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November 6, 2001

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

via Hand Delivery

Re: Docket No. 960786-TL – Consideration of BellSouth Telecommunications, Inc.'s entry into InterLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996

Dear Ms. Bayó,

Please find enclosed for filing in the above docket an original and seven (7) copies of the Post-hearing Brief of Florida Digital Network, Inc.

Also enclosed is a diskette containing a Microsoft Word for Windows 2000 file of the foregoing.

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

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

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**BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION**

In re: Consideration of)
BellSouth Telecommunications,)
Inc.'s entry into interLATA)
services pursuant to Section 271)
of the Federal Telecommunications)
Act of 1996.)
_____)

Docket No. 960786A-TL

POST-HEARING BRIEF OF FLORIDA DIGITAL NETWORK, INC.

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

Attorney for Florida Digital Network, Inc.

Dated: November 6, 2001

DOCUMENT NUMBER-DATE

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POST HEARING STATEMENT OF ISSUES AND POSITIONS

ISSUE A: In rendering its recommendation on BellSouth's 271 application, what is the nature of the Commission's consultative role?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 1: Has BellSouth met the requirements of Section 271(c)(1)(A) of the Telecommunications Act of 1996?

- (a) Has BellSouth entered into one or more binding agreements approved under Section 252 with unaffiliated competing providers of telephone exchange service?
- (b) Does BellSouth currently provide access and interconnection to its network facilities for the network facilities of competing providers?
- (c) Are such competing providers providing telephone exchange service to residential and business customers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities?

FDN: ***BellSouth's estimates of CLEC market share are inflated. Competition has not taken a meaningful and irreversible foothold in BellSouth's incumbent territory in Florida. Agree with AT&T, Worldcom, and other ALECs.***

ISSUE 2. Does BellSouth currently provide interconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1) of the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(i) and applicable rules promulgated by the FCC?

- (a) Has BellSouth implemented physical collocation requests in Florida consistent with FCC rules and orders?
- (b) Does BellSouth have legally binding provisioning intervals for physical collocation?
- (c) Does BellSouth currently provide local tandem interconnection to ALECs?
- (d) Does BellSouth currently permit the use of a Percent Local Usage (PLU) factor in conjunction with trunking?

- (e) Does BellSouth currently provide ALECs with meet point billing data?
- (f) Has BellSouth satisfied other associated requirements, if any, for this item?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 3: Does BellSouth currently provide nondiscriminatory access to all required network elements, with the exception of OSS which will be handled in the third party OSS test, in accordance with Sections 251(c)(3) and 252(d)(1) of the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(ii) and applicable rules promulgated by the FCC?

- (a) Does BellSouth currently provide all required unbundled network elements at TELRIC-based prices?
- (b) Has BellSouth satisfied other associated requirements, if any, for this item?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 4: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 224 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(iii). Does BellSouth currently provide nondiscriminatory access to the poles, ducts, and conduits, and rights-of-way owned or controlled by BellSouth at just and reasonable rates in accordance with the requirements of Section 224 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(iii) and applicable rules promulgated by the FCC?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 5: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 271(c)(2)(B)(iv) of the Telecommunications Act of 1996. Does BellSouth currently provide unbundled local loop transmission between the central office and the customer's premises from local switching or other services, pursuant to Section 271(c)(2)(B)(iv) and applicable rules and orders promulgated by the FCC?

- (a) Does BellSouth currently provide all currently required forms of unbundled loops?

- (b) Has BellSouth satisfied other associated requirements, if any, for this item?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 6: Does BellSouth currently provide unbundled local transport on the trunk side of a wireline local exchange carrier switch from switching or other services, pursuant to Section 271(c)(2)(B)(v) and applicable rules promulgated by the FCC?

- (a) Does BellSouth currently provide billing for usage-sensitive UNEs?
- (b) Has BellSouth satisfied all other associated requirements, if any, for this item?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 7: Does BellSouth currently provide unbundled local switching from transport, local loop transmission, or other services, pursuant to Section 271(c)(2)(B)(vi) and applicable rules promulgated by the FCC?

- (a) Does BellSouth bill for unbundled local switching on a usage-sensitive basis?
- (b) Does BellSouth currently provide unbundled local switching on both the line-side and the trunk-side of the switch?
- (c) Has BellSouth satisfied other associated requirements, if any, for this item?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 8: Does BellSouth currently provide nondiscriminatory access to the following, pursuant to Section 271(c)(2)(B)(vii) and applicable rules promulgated by the FCC:

- (i) 911 and E911 services;
- (ii) directory assistance services to allow other telecommunications carrier's customers to obtain telephone numbers; and
- (iii) operator call completion services?

- (a) Does BellSouth currently provide ALECs access to all information contained in BellSouth's directory listing database?
- (b) Does BellSouth currently provide selective routing in Florida?
- (c) Has BellSouth satisfied other associated requirements, if any, for this item?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 9: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 271(c)(2)(B)(viii) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Does BellSouth currently provide white pages directory listings for customers of other telecommunications carrier's telephone exchange service, pursuant to Section 271(c)(2)(B)(viii) and applicable rules promulgated by the FCC?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 10: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 271(c)(2)(B)(ix) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Does BellSouth currently provide nondiscriminatory access to telephone numbers for assignment to the other telecommunications carrier's telephone exchange service customers, pursuant to Section 271(c)(2)(B)(ix) and applicable rules promulgated by the FCC?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 11: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 271(c)(2)(B)(x) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Does BellSouth currently provide nondiscriminatory access to databases and associated signaling necessary for call routing and completion, pursuant to Section 271(c)(2)(B)(x) and applicable rules promulgated by the FCC?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 12: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 271(c)(2)(B)(xi) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Does BellSouth currently provide

number portability, pursuant to Section 271(c)(2)(B)(xi) and applicable rules promulgated by the FCC?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 13: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 271(c)(2)(B)(xii) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Does BellSouth currently provide nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of Section 271(c)(2)(B)(xii) and applicable rules promulgated by the FCC?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 14: In Order PSC-97-1459-FOF-TL, issued November 19, 1997, the Commission found that BellSouth met the requirements of Section 271(c)(2)(B)(xiii) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Does BellSouth currently provide reciprocal compensation arrangements in accordance with the requirements of Section 252(d)(2) of the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(xiii) and applicable rules promulgated by the FCC?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 15: Does BellSouth currently provide telecommunications services available for resale in accordance with the requirements of Sections 251(c)(4) and 252(d)(3) of the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC?

FDN: ***No. BellSouth does not resell xDSL service to CLECs as required, and BellSouth's refusal to do so has a significantly deleterious effect on competition in Florida.***

ISSUE 16: By what date does BellSouth propose to provide intraLATA toll dialing parity throughout Florida pursuant to Section 271(e)(2)(A) of the Telecommunications Act of 1996?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 17: If the answers to issues 2 through 15 are "yes," have those requirements been met in a single agreement or through a combination of agreements?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

ISSUE 18: Should this docket be closed?

