken with them. I mean, to me, that tells
11 us what we really need to know in terms of why are they doing
12 this. They only do this because it improves their profit, and
13 the only way to improve your profit by giving up \$600, if you
14 believe that the alternative is, the customer is going to say,
15 I don't want the CLEC, and buy all of its services from you.

16 Q Isn't that what bundling does with any customer?

17 A You know, we're not preventing you from offering
18 bundles. We're telling you you can't refuse to sell a service,
19 a service that you're willing to sell to the customers of other
20 CLECs so long as the CLEC agrees to a failed entry strategy.
21 This is not that extreme a suggestion. I mean, there's a
22 reason why the Commission found this to be anticompetitive
23 already several times. It's blatantly anticompetitive.

24 Q But it's okay for MCI to refuse to provide flat rate
25 toll service to its customers who move away from its

1 Neighborhood plan; right?

2 A If you -- I tell you what. If you would agree to
3 give MCI free access to the loop for long distance, I'll bet
4 you they would offer that long distance service to all your
5 customers on a non-stand-alone basis. If you would make the
6 offer to every other carrier that we're making back to you,
7 we're going to pay for all the facilities we're going to buy to
8 provide local, we're going to pay their entire costs, and we're
9 going to let you use them for free just so you quit punishing
10 your own customers, then maybe we could have a debate about
11 this. But the MCI example of bundling is fundamentally
12 different.

13 Q Does that change the fact that your other client,
14 AT&T, does in fact offer a flat rate service while MCI doesn't?

15 A If the AT&T flat rate service, which if it is indeed
16 offered irrespective of your local provider, a fact to which so
17 far only you have testified, but even if that's that true, if
18 it were really profitable -- I mean, first of all, it would
19 have to be priced to reflect that they were paying access
20 charges, and if it was really successful, then MCI would copy
21 it. I mean, the fact that AT&T and AT&T alone has that in the
22 marketplace tells me that that's not all that relevant. Again,
23 this isn't about what they do for long distance service. It's
24 just simply about -- is what you're proposing, is what you're
25 insisting on over and over again no matter how often we come to

1 this Commission and other Commissions: Is it a reasonable
2 practice?

3 MR. LACKEY: Thank you, Madam Chairman.

4 CHAIRMAN JABER: Thank you, Mr. Lackey. We're going
5 to take a one-hour lunch break. Let me just tell everyone the
6 game plan in terms of time for this evening. This is only a
7 two-day hearing, and tonight will be the day that we go the
8 longest. Tomorrow is not a long day for this Commission; today
9 has to be. So I would ask that everyone, you know, act
10 expeditiously in their questions and that the responses are as
11 concise as possible. We're going to take a one-hour lunch
12 break.

13 (Lunch recess.)

14 CHAIRMAN JABER: Let's get back on the record.
15 Staff, I think it was your turn; is that right?

16 MS. CHRISTENSEN: Yes, I believe we're -- it's time
17 to question Mr. Gillan.

18 CROSS EXAMINATION

19 BY MS. CHRISTENSEN:

20 Q We just have a few questions for you. Turning to
21 Page 8 of your direct testimony, Lines 1 through 6. Do you
22 have a copy of that?

23 A Page 8, yes.

24 Q Page 8, Lines 1 through 6. It addresses BellSouth's
25 refusal to provide DSL and risking their disconnection because

1 BellSouth expects to retain both the DSL and voice service. In
2 your opinion, what is the likelihood that a customer would
3 remain with BellSouth for both local voice service and DSL if
4 the customer was informed his DSL service would be
5 disconnected, it'd be switched to local voice provider?

6 A It's extremely high. As I indicated, the data
7 suggests that it's in excess of 80 percent that they would stay
8 with BellSouth as a result.

9 Q Okay. And you're referring -- the 80 percent that
10 you're referring to is in response to -- or BellSouth's
11 response to Staff's Interrogatory Number 24 that we've
12 previously referred to, and that's on Page 16 of Hearing
13 Exhibit Number 7; is that correct?

14 A Yes.

15 Q Can you explain how you come up with the 80 percent?

16 A Well, MCI had a certain number of customers that had
17 chosen to come to MCI but were informed that they would lose
18 their FastAccess. BellSouth went back and looked at that
19 subset of customers at some point later, which I -- it doesn't
20 indicate. At any rate, it says that they sampled 10 percent of
21 those rejected phone numbers and only 18 percent of those
22 customers had voice service with an ALEC. So you start with a
23 base of all the customers that wanted to go to MCI and now you
24 look at it, and only 18 percent had ended up with a CLEC, which
25 would indicate that 82 percent of the customers had decided to

1 stay with BellSouth.

