Florida
**Digital**
Network

April 11, 2002

Ms. Blanca Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

via Overnight Mail

Re: Docket No. 990649A-TP – Investigation into Pricing of Unbundled Network Elements (BellSouth Track)

Dear Ms. Bayó,

Please find enclosed for filing in the above docket an original and seven (7) copies of Florida Digital Network, Inc.'s Post-Hearing Brief. Also encloses is a diskette with a copy of the Brief in Word format.

If you have any questions regarding the enclosed, please call me at 407-835-0460.

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

C: All parties

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In re: Investigation into Pricing of )<br>Unbundled Network Elements )<br>) | Docket No. 990649A<br>Filed: April 12, 2002 |

# POST-HEARING BRIEF OF FLORIDA DIGITAL NETWORK, INC.

Matthew Feil
General Counsel
Florida Digital Network, Inc.
390 N. Orange Avenue
Suite 2000
Orlando, FL 32801

## INTRODUCTION

Florida Digital Network, Inc. ("FDN" or "Florida Digital") hereby submits its combined post-hearing statement of issues and positions and post-hearing brief. Following the order of issues as set forth in the Prehearing Order, issued January 25, 2002, FDN states its position on the issue and then presents argument, if any. The argument section for issues with subparts combines the arguments for all subparts under that issue.

**Issue No. 1(a): Are the loop cost studies submitted in BellSouth's 120-day filing compliant with Order No. PSC-01-1181-FOF-TP?**

**(b) Should BellSouth's loop rate or rate structure, previously approved in Order No. PSC-01-2051-FOF-TP, be modified? If so, to what extent, if any, should the rates or rate structure be modified?**

FDN: *BellSouth's loop rates should be reduced to permit meaningful competition in business and residential markets throughout Florida. Further, a new rate structure should be devised where lower UNE rates are available in more than just a minimal number of BellSouth Zone 1 wire centers. Also, agree with AT&T, MCI and Z-Tel.*

FDN agrees that BellSouth's UNE rates are far too high to foster competition, as asserted by the other ALECs. However, the competitive landscape also has been and will continue to be negatively affected by the UNE deaveraging scheme the Commission has imposed in BellSouth territory. Though the Sprint-proposed deaveraging methodology is not, in theory, objectionable, the Commission's altered version of that methodology as applied in this case nets highly undesirable, anticompetitive results that cannot stand. Therefore, in addition to reducing UNE rate levels consistent with the recommendations of the other ALECs, the Commission must revisit and alter BellSouth's UNE rate structure/deaveraging such that the lowest UNE rates are available in more than just a few isolated geographic pockets. Without such a change, competition throughout most of BellSouth's territory will be permanently stalled.

Although the price of a two-wire UNE loop in Zone 1 under interim stipulated rates and under final reconsideration rates in this docket decreased from $13.75 to $12.79, the fact of the matter is there was no net UNE cost decrease to ALECs because the number of Zone 1 wire centers was substantially reduced. Forty BellSouth wire centers, many in densely populated areas, were shifted from Zone 1 to Zone 2 classification as part of the Commission's decisions in this case.[1] To illustrate, while 71% of FDN's loops were in Zone 1 under the interim stipulation, only 37% of those same loops are in Zone 1 under the final and reconsideration orders.[2] The number of Zone 1 wire centers decreased so dramatically that FDN's preexisting 59 Zone 1 central office collocations became 33 Zone 1 central office collocations, without FDN having made any facilities changes.[3] Indeed, with the Commission's final and reconsideration decisions, rates for all loops in the 40 former Zone 1 (now Zone 2) wire centers went from $13.75 to $17.27, an increase of $3.52 per loop. From interim rates to final reconsideration rates, then, total UNE costs for ALECs like FDN increased rather than decreased.[4]

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1 Tr. at 617.

2 Tr. at 617 – 618.

3 Tr. at 618.

4 Tr. at 617 – 619; Confidential Hearing Exhibit No. 17.

FDN recognizes that the approved costs will drive the rate levels and recognizes that the rate design process, where the manner and the degree of shifting costs for recovery through one component rate versus another and through one rate zone/band versus another, is a very complex process. However, FDN believes the Commission did not adequately consider the end results of its deaveraging methodology as applied. While the UNE rates in Zone 1 may be lower than before, the number of Zone 1 wire centers is so extremely limited that the Commission will confine competition to those very small and limited geographic areas served as Zone 1, and ALEC UNE costs have actually increased due to the rate structure change. It must be emphasized that meaningful UNE-based competition in the residential market will never occur in BellSouth's Florida territory when there are a de minimus number of Zone 1 wire centers containing an inconsequential number of residential customers and when UNE rate levels remain a barrier.

The Commission must lower all UNE rates and must re-structure rates into zones whereby competition is not limited to a minute portion of the state. The deaveraging methodology/rate structure currently applied to BellSouth does not work, and a different methodology/structure supported by the prior evidence submitted in this case or a return to the interim regime should be implemented -- at rates that will permit ALECs to economically compete for most of BellSouth's customer base.

**2. (a) Are the ADUF and ODUF cost studies submitted in BellSouth's 120-day compliance filing appropriate?**

**(b) Should BellSouth's ADUF and ODUF rates or rate structure, previously approved in Order No. PSC-01-2051-FOF-TP, be modified? If so, to what extent, if any, should the rates or rate structure be modified?**

FDN: *Agree with AT&T and MCI.*

**3. (a) Is the UCL-ND loop cost study submitted in BellSouth's 120-day filing compliant with Order No. PSC-01-1181-FOF-TP?**

**(b) What modifications, if any, are appropriate, and what should the rates be?**

FDN: *Agree with AT&T and MCI.*

**4. (a) What revisions, if any, should be made to NIDs in both the BSTLM and the stand-alone NID cost study?**

**(b) To what extent, if any, should the rates or rate structure be modified?**

FDN: *Agree with AT&T and MCI.*

**5. (a) What is a "hybrid copper/fiber xDSL-capable loop" offering, and is it technically feasible for BellSouth to provide it?**

FDN: *The loop offering BellSouth should be required to provide is an unbundled xDSL capable loop, whether copper or fiber fed, that includes packet switching. It is technically feasible for BellSouth to offer such loops.*

**(b) Is BellSouth's cost study contained in the 120-day compliance filing for the "hybrid copper/fiber xDSL-capable loop" offering appropriate?**

FDN: *No, BellSouth's filing must be rejected. It is improper and impractical to require ALECs to purchase their own dedicated DSLAMs and DS1 feeders at BellSouth remotes, as BellSouth's filing proposes.*

**(c) What should the rate structure and rates be?**

FDN: *BellSouth should be required to resubmit its cost study consistent with a shared-facilities, TELRIC-based methodology, rather than a dedicated facilities/network segment basis.*

This proceeding is a cost case, established to determine the TELRIC rates for UNEs that BellSouth is required to offer to ALECs in Florida. Unlike the other network elements that the Commission is considering in this proceeding, the broadband loop proposed in Docket No. 010098, (the "FDN Arbitration") has not yet, as of the date of this brief, been classified as a UNE by the Commission. However, a decision in the FDN Arbitration will likely precede a decision in this case. If a new broadband loop UNE, as proposed by FDN and as endorsed by the Commission Staff, is adopted, the prior development of a record in this case will assist the Commission in establishing rates for this new UNE in a more expeditious manner.