FDN: ***Agree with Worldcom, AT&T, and other ALECs.***

INTRODUCTION AND SUMMARY OF ARGUMENT

Meaningful, viable, and irreversible competition simply does not yet exist in BellSouth's incumbent territory in Florida. BellSouth has intentionally employed a three-pronged approach to insure that competition in Florida remains, at best, anemic and unstable: (1) BellSouth stifles competition through its stranglehold on the broadband digital subscriber line (DSL) market, unlawfully refusing to resell its primary broadband DSL product (ADSL), tying its DSL service to its voice service, and refusing to provide digital subscriber line access multiplexer (DSLAM) functionality and packet switching as an unbundled network element (UNE), (2) BellSouth forecloses competition in the residential market, in particular, by charging UNE rates too high to make it economically possible for competitors to enter the residential market, and (3) BellSouth exercises its dominant market position to reverse the effects of competition through its winback programs.¹ Thus, the competition that BellSouth claims is "economically viable" and "irreversible" is, by BellSouth's own acts of suppression, just the opposite.

For alternative local exchange carriers (ALECs) in Florida to be viable entrant-competitors, they must be able to offer a full suite of voice and high-speed data telecommunications services to both business and residential class customers on a ubiquitous basis without undue, anticompetitive impedances by dominant providers with substantial control over the market as well as substantial control over the ALECs' costs and services. Ironically,

while BellSouth requests that it be allowed to offer a one-stop shop expanded suite of telecommunications services in this proceeding, BellSouth improperly refuses to permit its competitors the same opportunity. The Commission must recognize that if BellSouth is the only telecommunications provider in Florida able to offer high-speed data service and local and long-distance voice, what little competition there is in Florida will wither and fade away.

Since the deployment of broadband telecommunications is of significant interest to state and federal regulators and is absolutely vital to the development of competition for both voice and data services, FDN suggests in this brief that the Commission pay particular attention to the status of high-speed data service. This proceeding may be the Florida Commission's last chance to set a proper blueprint for broadband in this state and to account for all the competitive issues that branch therefrom.

Alarming, for all practical purposes, there is no broadband DSL competition in BellSouth territory in Florida. BellSouth controls substantially all of the broadband DSL market in Florida, is gaining fast, and the prospect for competition in the future is bleak, for a number of reasons.

Of special significance to this proceeding, and the first reason, is BellSouth's refusal to comply with its obligation to resell its DSL pursuant to the federal Telecommunications Act of 1996 (the Act). To make matters worse, BellSouth also refuses to provide the UNEs without which ALECs are impaired from providing broadband service throughout BellSouth's unique Florida network architecture, which is dominated by thousands of remote terminals serving almost all of BellSouth's Florida customers. Making matters worse still, BellSouth uses its

¹ Other ALECs participating in this proceeding would add to this list BellSouth's road blocking use of the UNE platform (UNE-P). FDN does not address this subject in its brief, but refers the Commission to the briefs of the other ALECs on the subject.

monopoly power in the broadband DSL market as leverage to strengthen its already firm grip on the voice market because BellSouth will not provide its DSL product to consumers who purchase ALEC voice service. ALECs are thus prevented from competing for customers desiring high-speed data because switching to ALEC voice means losing BellSouth ADSL and obtaining BellSouth ADSL means sacrificing ALEC voice.

The result of these BellSouth tactics is that few Floridians in BellSouth territory can choose among competing broadband DSL providers. It is not a matter of ALECs being out-marketed or out-hustled by BellSouth. Rather, BellSouth simply makes it impossible for ALECs to serve prospective high-speed data customers. Thus, competition for voice and data services is slow and stagnant, and broadband deployment takes a detour.

The Commission must require BellSouth to resell DSL before BellSouth could be considered for approval to enter the long-distance market. BellSouth's refusal to resell its ADSL product rests on two utterly transparent and sophistic arguments: (1) BellSouth does not sell ADSL to end users unless the ADSL is bundled together with Internet services, thus forming what BellSouth alleges is an "enhanced" or "unregulated" service and (2) BellSouth's ADSL is sold on a stand-alone basis only to Internet service providers (ISPs). However, the plain and undisguised facts are these: (a) BellSouth the incumbent local exchange carrier (ILEC) owns and maintains all of the facilities used to provide ADSL service, (b) BellSouth the ILEC markets that service only to end users and provides the direct support functions (billing, etc.) for that service, (c) BellSouth the ILEC chooses to "sell" the ADSL service to itself, BellSouth the ILEC, acting also as an ISP, and (d) BellSouth the ILEC chooses to bond or bundle the ADSL with Internet services before it "resells" the combined service to end users.

BellSouth cannot be permitted to purposely evade the resale obligation by bundling a telecommunications service with another service and claiming the telecommunications portion is subsumed within the bonded whole – somehow causing the telecommunications service to completely lose its identity and mysteriously evaporate – especially where BellSouth the ILEC is the only entity involved in providing the end product. No amount of debate and no amount of other bonded services can disguise the fact that BellSouth the ILEC is selling ADSL, a telecommunications service, to end users.

Further, BellSouth’s wholesale-only argument defies reason. The D.C. Court of Appeals in Ascent I² ruled that an ILEC cannot sidestep the resale obligation by providing DSL service to an affiliate that resold the service (bundled with Internet service) to end users; therefore, it makes no sense whatsoever to suggest, as BellSouth does, that an ILEC may escape the resale obligation through a wholesale “sale” of DSL service **to itself, rather than an affiliate**, and then “resell” the service to end users. The authority on which BellSouth relies, Ascent II,³ can only exempt from the resale requirements of the Act genuine, wholesale DSL sales to third party, unaffiliated ISPs. That is not the situation here. To permit BellSouth such an escape would elevate form over substance just as much as the separate affiliate scheme the Court rejected in Ascent I. BellSouth the ILEC markets and sells its DSL product at retail, so it must permit requesting ALECs to resell the service at the avoided cost discount provided by Section 252(d) of the Act.

² *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. Jan. 2001) (“*ASCENT I*”).

³ *Association of Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. June 2001) (“*ASCENT II*”).

In addition, while BellSouth's refusal to unbundle DSLAM functionality/packet switching has not been identified as a specific issue in this proceeding, FDN addresses its relevance insofar as BellSouth may argue ALECs can compete in the broadband DSL market through alternatives to reselling BellSouth ADSL (i.e. by collocating their own DSLAMs at remotes). The prospect of an alternative means to compete, even if viable, which is not so in this case, does not excuse BellSouth's failure to meet its resale obligation under the Act. Moreover, the economics simply do not support ALECs collocating DSLAMs at thousands of BellSouth remotes, and ALECs are thus impaired from providing service in the manner BellSouth proposes.

BellSouth's tying its ADSL to its voice service is discriminatory, anticompetitive and unlawful. In the FCC's recent order approving Verizon's Connecticut Section 271 application, the FCC held Verizon cannot refuse to resell its DSL service over the same line used to provide ALEC voice service.⁴ Thus, the FCC has brushed aside the very argument BellSouth has set up as a barricade to providing ADSL on the high frequency portion of loops ALECs use to provide voice. BellSouth's arguments against accommodating such combined services through resale in Florida must be rejected.

Florida ALECs are entitled to a fair opportunity to compete directly with BellSouth and offer consumers broadband DSL and voice products. Unfortunately, Florida ALECs do not have an opportunity to do so. BellSouth's anticompetitive practices and failure to comply with the Act's resale obligation have had and will continue to have a devastating impact on competition.

⁴ Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, FCC No. 01-208, CC Docket No. 01-100 (July 20, 2001) ("*Verizon-Connecticut 271 Order*") ¶¶ 27-33. See the detailed discussion of this order later in this brief.