2 Q Do you believe that's representative of MCI's
3 rejection? I mean, is that representative of other CLECs, or
4 how far do you think that that would extend?

5 A Well, I think it's -- I have no reason to believe
6 that it was a bias sample, so I would believe that that would
7 be representative. And as I indicated before, this only makes
8 sense as a policy for BellSouth to give up the \$600 a month in
9 revenue from -- or \$600 a year in revenue from a customer for
10 which there's really no additional incremental costs -- they've
11 already incurred all the costs to get it up and running -- and
12 market the customer unless they felt that the gamble would pay
13 off and the customer would come back to them for voice.

14 Q Okay. What is the likelihood if a customer wants
15 BellSouth FastAccess that that customer would migrate to
16 BellSouth's voice service if it is required to obtain
17 FastAccess?

18 A Okay. That's actually the question I thought we were
19 answering already. They would stay with BellSouth or go to
20 BellSouth in order to keep the FastAccess.

21 Q Let's refer to Page 10 of your direct testimony,
22 Lines 7 through 8. It states that BellSouth is threatening to
23 disconnect a service that is seen as a national priority. Why
24 do you believe the deployment of DSL is seen as a national
25 priority?

1 A The section, I guess it's 706, of the Telecom Act
2 encouraged the deployment of high-speed connections. I think
3 that that theme also runs through the FCC's triennial review
4 decision.

5 Q Okay. Let's look at Page 11 of your direct
6 testimony, Lines 8 through 9. It states that BellSouth's
7 policy effectively forecloses voice competition for those
8 customers desiring FastAccess service. Would you elaborate on
9 that statement, please.

10 A It just goes back to -- that customers, particularly
11 customers that have already gone through the trouble to get
12 FastAccess up and running, are going to be discouraged from
13 choosing a different voice provider if they have to give up
14 their FastAccess or they're refused FastAccess as a result of
15 that decision. And this place you cite me to is actually where
16 I bring out the fact that 60 percent of FastAccess customers
17 are also CompleteChoice customers. It's the most attractive
18 part of the marketplace that BellSouth is applying this policy
19 to.

20 Q Can you explain a little bit why that's the most
21 attractive part of the market? What makes those customers most
22 attractive?

23 A Because they buy a complete packet. They desire a
24 whole bunch of features for which they're willing to pay a
25 premium price, and as a result, those are the customers that

1 have the greatest price above cost out there. They're the
2 highest margin customers in the marketplace. At least in the
3 residential marketplace they would be the highest margin
4 customers.

5 Q Okay. So let me make sure I'm understanding
6 correctly that those are the ones that have the highest profit
7 margin for BellSouth as well as for any CLEC --

8 A For any potential CLEC --

9 Q -- that would be competing for those?

10 A -- yes.

11 Q Okay. In your opinion, has the FCC made a
12 determination whether BellSouth's policy of disconnecting a
13 FastAccess service as a result of the customer's migrating its
14 local voice service from BellSouth to a CLEC is discriminatory?

15 A No. I think they have only actually made a
16 determination that they don't currently have a rule that
17 prohibits it.

18 Q Okay. And, in your opinion, is a resale service
19 strategy a viable method for a company to pursue in the long
20 term?

21 A No, and it's not even viable in the short term. I
22 mean, that's why resale numbers, for instance, in Florida --
23 this trend is true anywhere in the country -- are down, I don't
24 know, maybe 90 percent from their high. There's less than
25 70,000 resold lines in BellSouth territory today.

1 Q And, in your opinion, is the intent of the Act to
2 encourage resale strategy as a long-term strategy for the
3 telecommunications market?

4 A No. I think the Act is completely entry strategy
5 neutral. People can use facilities. They can buy UNEs, or
6 they can do resale. The Act, I believe, would -- and actually
7 BellSouth, it's one area we seem to agree, they provided the
8 same answer in a discovery response. The Act is not intended
9 to try and encourage one form of entry over another form of
10 entry. It's neutral.

11 Q Over the long haul, does the Act have a preference
12 for which type of strategy?

13 A No.

14 Q Is it while on facility-based versus resale-based
15 over the long haul, or you don't --

16 A No. The Act is agnostic.

17 Q Let me ask, in your opinion, in the past three years
18 have the CLECs focussed on providing DSL service or voice
19 service?

20 A Different CLECs have focussed on different product
21 mixes. A Covad, a NorthPoint, a Rhythms focussed on providing
22 DSL service along with a number of other entrants, almost all
23 of which are bankrupted today -- well, actually bankrupt and
24 defunct. Other entrants have focussed on providing voice
25 services.