Before the Commission can establish a permanent TELRIC rate for any new UNE, it must have before it sufficient evidence on which to base its decision. An important element in this process traditionally involves the presentation by BellSouth of a cost study setting forth its support for the long-run incremental costs of providing a particular UNE to ALECs. However, the record undisputedly demonstrates that BellSouth's hybrid copper/fiber loop cost study does not represent the network element that FDN has requested in its arbitration. As described in more detail below, BellSouth's proposal purposefully excluded unbundled DSLAM functionality at the remote terminal, access to which has been the central objective of ALECs on this issue. Indeed, no ALEC in this proceeding has indicated that it would purchase the network element proposed by BellSouth, and no ALEC could, since BellSouth's proposal is not a viable option. Therefore, the next step in this proceeding should be an order requiring BellSouth to propose a new cost study setting forth its TELRIC costs of providing the UNE proposed by FDN and Staff in the FDN Arbitration -- an end-to-end loop, through a Digital Loop Carrier, with unbundled packet switching.

To ensure that the record in this case supported several possible outcomes that may be decided by the Commission, the record contains the hearing transcript, prefiled testimony of Mr. Gallagher, and late-filed hearing exhibit no. 13 from the FDN Arbitration (Exhibit No. 39). However, the inclusion of this record was not intended to prompt a relitigation of the underlying issue of whether broadband packet-switched loops should be unbundled. The Commission's objective in this proceeding should be to focus on what the TELRIC rates for this network element would be *if* it were unbundled.

Indeed, there is nothing inappropriate about the Commission's advance inquiry into the cost basis of a network element before ordering it to be unbundled; that is, in effect, what this Commission did already when it ordered BellSouth to submit its hybrid copper/fiber loop study for an as-yet unestablished UNE.[5] The Commission requested this cost study so that it would have before it the evidence necessary to establish an appropriate TELRIC rate for a UNE that would enable ALECs to offer competitive DSL-based services where BellSouth deployed DSLAM functionality at a remote terminal. Because BellSouth's hybrid loop cost study in no way represents the UNE product that FDN requested and the Staff recommended in FDN's Arbitration, a new cost study is needed to bring the record to the point where the Commission can properly evaluate the appropriate rate for this network element.

[5] Other state commissions have required cost studies in advance of unbundling; for example, the Massachusetts Department of Energy and Telecommunications required Verizon to submit a proposed tariff for packet-switched remote terminal UNEs for xDSL service even before Verizon deployed DSL-capable Digital Loop Carriers. *Investigation by the Department on its won motion as to the propriety of the rates and charges set forth in the tariff filings by Verizon – New England, Inc., d/b/a Verizon – Massachusetts*, D.T.E. 98-57, Phase III Order (Mass. D.T.E. September 29, 2000) at 86-87 (the Department ordered Verizon "to file a tariff that would enable CLECs to place or have Verizon place CLEC-purchased line cards in Verizon's DLC electronics at the RT.").

If for some reason the Commission has not yet ordered BellSouth to unbundle packet-switched broadband loops at the time that it is considering for decision the record in this proceeding, the record in this case is sufficiently developed to support unbundling. If, however, the Commission has already ordered BellSouth to unbundle these facilities in the FDN Arbitration, the remaining focus for this proceeding should be to establish an appropriate TELRIC rate. Therefore, in this brief FDN will not rehash the unbundling and impairment analyses that have already been thoroughly briefed for the Commission in the FDN Arbitration. To the extent that the Commission wishes to review any of these issues, FDN refers it to the brief filed by FDN in that proceeding on September 26, 2001.[6]

FDN does not shy from debating whether packet switching should be unbundled where BellSouth has deployed DSLAM functionality at remote terminals. Indeed, the record in this case is even stronger in its demonstration that ALECs would be impaired without unbundled access to remote terminal DSLAM ports. BellSouth's own cost study demonstrates that ALECs could not install their own DSLAMs at remote terminals and still be able to offer competitive retail prices. Second, BellSouth has openly admitted at the hearing in this proceeding that it has plans to install significant quantities of next-generation digital loop carriers, which use a less expensive DSL line card to perform the DSLAM function at the remote terminal. Because it is undisputed that ALECs would not be permitted to install their own line cards on the same terms and conditions available to

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6 *In Re: Petition of Florida Digital Network, Inc. for Arbitration of Certain Terms and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Docket No. 010098-TP, Post Hearing Brief of Florida Digital Network, Inc. (filed September 26, 2001).

BellSouth, it is even more clear that packet switching should be unbundled in accordance with the terms and intent of the Telecommunications Act of 1996.

Therefore, the primary threshold question before the Commission with respect to Issue #5 of this proceeding is whether sufficient evidence has been presented to establish a permanent, or at least interim, rate for the UNE proposed in the FDN Arbitration. As demonstrated below, because BellSouth has not offered any evidence of its long-run incremental costs in offering such a UNE, it would be difficult for the Commission to establish a permanent rate. However, the uncontroverted evidence offered by Mr. Gallagher could support the establishment of an interim rate. Therefore, the Commission should order BellSouth to submit a new cost study that could be used to price the network element proposed by FDN and Staff in the FDN Arbitration. If such a UNE is established subsequent to this brief but prior to the establishment of a permanent rate, BellSouth should be required to offer the new UNE at an appropriate interim rate.

## A. It is undisputed that BellSouth's proposed cost study does not develop a rate for the product at issue in the FDN Arbitration.