Unless the Commission acts quickly and decisively, the prospects for telecommunications competition in Florida are dim, and not just in the broadband market. Even with the current downturn in the economy, the demand for advanced services is growing quickly. Unless the Commission denies BellSouth's request for long-distance authority until such time as BellSouth ceases its anticompetitive conduct and meets its obligations under the Act, only BellSouth will be in a position to satisfy that demand, and competition in the data, voice, and combined voice-and-data markets will not exist.

BellSouth is a Leviathan that has pinned down its rivals. Its resources are infinite and have been nourished by decades of monopoly control. BellSouth will use the power of long-distance market entry to destroy the captive competitors and gain a new, more dominant status. This Commission must give the competitors a fighting chance.

ARGUMENT

ISSUE 1: Has BellSouth met the requirements of Section 271(c)(1)(A) of the Telecommunications Act of 1996?

- (a) Has BellSouth entered into one or more binding agreements approved under Section 252 with unaffiliated competing providers of telephone exchange service?
- (b) Does BellSouth currently provide access and interconnection to its network facilities for the network facilities of competing providers?
- (c) Are such competing providers providing telephone exchange service to residential and business customers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities?

FDN: *BellSouth's estimates of CLEC market share are inflated. Competition has not taken a meaningful and irreversible

foothold in BellSouth's incumbent territory in Florida. Agree with AT&T, Worldcom, and other ALECs.*

The Commission cannot find, and BellSouth cannot credibly claim, that competition in Florida is “economically viable” and “irreversible” when BellSouth has engaged and will continue to engage in several strategies intentionally designed to suppress competition’s viability and staying power. Indeed, not one of BellSouth’s arguments for a favorable competitive diagnosis in Florida can withstand scrutiny.

The statistical analysis of Florida Competitive Carrier’s Association (FCCA) witness Gillan shows conclusively that ALECs have no more than a 10% overall market share for voice line service in Florida, using a very conservative approach, with non-resale competition constituting 7.6% of that total. (Tr. 1790 – 1818; Exhibit No 50.)⁵ The anecdotal evidence, presented by FDN witness Gallagher (verifying the routing of a sample of numbers in the Magnolia/Orlando central office), corroborates this analysis with practical real world information. (Tr. 1619 – 1620.) But even if the Commission, as BellSouth witness Dr. Taylor promoted, turns away from statistics and looks to whether there is an abstract / theoretical environment conducive to competitive activity, the picture is no better for Florida competitors because that environment is one in which BellSouth actively suppresses competition, undermining entrants’ ability to compete.

⁵ FDN notes that BellSouth’s prefiled statistical data should be rejected for the reasons FCCA witness Gillan stated. However, the Commission must also question the credibility of BellSouth’s information. BellSouth has did not provide critical updated market share and trending data as part of its direct case (Tr. 1797-8) and unabashedly evaded doing so in response to an FDN discovery request (Exhibit No. 14, p. 41). Further, none of BellSouth’s witnesses had updated information on the stand. Thus, while updated and trending information would have been subject to heightened scrutiny, it was not provided, yet BellSouth managed to put together August numbers for Late-Filed Exhibit No. 40.

Suppressed Competition for High-speed Data and Voice.

BellSouth stifles competition for both voice, data, and voice-and-data combined services through its stranglehold on the DSL market, refusing to resell its ADSL product, unlawfully tying its ADSL product to its voice product, and refusing to unbundle DSLAM functionality/packet switching. (Tr. 1622 – 1626, 1649.) Although BellSouth’s justifications for its conduct will be debunked later in the brief, the conduct has a definite impact on competition in Florida. In point of fact, nowhere in the record of this proceeding does BellSouth deny it has intentionally leveraged its monopolistic position with ADSL service as a means to influence the voice market. BellSouth glibly acknowledges, for instance, that it will not provide ADSL over the same line used for ALEC UNE voice service although BellSouth ADSL and BellSouth voice may be obtained over the same line. (Tr. 287-9, Exhibit No. 14, pp. 14 –15.) BellSouth will even shut off its ADSL service once a customer ports to ALEC voice (Tr. 1649, Exhibit No. 14, pp. 14 – 15.) No BellSouth witness could explain why BellSouth would forego revenue from ALEC purchase/use of a BellSouth DSL product, but the explanation is obvious. BellSouth receives greater benefit by using its monopolistic position over broadband DSL, in concert with its tying ADSL to voice, to suppress competition. This BellSouth market advantage is a very insidious sort – one in which the dominant provider also has the power to deny competitors the ability to serve. That is, until and unless this Commission directs otherwise.

Entrant-competitors in the Florida telecommunications market must be able to offer a full suite of telecommunications services, including voice and high-speed data, to both business and residential class customers on a ubiquitous basis for competition to be

viable. (Tr. 1620.)⁶ BellSouth denies ALECs the ability to provide high-speed data service in the market BellSouth dominates.

BellSouth has a virtual monopoly on broadband DSL services in its incumbent territory. Even if BellSouth's data on page 52 of Exhibit No. 14 can be believed and ALECs in Florida provided high-speed data service on over 6,000 lines as of August,⁷ BellSouth has a dominant 95% plus market share, and BellSouth ADSL lines served have increased at a clip of over 30% a quarter.⁸ That BellSouth growth and market share will continue to rise disproportionately to the ALECs' because of BellSouth's network architecture and anticompetitive conduct.⁹

BellSouth's Florida network is dominated by remote terminals -- over 12,000 of them -- serving perhaps as much as 90% of BellSouth's customers.¹⁰ BellSouth could not present any evidence that so much as one ALEC high speed data line is served behind either a fiber or copper-fed remote.¹¹ BellSouth witness Williams acknowledged that spare copper loops needed for ALECs to provision DSL service to customers served

⁶ Further supporting the notion that packaged services are an important market tool is the fact that BellSouth offers a discounted bundle of voice and data service. (Exhibit No. 14, p. 48, Tr. 284 – 285.)

⁷ IDSL does not meet accepted criteria to be considered high speed or broadband. (Tr. 701, 1651.)

⁸ Exhibit No. 14, p. 11; Tr. 698.

⁹ BellSouth's growing market power is also a concern because it will permit BellSouth to again increase prices to Florida ADSL consumers. (Tr. 1625 – 1626.)

¹⁰ On page 14 of Exhibit No. 14, BellSouth estimates that 61% of its loops are fiber fed. FDN witness Gallagher estimated that the percentage is likely higher, 70% or more. (Tr. 1621 - 1623.) Further, on page 18 of Exhibit No. 14, BellSouth acknowledges that an additional 1.2 million of BellSouth's more than 7 million access lines are served through copper-fed digital loop carriers (DLC) placed at remotes. Whatever the exact percentage, the number is extraordinarily high, and both fiber and copper fed DLC present the same obstacle for ALECs.

behind remotes were rare. (Tr. 702.) He also acknowledged that not one ALEC has sought to collocate a DSLAM at a remote in Florida to provide broadband DSL service itself. (Tr. 703 – 704.) Clearly, the ALECs have not so requested because they are impaired in their ability to provide broadband DSL service without access to DLSAM functionality/packet switching as a UNE. (Tr. 1622, 1654 - 1655.) Further, BellSouth does not resell its ADSL service,¹² and BellSouth unlawfully ties its ADSL service to its voice service so ALEC voice customers cannot receive ADSL service with ALEC voice. (Tr. 287 – 289; Exhibit No. 14, pp. 14 – 15; Late-filed Exhibit No. 26.) Thus, BellSouth impedes ALECs from providing the same voice-and-data bundled offer BellSouth can.¹³

BellSouth's tying its ADSL to its voice is unquestionably anticompetitive as well as unlawful. The practice constitutes anticompetitive conduct under Section 364.051(5)(b), Florida Statutes; an unreasonable denial of service under Section 201 of the Act and Section 364.03(1), Florida Statutes; unreasonable discrimination under Section 202(a) of the Act and Sections 364.08(1) and 364.10(1), Florida Statutes; and a *per se* violation of the antitrust laws.¹⁴ Significantly, and as discussed in greater later in

¹¹ Mr. Williams admitted he could not substantiate the information on page 53 of Exhibit No. 14. (Tr. 702.)