1 Q Well, which would be the greatest percentage? Would
2 the greatest percentage of the CLECs be concentrating on voice
3 service provision or DSL provision?

4 A I really don't know. Today, it's probably more voice
5 because there are ways to provide voice such as UNE-P. I mean,
6 if you look at BellSouth's DSL footprint, it's largely based on
7 equipment installed in remote terminals. There are no remote
8 terminal collocations in the state of Florida, so there's
9 nobody that has an ability to offer a comparable footprint.
10 Just that alone would suggest to me that right now there's more
11 emphasis on voice because there's a strategy that people can
12 pursue without having it lead them to bankruptcy. It does not
13 appear that a data-only strategy for CLECs starting without a
14 voice monopoly like BellSouth have had a profitable path.

15 Q Let me ask you, I think earlier in cross-examination
16 you were asked about competition with cable companies and I
17 guess in trying to make an analogy that that's akin to the
18 competition with the DSL. Does cable have the same impact on
19 the provision of local voice service that DSL service has on
20 voice service?

21 A Now, of the cable modem service is typically not
22 offered in combination with voice service? Most cable
23 companies do not offer voice service, so it's just a different
24 technology platform, and it is offered by a different type of
25 provider. BellSouth's FastAccess service is really offered

1 as part -- or and they're certainly trying to make it part of
2 the customer's ability to get voice service. Cable companies
3 don't practice the kind of conduct that BellSouth is here.
4 That's why there's no complaint against cable companies.

5 Q So what you're saying is cable companies don't
6 compete in the voice market at all at this point in time?

7 A Generally they don't. I don't think -- I don't think
8 that there's currently -- I'm not aware of a cable voice
9 provider in Florida any longer.

10 Q Okay. If BellSouth had two lines to a customer's
11 home and could provision FastAccess service over that line,
12 over the second line, in a case where the customer was already
13 receiving CLEC voice service but not FastAccess service,
14 wouldn't you agree that you could have a seamless connection
15 over that second line?

16 A I'm sorry. Is the starting point that the customer
17 has one line that they're using for voice and the DSL service
18 and then they get a voice provider?

19 Q No. They're not receiving DSL service and
20 they would -- in the scenario, the customer -- BellSouth has
21 laid two pairs of wires to the home. Over one pair they're
22 getting UNE-P service from a CLEC. They have not received any
23 type of DSL service from a CLEC or from BellSouth, but it is
24 capable for them to receive DSL service. Could BellSouth
25 conceivably provision its FastAccess service over the second

1 line, and would that comply with the Commission's previous
2 policies that the transition be seamless, that it would appear
3 seamless to the customer?

4 A It's highly unlikely, because while they have the
5 second loop there, it is probably not true that that second
6 loop is cross-connected and activating a second jack in every
7 room in the house. So if you do what you would normally do and
8 just put FastAccess up on the loop that is providing voice
9 service, the customer knows that every jack from which it can
10 draw dial tone is a jack it can plug a computer in.

11 If you run a separate loop to the house, not only
12 does BellSouth have to dispatch the truck, but then it has to
13 make sure that in that house the jacks are able to accommodate
14 a plug-in, which means they have to get inside the house, they
15 have to make an appointment with the customer, they have to
16 reach them, then even if they do go in the customer's house,
17 their offer on that second-line strategy is to only make one
18 jack operational.

19 So compared to putting the service up on -- you know,
20 in the same way they would do it for their own customers where
21 the customer knows that every jack that has voice service they
22 can move their computer to, they would be having to let a
23 BellSouth technician in the house, they'd have to have the
24 technician install another jack. They'd only then have one
25 jack, and if they wanted to move the computer from one bedroom

1 to another bedroom and may or may not be operational, I find
2 those to be completely different customer experiences.

3 Q Okay. Let me ask you about -- you had some questions
4 about Call Memory and certain other services. Can you explain
5 whether or not Call Memory can be provisioned as a stand-alone
6 service, in your opinion?

7 A I guess it's Memory Call.

8 Q Memory Call, excuse me.

9 A I had it as a stand-alone service for a number of
10 years where I did not buy basic local exchange -- I did not buy
11 local exchange service from BellSouth but did have a voice
12 mailbox, you know, assigned to an old phone number that I
13 didn't want to lose service on. So they do offer it as a
14 stand-alone. Again, you know, I find that whole thing a
15 distraction just because that isn't what our complaint is
16 about. We're not here -- we're not in a position to try and
17 talk about everything that conceivably could happen. We have
18 one specific instance.