The record is clear that in its arbitration, FDN has requested an end-to-end broadband capable loop that includes *unbundled* packet switching, so that it is able to offer DSL services to customer locations where BellSouth has deployed DSLAM functionality at its remote terminals. As Mr. Gallagher explained:

> Unbundled packet switching should mean that an ALEC could purchase the switching that it needs, not that the ILEC would offer to sell the ALEC its own switch. For example, when BellSouth provides unbundled switching for voice services, either as a stand-alone UNE or as part of the UNE Platform, it cannot simply offer to sell to each ALEC its own dedicated Class 5 switch; instead, the switching is sold based on incremental usage of BellSouth's switching facilities."[7]

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[7] Tr. at 624:5-11 (Gallagher Rebuttal at 11:5-11).

BellSouth did not dispute this part of Mr. Gallagher's testimony. Instead, BellSouth has freely admitted that the product proposed in its cost study does not include unbundled packet switching, but would instead require ALECs to purchase their own packet-switching facilities to be deployed at the remote terminal. In his surrebuttal testimony, Mr. Kephart specifically admits that BellSouth's proposal "would require that the ALEC purchase the entire DSLAM regardless of the quantity of customer lines the ALEC services from a given remote terminal site."[8] Ms. Caldwell also admits that the hybrid fiber/copper loop cost study offered by BellSouth is based on the ALEC purchasing a dedicated DSLAM and feeder from the remote terminal to the central office, rather than using shared transport.[9]

To justify why the BellSouth cost study does not include unbundled DSLAM packet switching at the remote terminal, Mr. Kephart explained that "the Florida Commission only asked BellSouth to submit a cost study for a hybrid copper/fiber xDSL-capable loop, which is exactly what is included in BellSouth's submission."[10] Mr. Williams' testimony adds that the cost study "is not, and was never intended to be . . . an end-to-end offering that included an unbundling of [DSLAM functionality].[11]

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8 Tr. at 83:14-18 (Kephart Surrebuttal at 5:14-18). See also Tr. at 623:5-12 (Gallagher Rebuttal at 10:5-12) (explaining that BellSouth's proposal is not unbundling because it would force FDN to purchase capacity for 16 customers at a time in each remote terminal serving area, even if it only wanted to serve fewer customers).

9 Tr. 345:14 to 346:7. See also Tr. at 623:5-12 (Gallagher Rebuttal at 10:5-12).

10 Tr. at 80:15-17 (Kephart Surrebuttal at 2:15-17).

11 Tr. at 444:4-6 (Williams Surrebuttal at 18:4-6).

It is clear that the network element the Commission in interested in is the model that uses shared DSLAMs.[12] Therefore, to assure that cost information will be available to establish a permanent rate for the new UNE proposed by FDN and Staff in the FDN Arbitration, the Commission should order BellSouth to file a new TELRIC cost study that sets forth the costs of providing the UNE requested in the FDN Arbitration. FDN urges the Commission to act in any manner available to it to assure that this new cost study is filed as soon as possible.

**B. It is Undisputed that the UNE Proposed by FDN is Technically Feasible.**

Mr. Gallagher's testimony demonstrates the technical feasibility of the UNE proposed by FDN in its arbitration, including unbundled packet switching using shared DSLAMs or DSL line cards.[13] Mr. Milner specifically agreed at the hearing that it is possible for ALECs and BellSouth to share a DSLAM at a remote terminal.[14] In addition, he agreed that FDN's proposal is technically feasible:

> CHAIRMAN JABER: So then there is no technical reason for not supporting Mr. Gallagher's proposition [of unbundling packet switching at the remote terminal].
>
> MR. MILNER: Correct.
>
> CHAIRMAN JABER: There is no technical reason for not making that available as a UNE.
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> MR. MILNER: You're correct. This is not, this is not a disagreement over what's technically possible. I can see that that's technically possible. I think from a regulatory perspective that's not the proper thing to do.[15]

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12 *See, e.g.*, Tr. at 493:21-23 (Chairman Jaber states to Mr. Williams, "I went so far as to ask for information in a brief, thinking I'd get information on a cost study associated with sharing the cost of DSLAMs.

13 Tr. at 640:20-641:5 (Gallagher Rebuttal at 27:20-28:5).

14 Tr. 150:14-18.

15 Tr. at 155:12 to 156:6.

Therefore, BellSouth may not oppose a requirement of a new cost study on the basis that the requested UNE is not technically feasible.

### C. The offering of the unbundled packet switching would not expose BellSouth to "unacceptable risks."

Notwithstanding the clear record from the FDN arbitration that ALECs would be impaired without access to unbundled packet switching where BellSouth has deployed DSLAM functionality at remote terminals, BellSouth's witnesses try to dissuade the Commission from requiring BellSouth to offer any packet switching network element at TELRIC rates. Mr. Williams argues that requiring BellSouth to make its DSLAM functionality available to ALECs at remote terminals would "expose BellSouth to many unacceptable risks," namely, "obsolescence of technology; underutilization of equipment; and potential failure to recoup its investment."[16] However, on cross-examination, it became apparent that Mr. Williams' testimony was based on two flawed foundations. First, his fears of obsolescence and underutilization are mooted by the fact that BellSouth is not being asked to provide unbundled packet switching where it has not already deployed it. Second, Mr. Williams' objection to the alleged risk of non-recoupment is nothing more than a general opposition to the plain terms of the Telecommunications Act of 1996 and its implementing regulations. In any case, the record demonstrates that the establishment of a new UNE that includes shared DSLAM and line card facilities will actually promote effective utilization and enhance the value of BellSouth's investment, rather than undermining it. Therefore, Mr. Williams' concerns may be dismissed.