¹² Specifically, BellSouth does not resell its ADSL pursuant to the Act at all. BellSouth admits it does not resell ADSL over UNE or UNE-P CLEC voice. (Tr. 287.) The ADSL it offers to CLECs over resold CLEC voice is not at the resale discount required by the Act and at the discount set by this Commission, but rather some discount of BellSouth's own choosing (Tr. 1642 – 1644, 1650) that it could voluntarily alter at any time (Tr. 1626.)

¹³ BellSouth has suggested that customers with ALEC voice service can simply order a separate line with BellSouth ADSL service. Aside from the needless additional cost this would pose for the ALEC customer, when BellSouth's customers do not have to endure such additional cost, the idea of multiple bills from multiple providers defeats the benefits of the sort of one-stop shop carrier status that BellSouth seeks for itself. (Tr. 1623, 1649.)

¹⁴ See, e.g., *Eastman Kodak Co. v. Image Tech. Serv.*, 504 U.S. 451, 463 (1992).

this brief, no support exists for BellSouth's position and in the Verizon – Connecticut 271 Order the FCC rejected BellSouth's argument. It stands to reason, then, if BellSouth's tying practice runs afoul all these precepts, BellSouth could not be said to be offering access to UNE loops in compliance with all applicable legal requirements as needed for an affirmative response to Issue No. 5 in this case let alone creating an environment conducive to competitive activity.

The facts point the Commission to only one conclusion: BellSouth suppresses competition for data and for voice-and-data products. BellSouth has a substantial head start on the ALECs in the high-speed market. If the Commission does not correct BellSouth's conduct soon (Tr. 1614 – 1617), ALECs will not be able to compete in the high-speed data market at all, competition in the voice market will not take root, and BellSouth will retain its existing monopoly on high-speed data service.

Suppressed Residential Competition

There is little need to address the details of the obvious when it comes to BellSouth's suppression of residential service competition in Florida. Even if BellSouth's statistical data were considered reliable, residential competition in the state is anemic.¹⁵ Almost half of the ALEC residential lines, according to BellSouth, are resale,¹⁶ a business strategy recognized as neither viable nor sustainable (Tr. 1798 – 1799). Intuitively, if the cost to an ALEC for a UNE loop remains practically equal to BellSouth's basic retail residential rate, as is the case in Florida, competition for residential customers will forever remain de minimus and the promise of the Act

¹⁵ Late-filed Exhibit No. 40.

¹⁶ Id.

never fulfilled for millions of Florida consumers.¹⁷ Additionally, as the paragraphs above suggest, if the Commission does not take action soon, only BellSouth will be able to meet demand for high-speed data service in the residential market (where customers typically have only one line), thus further dampening any prospects for residential data and voice competition.

Reversing Competition Through “Winbacks”

Although the Commission ruled in this proceeding that it would not consider the impropriety of BellSouth’s pricing, marketing, and provisioning of “winback” programs, the results of those programs are clearly relevant to evaluating whether competition is “economically viable” and “irreversible.” What the record in this case shows is that BellSouth uses and intends to continue to use its winback¹⁸ programs to reverse what little advances competition has made.

Confidential Hearing Exhibit No. 15 reveals several facts that should be highlighted in this regard.¹⁹ BellSouth has devoted significant resources to winback programs.²⁰ With promotional Full Circle pricing in place, BellSouth has been able to winback a substantial percentage of lines lost to ALECs, in fact, a percentage greater than BellSouth had targeted.²¹

¹⁷ Accepting that the residential market is BellSouth’s most likely target for a mass offering of long distance services, were BellSouth to receive 271 approval, it seems only fitting that competition for local services in the residential market should receive the Commission’s priority attention in this case. As stated above, the results of competition in the residential market are dim, and the prospects dimmer.

¹⁸ BellSouth irrationally quibbles over the definition of “winback.” For discovery purposes, FDN defined “winback” on page 7 of Exhibit No. 14. BellSouth’s definition would exclude BellSouth price discounts not overtly stated as exclusively available to customers who had left BellSouth service for an ALEC, but available to such ALEC customers just the same. For example, BellSouth’s Key Customer program offers discounts to customers “served by wire centers in competitive situations” and is thus available to an ALEC customer to return to BellSouth. (Tr. 299 - 300.)

¹⁹ FDN commends the Commission to the exhibit itself. To avoid filing any portion of this brief as a confidential document, FDN has tempered its comments herein with generality.

²⁰ See, e.g. Confidential Exhibit No. 15, at pp. 15, 20 – 26.

²¹ Id. at pp. 8, 20, 23.

BellSouth is considering devoting additional resources and creating additional pricing plans to winback an even greater number of customers from ALECs.²² The biggest winback discounts are for the longest term commitments, and the contract BellSouth has winback customers sign contains a hefty penalty to discourage customers from ever migrating again before the term expires.²³ What should also be highlighted regarding Confidential Hearing Exhibit No. 15 is what is not there: the results of other BellSouth promotional discount programs available to customers returning to BellSouth, such as the Key Customer program, which BellSouth did not account for in the exhibit. Thus, fair inference from the evidence suggests that the relative success of BellSouth's "winback" programs is even greater than reported.

While BellSouth may defend its winback programs by stating that competition by all carriers, ALECs and ILECs alike, is at the very heart of the Act, this Commission cannot overtly or tacitly permit an ILEC with the almost 90% market share BellSouth has to employ pricing programs of dubious intent to eliminate the small market share of competitors still in a vulnerable state of infancy. BellSouth easily absorbs the subsidization of winback discounts, knowing ALEC rates can drop only so far to sustain their businesses. As the record shows, as easily as flicking on a switch, BellSouth offers discounts with the effect of keeping the minimal ALEC market share in check. The Commission must discourage this practice in this proceeding and in all cases if it wants Florida competition to survive infancy.

In summary, the Commission cannot hold that competition is "economically viable" and "irreversible" when BellSouth itself undermines competitors' viability and reverses competitors' minimal market share. Not in New York or Texas – the states BellSouth holds up as examples -- nor any other state where 271 has been granted have the BOCs had the same opportunity, ability

²² Id. at pp. 13, 20, 26.

and success for suppressing competition in the manner and to the degree that BellSouth has in Florida.

ISSUE 15: Does BellSouth currently provide telecommunications services available for resale in accordance with the requirements of Sections 251(c)(4) and 252(d)(3) of the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC?

FDN: ***No. BellSouth does not resell xDSL service to CLECs as required, and BellSouth's refusal to do so has a significantly deleterious effect on competition in Florida.***

FDN and all Florida ALECs must have the opportunity to purchase BellSouth's DSL transmission service at wholesale rates, pursuant to Section 251(c)(4) of the Act.²⁴ Because BellSouth denies Florida ALECs that opportunity – and has no legally sustainable reason for doing so – the Commission has no choice but to find that BellSouth does not meet checklist item 14 of section 271 of the Act.