19 Q Okay. Can you have DSL without having a voice
20 service?

21 A I mean, it's technically possible. The question is
22 whether or not -- is it economically practical for the DSL
23 service to cover the entire cost of a loop, which is why our
24 complaint is tied to the commitment that we will give them the
25 use of the loop for free so that there is no economic loop cost

1 imposed on the provision of their DSL service. If you don't
2 have -- if you don't have access to the loop for free, then it
3 becomes economically troublesome to try and recover the entire
4 cost of a loop from the DSL facility, the DSL service itself.

5 Q Does BellSouth obtain revenues from the CLEC in a
6 UNE-P arrangement?

7 A Yes.

8 MS. CHRISTENSEN: Staff has no further questions.

9 CHAIRMAN JABER: Redirect.

10 Oh, Commissioners, I should ask, do you have
11 questions?

12 Commissioner Baez.

13 COMMISSIONER BAEZ: I just have a couple.

14 Mr. Gillan, can you explain once again the difference between
15 what the relief granted as part of the FDN and Supra dockets is
16 and what the relief the parties are asking in this docket?

17 THE WITNESS: For UNE-P, and I'll come back to that
18 in a second, for UNE-P there's really only three things that
19 would happen. One, because it's a complaint, it would -- the
20 ability to have your customers retain FastAccess or get
21 FastAccess would apply to all carriers, not just Supra and FDN.
22 So it's sort of an administrative convenience effort that was
23 initiated by the association initially.

24 Secondly, the Commission has unambiguously required
25 that if you already have FastAccess, it may not be taken away

1 from you. So we're asking also that customers must not be --
2 customers shouldn't be required to have to give up a voice
3 provider they already have in order to obtain FastAccess, that
4 basically the customer could make the decision whether to have
5 FastAccess or retain FastAccess be treated the same.

6 And then third, while the Commission has already
7 decided that the migration of a UNE-P customer should be
8 seamless and without altering the service, BellSouth's proposal
9 as to how to implement that direction is to run a second line
10 to the customer, completely knock down their service, in effect
11 go through the scenario I just discussed with staff about
12 trading a second line DSL arrangement where the customer would
13 have to let the BellSouth rep in, do the -- install the jack.
14 And we feel that that's just not what the Commission -- when
15 the Commission said seamless and without altering the
16 arrangement, you meant the customer wouldn't be disrupted, they
17 wouldn't have to engage in other activities, and the
18 arrangement wouldn't be physically brought down and physically
19 reinstalled in a different way. So those are the three things.

20 Now, the oddity on the UNE-L is that we're not
21 actually really asking for any of that anymore for UNE-L
22 because there are a bunch of other issues those housekeeping
23 details create, and those housekeeping details really are being
24 adequately addressed by the carrier that is interested in that
25 arrangement, FDN. So while the issue is still in this docket,

1 evidentially we're not asking that you change any of the status
2 quo.

3 COMMISSIONER BAEZ: A follow-up. On the third, the
4 third relief or the third solution that you discussed, how much
5 of that is not being addressed, or to your knowledge, has it
6 been addressed in the previous dockets, the FDN and the Supra
7 dockets?

8 THE WITNESS: Well, when we read the Commission's
9 order, we thought the term "seamless and without disruption"
10 was, well, not perfect. I mean, it was pretty clear that when
11 we read the phrase "seamless and without disruption," you were
12 saying you didn't want the customer to be inconvenienced. Now,
13 in that sense, I guess I'd say you've already addressed it
14 because the answer "seamless and without disruption" is pretty
15 straightforward standard. You went on to say that you were
16 going to let BellSouth sort of figure out how to do it, but
17 that was standard.

18 We believe that the way they've come up with doesn't
19 meet that standard at all. It doesn't plausibly meet that
20 standard, that if you put in a system where a completely new
21 facility has to be installed, the customer, in effect, loses
22 FastAccess and gets its equivalent or gets a new FastAccess
23 service brought up but that the customer has to be home to let
24 in a service rep, that the company has to roll a truck, that
25 all that has to be coordinated, I mean, just in your life, you

1 know, being there for a phone company person to come in your
2 house is not that simple.

3 It's disruptive to the customer; it's disruptive to
4 the company; and then the end product is instead of having
5 FastAccess available to you at any jack in your house, you have
6 this one jack that you have to designate. And actually, now
7 that I'm on this -- and on top of that they say if they don't
8 have that second facility available, they relieve themselves of
9 the obligation to provide FastAccess at all. I mean, to me,
10 none of that conforms to seamless and without altering.