Mr. Williams' underutilization and obsolescence arguments are based on a mistaken belief that FDN was seeking to require BellSouth to deploy DSLAMs in remote

[16] Tr. 453:10-13, 432:15-25 (Williams Surrebuttal at 6:15-25).

terminals where no DSLAM is presently in place. Indeed, much of BellSouth's testimony, and its arguments against the concept of shared DSLAMs, are based on this false premise. For example, Mr. Kephart states that "[FDN's proposed UNE] would have BellSouth assume an investment risk for unfilled ports on DSLAMs deployed for ALECs and for which BellSouth has no intention to use for its own broadband services."[17] Mr. Kephart contends that as a result, "BellSouth would be left with stranded investment thereby raising costs and hampering its ability to offer broadband services."[18] Mr. Williams argued that FDN "would have BellSouth purchase and deploy a full DSLAM just so that FDN could use one (1) port."[19] Because FDN is only seeking access to existing, deployed DSLAMs, BellSouth's complaints may be dismissed. This conclusion became apparent at the hearing:

> MR. FEIL: On Page 8 starting at Line 9 through 24 [of your surrebuttal testimony], you address the risk of underutilization. Now, is this argument premised on the assumption that -- or excuse me, premised on the belief that FDN is asking that the Commission unbundle DSLAMs even in areas where BellSouth does not presently have a remote terminal?
>
> MR. WILLIAMS: Yes, that's the assumption here.
>
> MR. FEIL: Okay. So if that assumption changes and . . . the Commission requires unbundling only where BellSouth presently has DSLAM, is this argument completely eliminated?
>
> MR. WILLIAMS: Yes, it would go away.[20]

In fact, the record demonstrates that sharing of DSLAMs will *maximize* efficient utilization, not undermine it. As Mr. Gallagher explained:

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17 Tr. at 84:13-16 (Kephart Surrebuttal at 6:13-16).

18 Tr. at 85:18-19 (Kephart Surrebuttal at 7:18-19).

19 Tr. at 450:14-17 (Williams Surrebuttal 24:14-17).

20 Tr. at 472:19 to 473:5.

> The aggregation of all ILEC and ALEC traffic through shared DSLAMs would be the best way to ensure efficiency not only for ALECs, but also for BellSouth. If each carrier used its own facilities, there would be a much less efficient allocation of DSL ports. For example, if BellSouth had seven DSL customers at an RT, and three ALECs had four, two, and two customers, respectively, it would be much more efficient for the four carriers together to use 15 ports on one 16-port DSLAM than to use less than 25% of the total capacity of four separate DSLAMs. The higher utilization rate resulting from shared use will enable all carriers to reduce their per customer costs and thereby lower their retail prices. Even more significantly, pooling the DSL needs of all carriers could generate sufficient demand to enable the use of higher-capacity facilities, such as 96-port DSLAMs or DS3 feeders, which are more efficient and cost-effective if utilized sufficiently. These higher-capacity facilities are more efficient and would yield lower per subscriber costs. Shared facilities would reduce costs for both ALECs and BellSouth, and would increase the deployment of broadband to Florida consumers and businesses.[21]

Not only does FDN's proposal increase the chances that BellSouth's capacity will be used at maximum efficiency, but BellSouth will be able to pass off a portion of its risk of underutilization on other ALECs who use the facilities, by including an appropriate fill factor to cover the costs of unused ports.[22] BellSouth today has assumed 100% of the risk of underutilization on the DSLAMs it has deployed and keeps for its exclusive use. Under FDN's proposal, by contrast, this risk would be spread among all carriers that use the remote terminal DSLAMs. Therefore, BellSouth's financial risk of underutilization will decrease if the shared DSLAM approach is adopted.

At the hearing, it quickly became apparent that Mr. Williams' nonrecoupment argument is merely a thinly veiled request for an exemption from the Telecommunications Act of 1996 and the regulations of the FCC and this Commission implementing this mandate for competitive access to the incumbents' networks. The

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21 Tr. at 632:19-633:12 (Gallagher Rebuttal 19:19-20:12). See also Tr. 167:20-25 (Mr. Kephart agreed that under some circumstances the marketing efforts of multiple CLECs "could help to grow the overall DSL market").

22 Tr. at 654:4-8 (Gallagher Rebuttal at 31:4-8).

following exchange at the hearing readily illustrates the irrelevancy, for the purposes of this TELRIC proceeding, of Mr. Williams' contentions:

> MR. FEIL: On Page 6 of your [surrebuttal] testimony toward the bottom, you reference three risks regarding -- or that BellSouth would face in an unbundling situation. You identify obsolescence, underutilization, and nonrecoupment. ... It seems to me that you basically are saying that TELRIC pricing doesn't permit BellSouth to recover its costs because it's based on forward-looking technology and not actual facilities BellSouth has in the ground. Is that a fair summary?
>
> MR. WILLIAMS: Yes, that's correct. We could find ourselves in a situation where -- think about DSLAMs. Their costs are coming down. We actually deployed DSLAMs two years ago. Whereas, if you looked at the forward-looking cost of DSLAMs, they cost less looking forward than they do today. So we could in fact end up having to provide services at less money than it actually cost us to deploy two years ago. That's what I mean.
>
> MR. FEIL: So it seems to me that your argument is basically with the TELRIC methodology, is it not, Mr. Williams?
>
> MR. WILLIAMS: Well, yes, it probably is.
>
> COMMISSIONER DEASON: Let me ask a question. In looking over the broader perspective of things, and correct me if I'm wrong, I thought that's what the Act was all about and what competition is all about; that if the cost of providing service goes down, it doesn't matter what you have on your books and what you invested years ago, you're limited by competition to what it costs now to provide service, and you better get efficient if you're going to be an able competitor. Am I interpreting that incorrectly?
>
> MR. WILLIAMS: I believe you probably are interpreting it correctly, Commissioner. I was just stating that we could actually end up recouping less money than it cost us two years ago to put DSLAMs at a remote terminal.
>
> MR. FEIL: Doesn't that same argument apply -- or doesn't that same concern apply to all of the components that BellSouth is required to unbundle now?
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> MR. WILLIAMS: Yes, I believe so.[23]

BellSouth deployed its DSLAM facilities well after the adoption of the 1996 Act, understanding that ALECs could petition for unbundled access to these facilities upon a

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23 Tr. at 471:5-472:18.

showing that they would be impaired without such access.[24] As with any investment, BellSouth surely would have recognized that the moment it purchased its DSLAMs, it was exposed to the risk that the costs of DSLAMs could decrease, or that alternatives less expensive than DSLAMs would become available. Rather than assume that risk in a pro-competitive manner, BellSouth asks the Commission to sanction a monopoly over providing service to these customers, so that BellSouth can overcharge these customers to "recoup" as much money from them as BellSouth deems appropriate. Unfortunately for BellSouth's argument, and fortunately for the consumers that would be affected by it, the 1996 Act demands otherwise.

Finally, BellSouth makes a related "recoupment" argument against unbundled packet switching that is dependent on BellSouth's view that its DSL services should be exempt from all of the rules that apply to other UNEs. BellSouth argues that if it were forced to share its DSLAM functionality, it would incur additional expenses because its current OSS systems are only designed to support BellSouth-assigned telephone numbers.[25] This Commission and the FCC have consistently determined that BellSouth is required to support UNEs with appropriate OSS. While FDN disputes the degree of these alleged costs, if BellSouth believes additional costs are generated by these OSS demands, it can seek approval from the Commission to recover them through the same mechanisms that it uses to recover its other OSS costs.[26]

### D. The Commission should establish interim rates so that FDN and other ALECs will be able to enter the DSL market immediately upon entry of any unbundling order.