Section 251(c)(4) of the Act and FCC orders require ILECs to offer a resale discount on all telecommunications services that are offered on a retail basis to subscribers who are not telecommunications carriers. This obligation extends to all telecommunications services and, hence, all DSL service offerings. Thus, whether BellSouth's ADSL product must be made available for resale under Section 251(c)(4) depends on whether the product is available to end-

²³ Id. at p. 12.

²⁴ At no point in the hearing or in its pre-filed testimony has BellSouth even hinted that reselling its DSL over ALEC voice is technically unfeasible. BellSouth should be required to resell its DSL transport service on the same terms and conditions that it provides the service to itself.

user customers on a retail basis. If it is, then it must be provided to CLECs at the avoided-cost discount rate.²⁵

BellSouth refuses to comply with its statutory resale obligations and offers several justifications for its refusal. BellSouth claims that it has no “retail, tariffed” DSL products available for resale under Section 251(c)(4). BellSouth also claims that it offers only a “wholesale” DSL product available for purchase exclusively by ISPs, who, in turn, package it with Internet service and resell it to end-users.²⁶ (Tr. 213 – 218.) Further BellSouth has argued that it has no obligation to offer ALECs any access to the high frequency portion of the loop when an ALEC is the voice provider. (Tr. 287 – 289; Exhibit No. 14, pp. 14 – 15.)

The evidence presented to the Commission at the hearing demonstrated clearly that BellSouth markets and sells its DSL products to Florida end-users. Nonetheless, BellSouth relies

²⁵ The BellSouth’s current bundled ADSL/Internet Service includes DSL transport and unlimited access Internet service. When Internet service (dial-up) is ordered separately from BellSouth, it has a different rate. In the absence of any Commission-approved cost study allocating costs between the DSL and Internet service, the DSL transport service should have an imputed retail rate equal to difference between the BellSouth ADSL/Internet bundle and the dial-up service. The existing resale discount rates established by the Commission should be applied to that imputed rate. (Tr. 1643 – 1645.)

²⁶ There is, however, a notable exception to BellSouth’s purported ISP-only sales: BellSouth will not sell to ALEC-affiliated ISPs who seek to resell the service on the high frequency portion of ALEC UNE loops. (Tr. 287 – 288.) Thus, as mentioned earlier, BellSouth unreasonably discriminates in the provision of this service, because it refuses to serve FDN’s ISP affiliate in the same manner that it provides it to itself or AOL because BellSouth’s wholesale “tariffed” DSL offering is only available for telephone lines on which BellSouth is the local exchange carrier. Therefore, this service is not an option for Florida ALECs like FDN, which seek to combine high-speed data services on the same line as its facilities-based local exchange service. As discussed below, BellSouth can offer no supportable justification for refusing to provide DSL service on the high frequency portion of an unbundled loop that an ALEC uses to provide voice service.

on the FCC's Second Advanced Services Order²⁷ and Ascent II, *supra*, which exempted narrowly tailored offerings from the Act's resale obligations. To qualify for the Second Advanced Services Order "exception," however, ILEC offerings must be genuine and exclusively wholesale offerings. BellSouth's offering, however, is not so narrowly tailored, and thus not exempt. BellSouth also claims that the retail DSL-Internet access product it sells to end-users is an "enhanced" "nonregulated" service that is exempted from the Act's resale obligations. This argument, however, is similarly unavailing. For it is a black-letter regulatory principle that a common carrier must unbundle enhanced from basic services and offer the basic services separately.²⁸ Thus, it is irrelevant whether the "finished" service that BellSouth offers to end-users includes an enhanced or information service: the underlying telecommunications service remains subject to all common carrier obligations, including the Act's resale obligations. Further, as the FCC recently explained in the Verizon-Connecticut 271 Order, the "ILEC voice" requirement applicable to the line sharing UNE does not, contrary to BellSouth's claims, enter the resale obligation analysis.

BellSouth Sells DSL at Retail

No matter how BellSouth claims it is "technically" offering its DSL services, it cannot credibly claim that it does not offer retail DSL services to Florida consumers. Although even BellSouth's General Counsel was at one time confused regarding the involvement of BellSouth's

²⁷ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, CC Docket No. 98-147, FCC No. 99-330, 14 FCC Rcd. 19237 (rel'd Nov. 9, 1999) ("*Second Advanced Services Order*").

²⁸ *See, e.g., Independent Data Communications Manufacturers Association, Inc. and American Telephone and Telegraph Co. Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, ¶ 45 (1995) ("AT&T cannot avoid its *Computer II* and *Computer III* obligations under the auspices of the contamination doctrine, which applies only to nonfacilities-based service providers").

affiliates in BellSouth's DSL service offering,²⁹ BellSouth cannot evade the Act's resale obligation by elevating corporate form over function. As long as a BellSouth entity markets and sells DSL at retail, then BellSouth must make the service available for resale to competitors.

The objective evidence presented at the hearing documented BellSouth's retailing of DSL. An end user reading BellSouth's marketing materials, whether in a newspaper advertisement, on the back of a superstore receipt, on BellSouth's vehicles or web page, can come to but one conclusion: BellSouth itself is selling DSL services directly to retail customers.³⁰ Checking BellSouth's own web page (at www.BellSouth.com), and clicking on the proper icons for residential or business services reveals that BellSouth is directly marketing DSL services to end-users.³¹ On their face, none of the BellSouth marketing materials in the record of this proceeding are offerings to ISPs, as BellSouth might have the Commission believe. They are all plainly aimed at end users.³² Indeed, some advertisements explain that BellSouth's DSL services are available to residential customers and provide specific pricing, ordering and installation information; and some confirm that the process of ordering BellSouth's service can be done on-line. BellSouth's marketing material refers to the DSL product marketed by BellSouth to its retail customers as "*BellSouth FastAccess Internet Service.*"

Additionally, BellSouth bundles its DSL service with telecommunications services, such as complete choice, at discounted rates to end users.³³ BellSouth owns and maintains all of the

²⁹ See letter of Nancy White dated April 13, 2001. Exhibit No. 14, p. 22.

³⁰ See Exhibit No. 14, pp. 25, 26, 45, and 46; Tr. 287, 1628, 1639 – 1640.

³¹ Tr. 286 – 287.

³² In contrast, the record is completely devoid of any evidence of BellSouth's marketing its purported wholesale, stand-alone DSL to ISPs

³³ Exhibit No. 14, p. 48; Tr. 284 – 285.

facilities used to provide DSL service to end users.³⁴ BellSouth handles the customer care, service and billing functions.³⁵ Indeed, the record contains a litany of proof that BellSouth sells its DSL service at retail.

BellSouth holds itself out to the public as a provider of retail DSL service, and is therefore subject to the resale discount requirements of Section 251(c)(4). The evidence of this direct relationship between BellSouth – the regulated phone company – and retail consumers is overwhelming. BellSouth packages its own DSL transport services with Internet services, and offers that combined package directly to end-users. (Tr. 213 – 218.) Merely bonding these two pieces together does not disguise the fact the BellSouth provides the component DSL telecommunications service at retail, nor does it alter the character of DSL as a telecommunications service.