11 COMMISSIONER BAEZ: All right. But this extended
12 process that you've described, do you know if that standard
13 came about as part of Commission -- as part of the Commission
14 decision? That sounds like a clarification. I'm wondering --
15 there's been a fair amount of discussion after the fact of the
16 FDN -- of what the FDN order meant, and I'm wondering if that
17 standard -- if you can refresh my memory whether that standard
18 was established as a part of further clarification on the part
19 of the Commission panel, I guess.

20 THE WITNESS: I think the standard came about -- you
21 know what? I don't know. I don't know whether it was in the
22 original decision or in the clarification.

23 COMMISSIONER BAEZ: Okay.

24 THE WITNESS: It is a less critical issue to FDN
25 because the customers that they sell to, there's a lot of

1 manual activity is those customers anyway. Whereas, Supra in
2 the UNE-P environment, the whole reason UNE-P works is that it
3 doesn't disrupt the customer very much. And so when you
4 introduce a disruption in that customer segment, it has
5 enormous consequences. So that's why it's sort of here in
6 front of you through this path instead of through the FDN path.

7 COMMISSIONER BAEZ: Okay. On the second type of
8 relief that you were talking about, I guess I'm trying to
9 distill it in my mind. Is it as simple as saying that -- would
10 another way of saying it be that the parties would like
11 BellSouth to offer FastAccess -- or make FastAccess service
12 available to all customers regardless of who their voice
13 provider is?

14 THE WITNESS: All customers on UNE-P because
15 the operational issues are simplified, yes.

16 COMMISSIONER BAEZ: Fair enough.

17 THE WITNESS: And, in fact, I'll make it even
18 simpler. The relief specifically would just boil down to offer
19 in Florida the contract amendment that they offer for
20 Louisiana. It's a two-page contract amendment. They're
21 implementing it today manually. Evidentially they will have it
22 operational on an automated basis by February of next year.
23 And if that were available here, it would take care of this
24 exactly, I think.

25 COMMISSIONER BAEZ: And I know you're not an

1 attorney, but it's your nonlegal opinion that this Commission
2 has the authority to require FastAccess service to be made
3 available to every --

4 THE WITNESS: Yes, I think in this case it does.

5 COMMISSIONER BAEZ: -- UNE-P customer.

6 THE WITNESS: Yes.

7 COMMISSIONER BAEZ: Okay. And one more line of
8 questions. As part of the cross-examination with Mr. Lackey,
9 you alluded to a market segment or you alluded to some fact
10 that most DSL customers -- most FastAccess customers happen to
11 be CompleteChoice customers.

12 THE WITNESS: Yes.

13 COMMISSIONER BAEZ: What is the significance -- can
14 you explain for me what the significance of that is, and should
15 we be -- is it your opinion that the Commission should be
16 focussed on that kind of segmentation as part of its analysis?

17 THE WITNESS: The answer to the second part is, no, I
18 don't think it's important for your analysis. I think this is
19 an anticompetitive act no matter how you look at it. I was
20 bringing it up because CompleteChoice is the highest-priced
21 product that BellSouth offers residential customers. In
22 region-wide, the take rate for that highest-priced product is
23 about 35 percent, I think. In FastAccess environment,
24 60 percent of the people take it. So I was just trying to use
25 it as an illustration of BellSouth's conduct here can be

1 explained, because not only do they not want to lose these
2 customers, but they really don't want to lose these customers.

3 And these are also the customers that are going to
4 attract the most amount of competition attention. They're
5 clearly not the only customers that subscribe to FastAccess,
6 and we're not asking you to limit the relief to just that
7 customer segment. Quite frankly, any customer that wants to
8 take its voice somewhere else for whatever set of reasons we
9 think should be permitted to do so without being punished by
10 losing its FastAccess or being denied access to it.

11 So I wouldn't use it in your analysis at all. I was
12 just trying to use it in part to answer Mr. Lackey's concerns
13 that I was -- that I didn't have enough facts to support my
14 interpretation of their incentive or their motivation.

15 CHAIRMAN JABER: Commissioners, do you have any other
16 questions?

17 Commissioner Deason.

18 COMMISSIONER DEASON: Thank you. Mr. Gillan, I want
19 to ask you a few -- the way I have interpreted your testimony,
20 and I may be oversimplifying it, and I apologize if I am, and
21 correct me if I'm wrong, but the essence of your testimony, I
22 take it, is that in the situation where there is an existing
23 BellSouth customer taking local service and taking FastAccess
24 service, that in a situation where that customer wishes to
25 migrate local service to a CLEC, that BellSouth is willing to

1 risk losing all revenue from that customer by requiring that
2 that customer, if they transfer their local service, that they
3 have to give up their FastAccess service. So it's a question
4 of zero revenue -- ignoring the UNE-P revenue for a moment.
5 It's a question of zero revenue or 100 percent revenue, and
6 according to your interpretation of the numbers, that they're
7 probably going to be successful retaining 100 percent of the
8 revenue 80 percent of the time.