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24 Tr. at 498:6-17.

25 Tr. at 456:4-8.

26 See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order at ¶ 524.

Because of the limited evidence in the record as to the appropriate TELRIC analysis of unbundled packet switching, it would be appropriate for the Commission to order BellSouth to file a new cost study. However, it would be unfair and contrary to the public interest to allow BellSouth to prolong its monopoly position pending the calculation of permanent rates beyond any date in the future on which BellSouth is ordered to provide packet-switched broadband loops to ALECs. Because the Commission is likely to issue its decision in the FDN Arbitration prior to its consideration of BellSouth's yet-to-be-filed cost study, an interim rate should be established so that any new UNE is readily available to ALECs. BellSouth already has a significant head start in providing xDSL services to remote-terminal served areas, and with each day that passes, FDN falls further behind BellSouth in the high-speed data market, and the probability of losing its existing and prospective voice customers grows.[27] The Commission should seek to avoid any further delays in competitive entry.

The only detailed evidence pertaining to the approximate appropriate rate was offered by Mr. Gallagher. Using BellSouth's existing retail and wholesale rates for DSL-based services as a model, Mr. Gallagher estimated that the approximate rate for the proposed UNE, including the loop, would be between $16 and $22:

> Of the $45-50 retail charge, approximately $21 could be attributed to Internet and enhanced services, as BellSouth sells these separately for $20.95 per month. Another couple of dollars per month are attributable to the costs of providing transport from the central office to an Internet connection point. Using the Commission's resale discount rates as a proxy, approximately 16-22% of the remaining costs are attributable to retail costs such as advertising, customer service and billing. Therefore, the portion of its $45-50 retail charge attributable to the DLC loop and DSLAM packet switching should be in the approximate

[27] Tr. at 675:19-22; Exhibit 39 at page 7, lines 1-14 (Gallagher Direct Testimony from FDN Arbitration at 7:1-14).

> range of \$16-22. Further, BellSouth's rates for the DLC loop with packet switching should be measurably less than \$33 per month, which is the rate in BellSouth's FCC tariff for DSL transport sold to ISPs to provide service to BellSouth's voice customers ("wholesale ISP rate"). This wholesale ISP service is more expensive to provide than DLC loops alone because it includes connectivity from the central office to a single connection point in each LATA. Therefore, the Commission should view with great skepticism any BellSouth rate for DLC loops that exceeds \$25.[28]

These estimates, which BellSouth did not rebut, are not based on TELRIC methodology and should in no way be interpreted as FDN's position in a later phase of this proceeding to establish final rates. Indeed, the actual TELRIC rates for these network elements may be substantially less than the estimates above that are based on rates developed by BellSouth as a near-monopoly provider of DSL transport services. However, for the purposes of allowing competitive access during the remaining pendency of this proceeding, it would not be unreasonable for the Commission to adopt an interim rate in the \$16-22 range. This rate is an all-inclusive rate for a loop between the customer and the interconnection point and for the packet switching necessary to route the telecommunications to the ALEC. As discussed below, the appropriate rate structure for permanent rates may be different, but this proposed interim rate is all that would be supported on the existing record.

### E. Parameters for the New Cost Study

In his testimony, Mr. Gallagher explained that the only new rate that the Commission needs to calculate is the TELRIC charge for unbundled packet switching, because this charge can be added to the rate for the loop or portion of a loop that the ALEC already purchases for other services or would purchase in association with the new DSL service:

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[28] Tr. at 627:21-628:13 (Gallagher Rebuttal at 14:21-15:13).

> The rate structure for xDSL UNE loops should include two basic product types: data-only and voice-and-data. Each should be offered on a line-at-a-time basis, with a single loop rate for each zone. The rates should represent the sum of adding unbundled packet switching to different types of already existing UNE loops. The only new calculation necessary to compose the TELRIC-compliant rates for the two types of xDSL loops is a TELRIC-based charge for packet switching on a per line basis. For data-only xDSL loops, this surcharge would be added to the applicable rate for a line shared loop. For combined voice and data xDSL loops, the packet switching surcharge would be added to the applicable rate for a UNE loop.[29]

Not only did BellSouth not rebut this testimony, but indeed its testimony is consistent with this proposal. While BellSouth steadfastly avoided preparing a cost study that is responsive to the UNE requested by FDN in its arbitration, at the hearing Mr. Milner also explained how the packet switching surcharge, described by Mr. Gallagher above, might be calculated:

> CHAIRMAN JABER: Assuming you can enter into an agreement with an ALEC to share that DSLAM to provide services by both companies, tell me how to share the costs. I want to find a way to allocate and split the costs between the ALEC and BellSouth, assuming that there could be an arrangement between the companies to share the DSLAM.
>
> MR. MILNER: Okay. Well, the simplest way to allocate the cost would be to allocate it on the basis of the number of ports, that is customer lines that were attached to the DSLAM. If the ALEC and BellSouth each use 50 percent of those ports, then you could allocate 50 percent of the cost of the DSLAM to BellSouth and the other 50 percent to the ALEC. That's the simplest part, way to do it. And, in fact, there are some fixed costs in the DSLAM that would argue that that's the right way to do it. But the, the other parts that would make that device functional are more sensitive to the amount of packet traffic that's conveyed by each individual customer than not. So it may mean that the, the ALEC has half the, the customers served by that but that those customers generate 95 percent of the traffic which is carried over that shared facility forward to the central office. So you might -- you know, in that case, you'd look at devising a scheme where you'd measure the number of packets sent and allocate the transport costs or the, you know, the traffic-sensitive costs on that basis. Probably at the end of that exercise you'd conclude that you needed some, some blending of both traffic

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29 Tr. at 643:13-22 (Gallagher Rebuttal at 30:13-22).

> sensitive and nontraffic sensitive costing to really accurately assess the right amounts to each party.[30]

While FDN does not necessarily agree with Mr. Milner's ambiguous references to traffic-sensitive charges, it is clear that BellSouth recognizes that the costs of the UNE proposed by FDN in its arbitration could be calculated in a TELRIC cost study simply by developing an appropriate surcharge for packet switching.