Bundling/Bonding DSL and Internet Services

BellSouth claims its ADSL is bundled with or bonded to Internet services, thus forming an “enhanced” or “unregulated” service sold to end users but exempt from the resale requirement. Conspicuously absent from BellSouth’s explanation is any citation to supporting legal authority that a “bundled” “enhanced” service is somehow exempt from the resale obligation. The explanation for this omission is that there is no such authority. Indeed, exactly the opposite is true. For the last 20 years, FCC bundling rules have required facilities-based common carriers to offer telecommunications services separately from any enhanced services,

³⁴ Exhibit No. 14, p. 49.

³⁵ Exhibit No. 14, p. 50; Tr.284. In fact, end users can have BellSouth provide them one bill for both voice and DSL service. Exhibit No. 14, p. 47; Tr. 283.

even if it only offers them at retail as a bundled product.³⁶ The FCC has expressly held that DSL transmission is an interstate telecommunications service that does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II.³⁷ As the FCC explained in its March 2001 Computer III Order:

[W]here there is an incentive for a carrier to discriminate unreasonably in its provision of basic transmission services used by competitors to provide enhanced services, section 202 acts as a bar to such discrimination. In addition, we would view any such discrimination in pricing, terms, or conditions that favor one competitive enhanced service provider over another or the carrier, itself, to be an unreasonable practice under section 201(b) of the Act. We also note that the Commission's Title II resale requirements mandate that wireline common carriers provide telecommunication services to competitors.³⁸

Thus, the FCC's bundling rules forbid *exactly* what BellSouth is trying to get away with here. A carrier may not evade Title II obligations (including the resale obligations of Section 251(c)(4)) by attempting to obscure the common carrier services it provides by bundling them with information services.

³⁶ See, e.g., *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling and American Telephone and Telegraph Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶ 1 (1995) (holding that carrier must unbundle basic from advanced services).

³⁷ *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, FCC No. 98-292, CC Docket No. 98-79, 13 FCC Rcd 22466, ¶ 20.

³⁸ *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket 96-61; *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, CC Docket 98-183, FCC 01-98 (rel. March 30, 2001), at ¶ 46.

The expansive scope of BellSouth's resale obligations was confirmed recently in the D.C. Circuit's recent WorldCom decision.³⁹ Among the issues in WorldCom was whether DSL would be subject to the Act's resale and unbundling obligations. Qwest argued that because DSL is neither "exchange access" nor a "telephone exchange service," that its DSL offerings were exempt from the various Section 251(c) obligations. The court rejected the argument, finding that so long as a carrier "qualifies as a LEC by providing either 'telephone exchange service' or 'exchange access,' then it must resell and unbundle all of its telecommunications offerings, including DSL. Id. at 694. The Court further rejected Qwest's policy arguments that the FCC's interpretation could lead to absurd results, including overly expansive resale obligations. Id. at 694-95. As the Court explained, "the duty of an incumbent LEC under § 251(c)(4) to offer at wholesale those telecommunications services that it sells at retail *seems unlimited.*" Id. at 695 (punctuation altered) (emphasis added).

The FCC's Second Advanced Services Order and Ascent II

BellSouth's reliance on the FCC's Second Advanced Services Order, supra, which was affirmed in Ascent II, supra, as justification for BellSouth's position that it is not obligated to resell DSL under Section 251(c)(4) is similarly misplaced. Among the questions before the FCC in Second Advanced Services Order was the legal classification of discounted transport offerings made available exclusively to ISPs, and whether such offerings trigger the discount requirement." In ruling on this question, the FCC specifically held that "advanced services" sold directly by the ILEC "to residential and business end-users are subject to the Section 251(c)(4)

³⁹ *WorldCom, Inc. v. FCC*, 246 F.3d 690 (2001).

resale obligations without regard to their [regulatory] classification”⁴⁰ The FCC created an exception, however, for genuine, exclusive wholesale offerings to ISPs. The FCC found that ILEC sales to ISPs (usually offered with term and volume discounts) are not subject to resale under Section 251(c)(4).

BellSouth errs in relying on this FCC order, and the D.C. Circuit decision in Ascent II affirming it because the FCC’s finding that wholesale DSL offerings are exempt from the resale discount obligations was only intended to apply to situations in which an ISP is *unaffiliated* with the ILEC. As envisioned by the FCC, “entities obtaining the bulk DSL services” would “perform certain functions with respect to the DSL service supplied to them, including provisioning all customer premises equipment and wiring, providing customer service, and marketing, billing, ordering, and repair.” Second Advanced Services Order ¶ 7. The FCC emphasized that when an ILEC offers DSL service to end-user customers and provides “marketing, billing, and customer care for the end-user,” those DSL services fall into the category of DSL services offered “directly to residential and business end-users” and are subject to the 251(c)(4) resale discount. In creating the wholesale exemption, the FCC contemplates avoiding a redundant discount in an arm’s-length environment: one discount at the wholesale level in the sale to an ISP, and then a second at the resale level by an interjecting ALEC. However, there is no basis whatsoever to suggest that in creating the exception the FCC sanctioned ILEC avoidance of the resale obligation through a phantom wholesale “sale” of the DSL telecommunications service to the ILEC itself, which is what precisely what BellSouth does (Exhibit 14, p. 51; Tr. 286).

⁴⁰ *Second Advanced Services Order* ¶ 8.

Moreover, BellSouth's argument that its DSL service arrangement falls within the Second Advanced Services Order exemption and Ascent II is illogical. Ascent I held that the resale and Internet obligation could not be evaded through a separate affiliate's sale of the DSL component of a bundled product, so it makes no sense to find that Ascent II permits such evasion if there is **no separate affiliate** involved in the exact same sale and service arrangement. That Ascent II concerned only genuine wholesale sales to unaffiliated ISPs is the only logical conclusion.

Rulings by Other State Commissions

At least two state Commissions have found that Section 251(c)(4) requires ILECs to resell DSL. On May 7, 2001, the Connecticut Department of Utility Control (DPUC) issued a draft decision⁴¹ that will require the state's largest incumbent, Southern New England Telephone Company (SNET), to resell any telecommunications service, including DSL, that is sold by its ISP affiliate and any other affiliates. The DPUC specifically rejected SNET's claim that its only DSL offering was a wholesale transport service purchased by third-party ISPs, including its own ISP affiliate, and was therefore exempt from the Act's resale obligations, accusing SNET of "ignor[ing] th[e] *ASCENT I*] decision's plain language."⁴² *Id.* More recently, the Indiana Commission reached the same result on the same grounds.^{43,44} The only difference between

⁴¹ As of two weeks ago, hearings on the draft decision continued and a final decision had not yet been rendered.

⁴² Petition of DSLnet Communications, LLC Regarding Section 251(c) Obligations of the Southern New England Telephone Company, Docket 01-01-17, Draft Decision at 9 (Conn. D.P.U.C. May 7, 2001) (internal citations omitted).

⁴³ Petition of Indiana Bell Telephone Co., Inc. d/b/a Ameritech Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996, Cause No. 41657, Order on EDR-1 ALJ Decision on First Request for Expedited Dispute

those cases and this one is that here, an ILEC affiliated ISP is not involved in the wholesale sale. However, as explained in the paragraphs earlier, to accept that a phantom “sale” of DSL to the ILEC itself will permit resale avoidance is to recognize illusion as reality.