9 THE WITNESS: Yes.

10 COMMISSIONER DEASON: Now, in the reverse situation
11 where there is an existing CLEC customer, and just for the sake
12 of this question assume this customer has never been a
13 BellSouth customer, and they wish to acquire DSL service and
14 inquire BellSouth about obtaining FastAccess service, and
15 according to current BellSouth policy that customer is told
16 that they did not qualify for FastAccess service because they
17 do not receive local service from BellSouth, is it your
18 position that BellSouth is once again willing to take that risk
19 of in that situation obtaining they have zero revenue from that
20 customer, they're willing to take the risk of maintaining zero
21 revenue, or they're going to get 100 percent of the revenue,
22 that being the local revenue plus the FastAccess revenue?

23 THE WITNESS: Yes.

24 COMMISSIONER DEASON: Do you have any information as
25 to how -- what percentage of time they would be successful with

1 that strategy?

2 THE WITNESS: No. No, I don't. But since CLECs have
3 about a 10 percent share of the mass market, the type of
4 customers we're talking about, both bus and res, and it's about
5 10 percent in both, in small bus and the res markets, they
6 would only confront that question about, you know, one-tenth as
7 frequently as the former one of where they're dealing with one
8 of their own subscribers. So I don't really have statistics
9 that will tie us directly to what the impact is on customers
10 that currently have a CLEC for voice, they want to get
11 FastAccess, they're told they are not, what is the customer's
12 behavior, I don't have that statistic.

13 I think they're taking that bet in part because
14 they're still in an environment where CLEC penetration in this
15 market is so modest, you know, 10 percent; that however often
16 the deal doesn't work out for them, it's a relatively small
17 fraction compared to the issue of trying to retained customers
18 they have already gotten.

19 COMMISSIONER DEASON: Well, in a situation where --
20 and let's just take it out of the context for just a moment, if
21 we can, out of a telephone situation. There's a business out
22 there. You're an economist. There's a business out there
23 that's in the business of making money selling whatever they
24 have. They're not getting any revenue from this specific
25 customer, and they get an inquiry from that customer about

1 obtaining some service. And the business says, well, we cannot
2 get your \$600 a year because the only way we're going to take
3 your \$600 a year is if you also, you know, take an additional
4 service from us. That just doesn't seem to work -- I mean, in
5 the normal competitive market, you just don't see that
6 happening very often.

7 THE WITNESS: Well, it wouldn't. And it makes no
8 sense here because BellSouth's story is the other service they
9 want to sell the customer is residential local service which
10 they continue to tell is below cost. So how is it that they're
11 made better off? If they sell the customer just FastAccess and
12 the CLEC continues to provide the voice, and again under what
13 I'm discussing, they would give BellSouth use of those
14 facilities for free. The service that BellSouth wants the
15 customer to bring to it is the service that they constantly
16 tell you is priced below cost. So how is that they're made
17 better off by mixing the profitable service, FastAccess, with
18 the unprofitable residential voice service? On its face, none
19 of this makes any sense.

20 COMMISSIONER DEASON: And then that raises -- the
21 next question is, does that mean that the technical
22 difficulties which BellSouth indicates exists, is that the
23 reason why they're willing to forego the \$600 a year in
24 revenue?

25 THE WITNESS: No, I don't think. In fact, I think

1 one of their discovery responses they indicated it's not
2 relevant whether the customer even pays for the service, it's
3 because we want to do it or something to that effect. I can
4 direct you to the discovery responses. It's not much better
5 than what I said, but it's a little different. Because if you
6 look at the operational issues, and I think the other witnesses
7 address them more clearly, but BellSouth was allowing these
8 orders to happen and allowing customers to go to UNE-P and
9 allowing the FastAccess to continue, and then they spent money
10 to take it away. And as a practical matter, the Louisiana
11 Commission has ordered them to cease this practice.
12 Administration required a two-page contract that carriers are
13 signing today for that state of Louisiana. So the operational
14 hurdle in terms of contract administration is writing Louisiana
15 and Florida at the top of that contract instead of just
16 Louisiana.

17 And their OSS systems, they're all region-wide. So
18 once they make this work in Louisiana, making it work in
19 Florida should be no operational hurdle whatsoever.