At the hearing, suggestions were floated regarding the possibility that any new packet-switched UNE could be priced at a "market rate," rather than in accordance with TELRIC. Other than for comparative purposes, such considerations are not relevant to this proceeding, as the plain terms of the Telecommunications Act of 1996 and five years of FCC and Commission precedent clearly indicate that UNEs are to be priced in accordance with TELRIC. Even BellSouth's counsel noted at the hearing that, "there has been a lot of talk over the last couple of days about market rates, and I've got some concerns about rates that this Commission is authorized to set in this proceeding and whether or not those are limited to UNEs and need to be based on TELRIC to the extent the Commission finds something to be an unbundled network element,"[31] and that, "I think to the extent then if the Commission were to determine something was an unbundled network element, by definition the law would require that to be priced at TELRIC."[32] In any case, for bottleneck facilities controlled by an incumbent, the only meaning of a "market rate" is whatever rate the only seller, the ILEC, deems appropriate, if any. Discussions regarding a "market rate" presume not only that there is a competitive supply for these services -- which there is clearly not -- but also that

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30 Tr. at 150:19 to 151:23

31 Tr. at 685:18-24.

32 Tr. at 687:21-24.

BellSouth is willing to develop a reasonable price strictly based upon the economics of its DSL investment. The 1996 Act and the implementing regulations developed by the FCC and this Commission reveal a fundamental premise that incumbent carriers cannot be relied upon to unilaterally develop rates for competitive access to its network that would afford to ALECs a meaningful opportunity to compete. This premise is borne out in the record of this proceeding, which reflects BellSouth's incentive not only to maintain its status as the exclusive provider of DSL service in these areas, but also as a means of protecting itself from competition in the voice market as well. Because BellSouth has an anticompetitive tying arrangement in which it will only sell its DSL service to customers who use BellSouth for voice service, it is able to leverage its monopoly position for DSL in remote terminal served areas into an even stronger position in the voice market. In other words, BellSouth likely would not sell access to its DSLAMs even at a substantial profit if its refusal to do so could undermine ALECs' ability to compete in the voice market, and perhaps altogether.

Even BellSouth's discussion at the hearing of a "market" rate came only after repeated inquiries from the Commissioners. And then through the course of the hearing, it became more and more clear that this "market rate study" BellSouth was calculating represented less and less. First, BellSouth disclosed that it would apply only to lines where BellSouth provided the voice service. Then BellSouth revealed that it would not apply to remote terminal DSLAMs, but instead only to remote terminals that had been equipped with DLC DSL line cards. If BellSouth were truly interested in making DSL capability available to ALECs, it would have already offered viable rates and terms to FDN and other ALECs. Instead, BellSouth's cost study in this docket was prepared only begrudgingly after ordered by the Commission, and even then, the study was contrived to offer a service that no ALEC has requested and at rates that no competitor could afford.

BellSouth attempted to give credence to the use of market rates rather than TELRIC by stating -- erroneously -- that SBC's Project Pronto broadband service is offered at "market rates." Mr. Williams testified that he did not believe that SBC's service -- which is very similar to the UNE requested by FDN in its arbitration -- is not priced at TELRIC, and that "I know that SBC, their Project Pronto is an end-to-end DSL service supposedly at market rates." On the contrary, SBC's rates are not only based on TELRIC, but SBC voluntarily agreed to such pricing.[33]

The heart of BellSouth's argument appears to be that, notwithstanding the 1996 Act, it would not be good policy to allow ALECs to have access to BellSouth's RT DSLAMs and line cards at TELRIC rates because otherwise, ALECs would not have the incentive to deploy their own last mile networks and their own DSLAMs at remote terminals.[34] This argument ignores the substantial evidence in this case that it is not a viable option for FDN to collocate DSLAMs at BellSouth remote terminals. It is not a matter of creating or destroying incentives; the clear evidence in the record demonstrates that not a single ALEC has collocated a DSLAM at a single BellSouth remote terminal in Florida,[35] and it is likely to remain that way, because the economics simply do not exist to support widespread collocation of numerous DSLAMs at hundreds or thousands of

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33 Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket No. 98-141, ASD File No. 99-49, Second Memorandum Opinion and Order, FCC 00-336 (rel. September 8, 2000) (*"Project Pronto Order"*), ¶ 30.

34 Tr. at 155:12 to 156:6.

35 Tr. at 465:14 (testimony of Mr. Williams).

remote terminals. In any case, BellSouth is attempting to create the misleading impression that there is no public benefit to allowing ALECs to have this manner of access to BellSouth's packet switching, because "the features that the end-user receives are the same as those that BellSouth provides to its end-users."[36] On the contrary, FDN is not merely proposing to resell BellSouth's service.[37] As Mr. Gallagher explained at the hearing, FDN can and does add value-added services on top of BellSouth's basic service offering. For example, FDN added routers to its DSL network that allowed its customers to obtain static IP addresses, maintain their own email servers, and perform other advanced functions not available to BellSouth DSL customers.[38] The public interest should not be measured only on the number of last mile networks entering the homes and business premises of Floridians, but also on the *quality and variety* of services offered over these last mile networks. By restricting the ability of FDN and other innovative competitors to use BellSouth's last mile network, BellSouth's proposal would stifle, not encourage, broadband innovation and investment.

Moreover, BellSouth's contention that the proposed unbundling would have no public benefit ignores the impact of this issue on competition for voice services. As FDN demonstrated in the FDN Arbitration, FDN's inability to offer xDSL services to consumers served by remote terminals severely impairs its ability to be competitive in the voice services market, as many consumers seek to obtain local and data services from the same carrier.[39] This practice threatens to undermine the already troubled state of

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[36] Tr. 447:1-4 (Williams Surrebuttal at 21:1-4).

[37] Even if it were, the 1996 Act premises that competition from resale promotes the public interest, such as through price competition.

[38] Tr. at 674:12-23, 675:1-6.