The FCC’s Verizon-Connecticut 271 Order

After the FCC’s ruling in the Verizon-Connecticut 271 Order, there should be little doubt that ALECs are entitled to resell BellSouth DSL. In rejecting many of the same arguments BellSouth raises here (Tr. 287 – 292), the Commission ruled that, “we cannot accept Verizon’s contention that it is not required to offer resale of DSL unless Verizon provides voice service on the line involved.” Verizon-Connecticut 271 Order ¶ 30. Specifically, the FCC stated as follows:

In light of the *ASCENT* decision, we cannot accept Verizon’s contention that it is not required to offer resale of DSL unless Verizon provides voice service on the line involved. As an initial matter, we reject this argument based on the plain language of section 251(c)(4). Section 251(c)(4) states that incumbent LECs must “offer for resale at wholesale rates any telecommunications service that [they] provide[] at retail” Verizon and VADI, which are subject to the same resale obligations, currently provide local exchange and DSL services to retail customers over the same line. Therefore, we find that, because Verizon and VADI offer these services on a retail basis, these services are eligible for a wholesale discount under section 251(c)(4). Accordingly, we conclude that Verizon must make available to resellers, at a wholesale discount, the same package of voice and DSL services that it provides to its own retail end-user customers.

We also reject Verizon’s position on the resale of DSL on two additional grounds. First, Verizon argues that it currently provides DSL services through its affiliate VADI, and VADI provides such services exclusively through a line sharing arrangement with Verizon. Therefore, according to Verizon, the only DSL services that VADI must make available for resale are those provided to Verizon voice customers because, under the Commission’s rules, an incumbent LEC is only required to provide line sharing, or access to the high frequency portion of the loop, when the incumbent provides the underlying voice service. Thus, Verizon takes the position that there is no DSL service for VADI to

Resolution, (Indiana Util. Regulatory Comm. June 27, 2001) (affirming Indiana ALJ’s June 12, 2001 decision).

⁴⁴ At the request of Commissioner Jaber, FDN confirmed that as of two weeks ago, the Indiana decision had not been overruled or overturned.

resell when a competitive LEC provides voice service over the line involved. Verizon's position is the same regardless of whether the competitive LEC is reselling voice service or providing voice service over a UNE loop or UNE-platform (UNE-P). We find that Verizon's position is based on a misapplication of this Commission's line sharing rules. Line sharing is not a retail service; it is a UNE provided under section 251(c)(3). Therefore, **the restriction on the line sharing UNE is inapplicable to Verizon's obligations relating to retail services.** Resellers purchase retail services at a wholesale discount, they do not purchase UNEs.

Second, Verizon's argument rests on precisely the conduct ruled unlawful by the court – the use of an affiliate to avoid section 251(c) resale obligations. The *ASCENT* decision made clear that Verizon's resale obligations extend to VADI, whether it continues to exist as a separate entity or whether it is integrated into Verizon, and regardless of the way Verizon structures VADI's access to the high frequency portion of the loop. Accordingly, we conclude that to the extent Verizon's attempt to justify a restriction on resale of DSL turns on the existence of VADI as a separate corporate entity (or even a separate division), it is not consistent with the *ASCENT* decision. We also emphasize that **Verizon's policy of limiting resale of DSL services to situations where Verizon is the voice provider severely hinders the ability of other carriers to compete. Specifically, Verizon's policy prevents competitive resellers from providing both DSL and voice services to their customers, while Verizon is able to offer both together to its customers. This result is clearly contrary to the pro-competitive Congressional intent underlying section 251(c)(4).**

Verizon-Connecticut 271 Order ¶¶ 30-32 (emphasis added).

As the FCC explained, the FCC's Line Sharing Order⁴⁵ and Line Sharing Reconsideration Order⁴⁶ provide no support for BellSouth's refusal to resell its service on the high frequency portion of ALEC UNE loops. These orders, the FCC held, dealt exclusively with ILEC obligations when providing line sharing as a UNE – *i.e.*, unbundled access to the high frequency portion of the loop in order for data LECs to provide DSL service to end-users. The Line Sharing Orders are, thus, inapplicable to the ALECs' resale demands here because ALECs are not seeking to purchase a UNE line sharing product. ALECs simply want the ability to resell

⁴⁵ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order, 14 FCC Rcd. 20912 (rel. December 9, 1999) (“*Line Sharing Order*”).

a product to their customers on the same terms and conditions that BellSouth provides to its own customers.⁴⁷

In paragraph 33 of its Order, the FCC expressly required Verizon to offer resold DSL over resold ALEC voice service. “[Verizon/Verizon’s advanced services affiliate] must permit resale of DSL by a competitive LEC over lines on which the competitive LEC provides voice service through resale of Verizon service.” *Id.* at ¶ 33. However, because the issue was not fully debated or timely raised and/or because there was unresolved confusion in the aftermath of Verizon’s, in reliance on the FCC’s merger order, actually having transferred interests in DSL assets to its advanced services affiliate (VADI), the FCC deferred specifically requiring Verizon to offer resold DSL over UNE or UNE-P ALEC voice. See *Id.* at ¶ 33.⁴⁸ The Florida Commission should not similarly defer.

Neither failure to timely raise the issue nor unwinding an affiliate’s involvement exists here. In fact, FDN had raised this issue when it first submitted issues for the Issue Identification

⁴⁶ Third Report and Order on Reconsideration in CC Docket No. 98-147, *et al.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 01-26 (Jan. 19, 2001).

⁴⁷ Despite the FCC’s clear ruling in the *Verizon-Connecticut 271 Order*, BellSouth has continued to argue its futile point. But even if the FCC had not ruled as it did in the *Verizon-Connecticut 271 Order*, BellSouth’s argument is still misguided. In the *Line Sharing Reconsideration Order*, AT&T asked the FCC to rule that the *Line Sharing Order* imposed a requirement with respect to ILEC provision of *retail* DSL services. The FCC did not find that ILECs may lawfully refuse to provide DSL service on lines on which it is not the retail voice carrier. To the contrary, the FCC simply determined that AT&T’s request was beyond the scope of a reconsideration order, which, for procedural reasons, was limited to consideration of the ILECs’ obligation to provide access to line sharing as a UNE. The FCC specifically noted that it did *not* rule on the merits of AT&T’s argument, instead it invited any party aggrieved by an ILECs refusal to provide service to file a petition alleging that the ILEC’s practice constituted an unreasonable practice in violation of the common carrier obligations to provide service to the public on a nondiscriminatory basis. As argued hereinabove, BellSouth’s practice of tying its ADSL exclusively to its voice is an anticompetitive and discriminatory practice.

⁴⁸ The FCC similarly ruled in the *Verizon-Pennsylvania 271* decision.

Meeting, and all parties have had a full and fair opportunity to address all ramifications of the issue in testimony and briefs. As stated by FDN witness Gallagher, there is a genuine need for this Commission to rule on the issue promptly and properly, since every passing day means that ALECs fall further behind BellSouth in the data and combined voice-and-data markets. (Tr. 1624.) Further, as explained above, there is more than adequate legal basis in the current law for the Commission to rule BellSouth has not met its resale obligations by refusing to resell its DSL over ALEC UNE and UNE-P voice. Indeed, the rationale of the Verizon-Connecticut 271 Order, quoted above, supports such a finding.

BellSouth must offer DSL for resale on terms and conditions that permit ALECs to provide DSL to their customers on the same UNE loop that ALECs use to provide voice service. BellSouth must provide the service in “substantially the same time and manner as it provides . . . itself.” Verizon-Connecticut 271 Order, ¶ 5. Just as BellSouth customers are entitled to purchase DSL and voice on the same line, so should be ALEC customers. Any failure to provide ALECs and their customers with the same level of service would constitute an unreasonable and discriminatory practice in violation of both federal and Florida law.