20 You know, Commissioner, I've been doing this a long
21 time. I remember when equal access was impossible. I remember
22 when interLATA equal access was impossible. I remember when
23 unbundling was impossible. I remember when resale was
24 impossible. You know, the one thing an incumbent will always
25 tell you when you're looking at doing something they don't want

1 you to do is, my God, it's impossible. It will cost billions
2 of dollars; it will cost millions of dollars; it will take
3 thousands of hours. But I guess in this --

4 COMMISSIONER DEASON: You've answered my question.
5 You've more than answered my question.

6 THE WITNESS: Sorry.

7 COMMISSIONER DEASON: Back to the situation where
8 there is an existing CLEC customer who inquires about obtaining
9 FastAccess. And it's your belief, your testimony that
10 BellSouth through an anticompetitive nature is willing to
11 approach -- is willing to tell that customer, it's kind of all
12 or none, either you take everything from us or we're not going
13 to give you FastAccess service, and there's a certain risk
14 associated with that. Is your testimony they're willing to
15 take that risk?

16 THE WITNESS: Yeah.

17 COMMISSIONER DEASON: Really take that risk that
18 they could lose -- that that customer could say, fine, I'll get
19 DSL service, not DSL service, I will get cable modem service to
20 address my needs and -- because that is an option, maybe not
21 the preferred option, but it is an option, and I will retain my
22 local service with the CLEC. And isn't that a risk that
23 BellSouth has to face that that would be an outcome of their
24 policy?

25 THE WITNESS: Yes, that would be a risk which, in my

1 mind, tells you how seriously do they really perceive the cable
2 modem option and how seriously do they really perceive the CLEC
3 threat of the voice service. Again, given current penetration
4 rates, we're looking at about 10 percent in the res market and
5 10 percent in the bus market for the types of customers that
6 would be interested in this market. So they would only come
7 across those kind of customers one out of ten. And that's why
8 I think they're willing to take that risk.

9 If this was really taking -- if they were really
10 seeing customers walk away from FastAccess or shrug their
11 shoulders and not buy it, then they would reevaluate. So it's
12 almost like you know this is anticompetitive because they're
13 doing it, because it only makes sense if they win that bet with
14 the customer, if they believe that the risk is slight that the
15 customer actually will not end up back in the fold of the
16 monopoly -- or of BellSouth. I didn't mean to say "monopoly"
17 pejoratively.

18 COMMISSIONER DEASON: And it's your belief, your
19 testimony that BellSouth's willing to take that risk of having
20 a customer, a potential customer approach them expressing
21 interest in obtaining a service and paying revenue to them, if
22 they're willing to take the risk of losing that customer
23 altogether, potential customer altogether because they want to
24 continue an anticompetitive behavior?

25 THE WITNESS: Yes. I think they want to do it

1 because they think they'll win that bet more than they'll lose
2 it.

3 COMMISSIONER DEASON: There is the risk that that
4 customer will simply say, well, I will not take DSL service
5 because I want to stay with my CLEC. And if I really do need
6 some type of enhanced Internet access, I will receive it by
7 satellite or by cable.

8 THE WITNESS: Well, by cable. I mean, I don't really
9 think satellite is really plausible. I will either get it by
10 cable or I will dial up, I will keep dialing up. People still
11 keep dialing up.

12 CHAIRMAN JABER: Mr. Gillan, I just need to
13 understand your client's ability to provide high-speed Internet
14 access and how that might be related to this debate. AT&T,
15 WorldCom, and AIN, I assume if the existing customer is an
16 existing customer of one of those three companies, that whether
17 by habit, or advertisement, or whatever, they are going to call
18 their local service provider and ask about the ability to
19 provide high-speed Internet access. Would you agree with that?

20 THE WITNESS: They might. I don't really -- they
21 might. I have to tell you that -- I'm sorry.

22 CHAIRMAN JABER: And I will let you elaborate in a
23 minute, but all three of your clients do or don't provide some
24 sort of broadband? I know AT&T does, for example.

25 THE WITNESS: They do, but I don't really know how

1 situated they are to offer it in this customer segment. The
2 same with MCI, they are starting to, but their product is by
3 its nature going to have a limited geographic application. I
4 don't believe AIN has a broadband offering in their product
5 mix.

6 CHAIRMAN JABER: Okay.

7 THE WITNESS: But the point I was going to make is
8 that really, I think, from the customer's perspective, from
9 your perspective, in part this has to do with the impact on
10 these carriers, but in part it has to do with the impact on the
11 customer.

12 CHAIRMAN JABER: And that is what my focus is. From
13 a consumer standpoint, I'm trying to understand if these are
14 the customers that don't have any choice with regard to some
15 sort of Internet service or -- you know, isolate these
16 customers for me. Are these the existing customers of your
17 clients that perhaps did contact your company and don't have
18 available to them some sort of Internet service, and then they
19 call BellSouth?