[39] Tr. at 620:15-22 (Gallagher Rebuttal at 7:15-22).

telecommunications competition in Florida by effectively preventing ALECs from competing in the voice market for customers who purchase DSL from BellSouth. Customers who switched to FDN would lose their BellSouth DSL, and FDN is not in a position to offer them alternative DSL service. Similarly, any current FDN voice customer that wants DSL will have to drop FDN service and purchase both voice and DSL from BellSouth. Therefore, BellSouth's exclusive control over the DSL market in remote terminal served areas frustrates and undermines competition in both the DSL and voice services markets. Only on cross-examination did BellSouth finally admit the repercussions this issue has on the voice market, as indicated in Mr. Williams' responses to questions by Mr. Feil of FDN and Commissioner Deason:

> MR. FEIL: You state in your testimony, Page 23 at the bottom, starting at Line 23 of Page 23, "To my knowledge, no customer in Florida or anywhere in the BellSouth region has ever been denied the ability to select different voice or data carriers." What about the BellSouth customer that wants DSL and FDN voice over the same line?
>
> MR. WILLIAMS: Well, that would be an exception.[40]
>
> and:
>
> COMMISSIONER DEASON: What if a customer wants voice service from FDN or someone else but wants to continue BellSouth Fast Access service? They don't have that choice, do they?
>
> MR. WILLIAMS: No, they don't.[41]

The anticompetitive effect of BellSouth's exclusionary policies is yet another reason why the public interest demands that ALECs be able to access unbundled packet switching on the rates and terms appropriate for an unbundled network element under the 1996 Act.

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40 Tr. at 507:18-24.

41 Tr. at 491:11-15.

These rates and terms include pricing of the network element in accordance with TELRIC methodology.

Therefore, the new cost study required to complete this proceeding should be based on TELRIC, just as has been required of every other BellSouth UNE cost study in this proceeding and in prior cases.

**F. BellSouth's Own Study, Although Flawed, Helps to Further Demonstrate that ALECs Are Impaired without Access to Unbundled Packet Switching**

As set forth above, the principal reason that BellSouth's cost study should be rejected is because it does not offer unbundled access to packet-switched loops that can be used to provide DSL services where BellSouth has deployed DSLAM functionality. The numerous reasons why ALECs should be afforded unbundled access to unbundled packet switching in these circumstances are already well established in the record of the FDN Arbitration. While as promised above, FDN will not repeat in this proceeding every argument made in the FDN Arbitration, FDN's impairment without access to unbundled packet switching became even more apparent from BellSouth's own cost study. BellSouth's study illustrates that, in addition to the factors set forth in the arbitration, FDN could not realistically provide xDSL services using BellSouth's proposed dedicated-DSLAM and dedicated-feeder model because the costs of BellSouth's proposal are too high to be an input in a competitive service offering. BellSouth made feeble attempts to poke holes on the fringes of this analysis at the hearing. However, the fundamental basis of Mr. Gallagher's testimony is not at all undermined by BellSouth's critique.

In his rebuttal testimony, Mr. Gallagher illustrated that it would be impossible to profitably sell DSL service to Florida consumers using the rates from the hybrid loop/dedicated DSLAM cost study proposed by BellSouth in this proceeding. Even if FDN managed to obtain, and maintain, exactly 16 customers at each remote terminal location where it offered service, so that it would have constant 100% utilization of its dedicated DSLAMs, the average cost to FDN for the DSL transport alone would range from $52.68 in Zone 1 to $109.44 in Zone 3. Without assuming maximum efficiency, FDN's average costs per customer could be as high as $684.41 per customer in Zone 1 to $1247.86 in Zone 3.[42] On top of these charges, FDN would have to expend significant amounts for ISP services, central office collocation, transport from the central office to the Internet, customer acquisition costs and retail support such as customer service, billing, and other retail functions.[43] On top of these costs, FDN would need to be able to cover its administrative overhead, produce a rate of return on its investment (BellSouth requests the Commission afford it an 18% rate of return[44]), and make a reasonable profit. Even in the few cases in which BellSouth's proposed charge for its "hybrid loop" and dedicated DSLAM (assuming 100% utilization) do not exceed its retail rate, the small margin between is wholly insufficient to make up for all of these additional costs and thereby afford a realistic opportunity for any ALEC to use this offering to provide a competitive service.[45] First, it is absolutely clear that BellSouth's proposed rates would continue to completely exclude FDN from the residential market. BellSouth's retail rate

42 Tr. at 630-631 (Gallagher Rebuttal at pp. 17-18); Tr. at 703:21-24.

43 Tr. at 695:21-24, 733:8:15, 734:6-21.

44 Tr. at 733:13-15, 734:10-12.

45 Tr. at 732:9-16, 735:4-21.

for residential ADSL service is between $45-50, and this rate includes all of the additional costs beyond DSL transport described above.[46] Even the lowest possible cost to FDN for the DSL transport alone, in the cheapest Zone 1 and at 100% utilization, would still be higher than BellSouth's retail rate. While it is true today that nearly all of FDN's data services are provided to business customers, this is partly due to the fact that BellSouth's UNE rate structure makes it extraordinarily difficult to compete in the residential market. Adoption of BellSouth's proposal would perpetuate the inability of ALECs to compete in the residential DSL market.[47]

BellSouth's proposal would also clearly preclude FDN from competing for any customers in Zone 2, where the vast majority of current and prospective FDN customers are located,[48] and in Zone 3, such as in rural and outlying areas. Under BellSouth's proposal, the average cost of DSL transport per customer in Zone 3, BellSouth's proposed charges Zone 3, no matter how many customers FDN obtained, is so far above the market rate for DSL service that any service using BellSouth's proposed offering would clearly be impossible.[49]

At the hearing BellSouth's counsel sought to compare BellSouth's $79.95 retail rate for business-class DSL with the rates for the proposed dedicated DSLAM product in the least expensive zone, Zone 1, and assuming a 100% utilization rate of every FDN DSLAM.[50] This approach is flawed because a 100% utilization rate cannot be expected; in any case, even with all of BellSouth's assumptions, the rates from BellSouth's study

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[46] Tr. at 627:10-17 (Gallagher Rebuttal at 14:10-17).

[47] See Tr. at 706:13-18, 739:10-16.

[48] Tr. at 739:12-16.

[49] Tr. at 704:18-24, 706:13-18, 707:18-21, 707:25-708:1.

[50] Tr. at 694:24-695:8.

would still be non-viable for competitors. As demonstrated in the rebuttal testimony of Mr. Gallagher, it is simply not realistic to expect a constant 100% utilization rate for remote terminal DSLAMs. FDN could not expect to be so fortunate at to immediately subscribe, and continue to maintain, exactly 16 customers for every 16-port DSLAM it purchases for deployment at a remote terminal. Many BellSouth remote terminals, including those served by BellSouth DSLAMs, serve areas large enough for FDN to aspire to obtain several customers, but realistically not enough customers to expect to fill an entire 16-port DSLAM.[51] However, under BellSouth's proposal, FDN would not be able to provide service in these areas.[52] Indeed, Mr. Williams would agree that BellSouth's proposed solution is not viable for a ALEC to serve a small number of customers, concluding that it would not make sense to undertake the purchase of a DSLAM at a remote terminal if the carrier could only obtain four customers for the equipment.[53]

Even if FDN had exactly 16 customers, it is likely that it would have to turn down or waitlist requests for service from a prospective 17th or 18th customers, because the marginal costs of serving them would be too high unless there were likely prospects for quickly obtaining additional customers to completely fill a second DSLAM. But if FDN could not provide service quickly to prospective customers, these customers will likely turn elsewhere for service, such as BellSouth.