20 THE WITNESS: I don't know what process the customer
21 uses to get to the point where they want FastAccess or they
22 call these companies. What I do know, however, is that what we
23 are talking about are just really average residential and small
24 business consumers. The network arrangement to provide it to
25 the base that FastAccess is able to address is largely a remote

1 terminal-driven deployment. I think it is like 190 central
2 offices, but then 4,000 remote terminals. The ability of any
3 competitor to get DSL out into the remote terminal
4 configuration is several orders of magnitude more complicated
5 than getting it into CO-based arrangements. And in Florida --
6 actually, I think in the entire BellSouth region there still is
7 not remote terminal collocation anywhere.

8 So it is not clear to me that people will ever be in
9 a position actually to offer a DSL alternative if in order to
10 do it you have to get equipment out in the remote terminals.
11 BellSouth can do it because they are starting with everybody.
12 But everyone else, particularly given the hurdles they would
13 have to jump through to get into that remote terminal, I don't
14 know that any -- certainly nobody has shown a business case yet
15 that they are able to go into that and then serve all the
16 customers that would be downstream from the remote terminal.
17 There will be some CO-based alternatives, I'm sure, become
18 available.

19 CHAIRMAN JABER: Let me tell you why I ask the
20 question and what I find myself asking. You want us to expand
21 the FDN and Supra decisions to apply the decision to new
22 customers and customers that were never BellSouth customers,
23 existing customers of other carriers. It seems like the
24 statistic I just asked you about is relevant because if I
25 accept your argument that it is anticompetitive behavior

1 regardless, then BellSouth's alleged refusal to provide
2 FastAccess in the hope that they will capture their local, the
3 local customer, seems more realistic if there was no choice for
4 high-speed Internet access anywhere else. Does that make
5 sense? So then I find myself wondering are these customers
6 that just don't want high-speed Internet access from AT&T, AIN,
7 and WorldCom?

8 THE WITNESS: Well, I think as a practical matter
9 they couldn't get it from AIN. I think they can get it on a
10 limited scale from AT&T and WorldCom in some geographic
11 locations, but even then as a practical matter it is going to
12 be a long time before you have anything remotely approaching
13 the geographic footprint that BellSouth has achieved.

14 I mean, their whole testimony has been -- even in
15 this case has been we were able to do this because of our voice
16 monopoly. Then what they don't really go on to say is not only
17 that, we were able to do it because we own the remote
18 terminals, so we were able to give ourselves access to it. It
19 is just the whole nature of this proposition becomes very
20 entry -- it is a big entry barrier by having it out in the
21 remote terminal.

22 It might be the best thing for the network, I'm not
23 saying it isn't, it might be the best way to get it to
24 consumers, but you shouldn't -- it also means that people
25 aren't likely to get DSL alternatives when remote

1 terminal-based collocation is a prerequisite.

2 CHAIRMAN JABER: Okay. Commissioners, do you have
3 any other questions before we go to redirect. Redirect.

4 MS. KAUFMAN: Chairman, I have no redirect.

5 CHAIRMAN JABER: Thank you. Mr. Gillan, thank you
6 for your testimony.

7 THE WITNESS: Thank you very much.

8 CHAIRMAN JABER: Okay. Ms. Kaufman, that is Exhibit
9 13?

10 MS. KAUFMAN: Yes, ma'am.

11 CHAIRMAN JABER: Without objection, Exhibit 13 is
12 admitted into the record.

13 (Exhibit 13 admitted into the record.)

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15 (Transcript continues in sequence with Volume 2.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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WE, JANE FAUROT, RPR, LINDA BOLES, RPR, and TRICIA DeMARTE, RPR, Official Commission Reporters, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that we stenographically reported the said proceedings; that the same has been transcribed under our direct supervision; and that this transcript constitutes a true transcription of our notes of said proceedings.

WE FURTHER CERTIFY that we are not a relative, employee, attorney, or counsel of any of the parties, nor are we a relative or employee of any of the parties' attorneys or counsel connected with the action, nor are we financially interested in the action.

DATED THIS 4th DAY OF AUGUST, 2003.

Linda Boles
LINDA BOLES, RPR
Official Commission Reporter
(850) 413-6734

Tricia DeMarte
TRICIA DeMARTE, RPR
Official Commission Reporter
(850) 413-6736

Jane Faurot
JANE FAUROT, RPR, CHIEF
Office of Hearing Reporter Services
FPSC Division of Commission Clerk and
Administrative Services
(850) 413-6732