Even if the rates in BellSouth's study were reduced significantly such that they yielded a price point that looked more comparable to BellSouth's retail rates, FDN would

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51 Tr. at 632:8-16 (Gallagher Rebuttal at 19:8-16).

52 Tr. at 703:21-24.

53 Tr. at 447:8-11 (Williams Surrebuttal at 21:8-11).

still remain disadvantaged. FDN would be unable to purchase on a ubiquitous basis entire DSLAMs from BellSouth, as proposed in the BellSouth cost study, because the initial up-front cost would far greater than FDN could allocate to the endeavor. Because FDN could therefore only offer service in very limited, selected areas, FDN's customer acquisition costs, such as marketing costs per customer would be much higher than under FDN's proposed UNE. If FDN could only provide service in a limited number of RT-served areas, its customer acquisition costs would be very high. Cost-effective advertising plans, such as billboards and radio ads, are not useful when FDN cannot provide ubiquitous service.[54] Ultimately, because BellSouth would be able to have a greater number of customers in a wider variety of locations, FDN would not enjoy comparable economies of scale.[55]

BellSouth's inclusion of UNE-P rates in its critique of Mr. Gallagher's calculations is irrelevant and merely confuses this issue. BellSouth is not permitted to subsidize its DSL service with profits from its voice services; if it were doing so, it would violate, among other requirements, its federal *Computer III* obligations. BellSouth should be able to justify its rate for DSL service independent of the rates for its voice services, and ALECs should not be expected to accumulate surplus profits from voice services to cover losses from data services resulting from excessive UNE rates for data network elements.

Above all of these factors, there is simply no realistic way for FDN to offer a viable DSL product to residential or business consumers served by remote terminals, in any rate zone, if it must pay BellSouth's proposed charges for a dedicated DSLAM, and

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54 Tr. at 734:16-21, 735:4-12, 738:4-9.

55 Tr. at 739:25 to 740:2.

then also cover the cost of ISP services, central office collocation, transport from the central office to the Internet, customer acquisition, retail support, and administrative overhead. Considering all of these factors, Mr. Gallagher estimated that to cover all of FDN's costs using the dedicated DSLAM option proposed by BellSouth, FDN would have to raise its existing retail rates for business DSL significantly, perhaps doubling them,[56] and would continue to be locked out of the residential market. FDN cannot compete with BellSouth in the long-term if it is only able to offer service at significantly higher rates. While FDN can provide additional value-added products or superior customer support that might help to justify a higher retail rate, these additional services require FDN to undertake additional costs. Because the resulting rates from BellSouth's proposed cost study would preclude any realistic opportunity for FDN to provide DSL services to all or nearly all Floridians served by BellSouth remote terminals, FDN would clearly remain impaired in its ability to deliver the services it seeks to offer in Florida.

## G. CONCLUSION

The Commission should reject BellSouth's hybrid loop cost study and require BellSouth to file a new TELRIC cost study for the packet-switched network element proposed by FDN and recommended by Staff in the FDN Arbitration. During the remaining pendency of this proceeding, if at any time BellSouth is ordered to unbundle this network element on an unbundled, the Commission should require BellSouth to offer it immediately at an interim rate of between $16-22.

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[56] Tr. at 735:16-21.

**6. In the 120-day filing, has BellSouth accounted for the impact of inflation consistent with Order No. PSC-01-2051-FOF-TP?**

FDN: *Agree with AT&T and MCI.*

**7. Apart from Issues 1-6, is BellSouth's 120-day filing consistent with the Orders in this docket?**

FDN: *Agree with AT&T and MCI.*

RESPECTFULLY SUBMITTED, this 11 day of April, 2002.

Matthew Feil
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by email on April 11, 2002, and by U.S. Mail or by overnight mail (if designated with a *) on the same date.

Beth Keating*
Jason Fudge
Wayne D. Knight
Florida Public Service Comm.
Division of Legal Services
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Nancy B. White
Bennett Ross
E. Earl Edenfield
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, FL 32301-1556

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman, Arnold,
& Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Tracy Hatch
Norman Horton, Jr
Messer, Caparello & Self
PO Drawer 1876
215 S. Monroe Street
Suite 701
Tallahassee, FL 32302-1876

Donna Canzano McNulty
MCI WorldCom
325 John Knox Road Suite 105
Tallahassee, FL 32303

Karen M. Camechis
Mark W. Dunbar
Pennington, Moore, Wilkinson
Bell & Dunbar, P.A.
PO Box 10095
Tallahassee, FL 32302

Catharine F. Boone
William Weber
Covad Comunications Co.
1230 Peachtree Street, N.E.
19th Floor
Atlanta, GA 30309

Charles J. Rehwinkel
Susan Masterton
Sprint Communications Co.,
L.P.
PO Box 2214
Tallahassee, FL 32302

J. Jeffrey Wahlan
Ausley & McMullen
PO Box 391
Tallahassee, FL 32316

Michael Sloan
Swidler, Berlin, Shereff,
& Friedman, LLP
3000 K Street, NW
Suite 300
Washington, DC 20007

Virginia Tate
AT&T Communications of the
Southern States, Inc.
1200 Peachtree Street, Ste. 1200
Atlanta, GA 30302

Michael A. Gross
Florida Cable Telecomm. Ass'n
246 East 6th Avenue
Tallahassee, FL 32303

Michael Hazzard
Kelley Drye & Warren, LLP
1200 Nineteenth Street NW
Fifth Floor
Washington, DC 20036

Rick Melson
Carolyn S. Raepple
Hopping Green & Sams P.A.
123 South Calhoun Street
Tallahassee, FL 32301
(850) 222-7500

John P. Fons
Ausley & McMullen
PO Box 391
Tallahassee, FL 32302

Matthew J. Feil, General Counsel
Florida Digital Network, Inc.
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
(407) 835-0460