BellSouth’s Alternatives to Resale are No Alternatives

FDN has not raised BellSouth’s refusal to unbundle DSLAM functionality/packet switching as a specific issue in this proceeding. However, that subject touches upon several other issues in the proceeding, as the parties will argue. FDN briefly addresses its relevance to rebut any BellSouth argument that ALECs can compete in the broadband DSL market through alternatives to reselling BellSouth ADSL (i.e. by collocating their own DSLAMs at remotes) and also to rebut BellSouth’s suggestion that terms and conditions for collocation at remotes are fair

and reasonable.⁴⁹ Nonetheless, the prospect of an alternative means to compete, even if viable – and that is not the case when it comes to ALECs collocating DSLAMs -- does not excuse BellSouth's failure to meet its resale obligation under the Act.

As stated above, BellSouth's network architecture in Florida is unique. Remote terminals that serve perhaps as much as 90% of BellSouth's Florida customer base are a principal feature of that architecture. The evidence presented at the hearing demonstrated that collocation on the massive scale necessary to provide even partially ubiquitous service in Florida is financially and logistically impossible. (Tr. 1622, 1654 – 1655.) BellSouth cannot cite evidence of a *single* competitor that has even tried to accomplish in Florida what BellSouth maintains is so readily achievable. (Tr. 703 –704.)

Even the less onerous terms for ALECs remote terminal collocation announced at the last minute in this proceeding to help save BellSouth's claim – possible waiver of non-recurring charges for augment/adjacent site preparation⁵⁰ and availability of remote location and serving locations⁵¹ – do little to facilitate the RT collocation process. As FDN witness Gallagher testified, even assuming these conditions and an undersized 8-port DSLAM, ALEC remote

⁴⁹ See FDN's post-hearing brief filed in Docket No. 010098-TP for a complete exposition of the need for a broadband UNE. A decision in that docket is scheduled for November 19.

⁵⁰ BellSouth witness Gray's late-filed deposition exhibit no. 2, which is contained in Hearing Exhibit No. 8, announces this "policy." On cross-examination (Tr. 847 – 853), Mr. Gray was unable to identify where or whether this "policy" was contained in BellSouth's 271 filing. The reason is because it is not there. It is not in the Statement of Generally Available Terms and Conditions, it is not in the tariff, it is not in any of the agreements that Mr. Gray averred reflected BellSouth's generally available terms, conditions and prices for collocation. BellSouth's 271 filing was made in May of this year, and Mr. Gray's late-filed deposition exhibit no. 2 was circulated in September. FDN submits that, at best, this "policy," if it does truly exist, was made up at the last minute to bolster BellSouth's case. The absence of this "policy" from the 271 filing supports this view and supports the notion that ALECs are not even informed of it.

⁵¹ BellSouth witness Williams announced from the stand that remote location and serving address information would be made available to ALECs. (Tr. 672 – 673.)

terminal collocation is hopelessly cost-prohibitive. (Tr. 1654 – 1655.) An ALEC could not justify the expense for collocating at remotes, and even if it could, an ALEC could not collocate in remotes quickly enough to actually catch up to BellSouth's head start.

Neither is BellSouth's offer to wholesale DSL over ALEC resold voice an acceptable alternative. BellSouth would only make this DSL product available over resold voice (Tr. 287) when it is widely acknowledged that resale is not a viable, financable business model (Tr. 1798 – 1799). Further, the resale DSL BellSouth contemplates is not retail DSL at the Commission's approved discount, but rather wholesale DSL at some discount of BellSouth's own choosing. (Tr. 1626, 1642 – 1644). Again, BellSouth is simply scrambling to find ways to avoid what the law requires it to do – resell at the Commission's approved discount rate the DSL service BellSouth sells at retail.

CONCLUSION

The Commission must once and for all clear the room of all of BellSouth's smoke regarding the status of competition in Florida, regarding BellSouth's intentional suppression of competition, and BellSouth's refusal to resell DSL to ALECs.

For the reasons stated herein, the Commission should not recommend that BellSouth be permitted to provide in-region inter-LATA services in Florida pursuant to Section 271 of the Act.

Respectfully submitted this 6th day of November,
2001

A handwritten signature in black ink, appearing to read "Matthew Feil". The signature is written in a cursive style with a large, stylized initial "M" and a long, sweeping underline that extends to the right.

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

**CERTIFICATE OF SERVICE
DOCKET NO 960786-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Overnight delivery (if marked *) or by U.S. mail this 6th day of November, 2001 to the following:

Mr. Brian Sulmonetti
LDDS WorldCom Communications
Suite 3200
6 Concourse Parkway
Atlanta, GA 30328
Tel. No. (770) 284-5493
Fax. No. (770) 284-5488
brian.sulmonetti@wcom.com

Floyd R. Self, Esq.
Messer Law Firm
215 South Monroe Street
Suite 701
P.O. Box 1876
Tallahassee, FL 32302-1876
Tel. No. (850) 222-0720
Fax. No. (850) 224-4359
Represents LDDS/ACSI
fself@lawfla.com

Vicki Gordon Kaufman
Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
Represents FCCA
Represents NewSouth
Represents KMC
vkaufman@mac-law.com

Ms. Nancy White *
c/o BellSouth Telecommunications, Inc.
Ms. Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556
Tel. No. (850) 224-7798
Fax: No. (850) 222-8640

Charles J. Beck
Office of Public Counsel
111 W. Madison Street
Suite 812
Tallahassee, FL 32399-1400
Tel. No. (850) 488-9330
Fax No. (850) 488-4992
Beck.Charles@leg.state.fl.us

Richard D. Melson
Hopping, Green, Sams & Smith
123 South Calhoun Street
P.O. Box 6526
Tallahassee, FL 32314
Tel. No. (850) 222-7500
Fax. No. (850) 224-8551
Represents MCI, Rhythms
RMelson@hgss.com

Susan S. Masterton
Sprint Communications Co.
Post Office Box 2214 (zip 32316-2214)
1313 Blair Stone Road
Tallahassee, FL 32301
Tel. No. (850) 599-1560
Fax. No. (850) 878-0777
susan.masterton@mail.sprint.com

Beth Keating, Staff Counsel *
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6212
Fax. No. (850) 413-6250
bkeating@psc.state.fl.us

Scott Sapperstein
Intermedia Comm. Inc.
One Intermedia Way
MCFLT-HQ3
Tampa, Florida 33647-1752
Tel. No. (813) 829-4093
Fax. No. (813) 829-4923
Ssapperstein@intermedia.com

Rhonda P. Merritt
AT&T
101 North Monroe Street
Suite 700
Tallahassee, Florida 32301
Tel. No. (850) 425-6342
Fax. No. (850) 425-6361
rpmerritt@ATT.com

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
215 South Monroe Street
Suite 420
P.O. Box 551
Tallahassee, FL 32302
Tel. No. (850) 681-6788
Fax. No. (850) 681-6515
Represents TCG
Represents US LEC
Ken@Reuphlaw.com

John R. Marks, III
215 South Monroe Street
Suite 130
Tallahassee, FL 32301
Tel. No. (850) 222-3768
Fax. No. (850) 561-0397
Represents BellSouth
JohnM@KMRlaw.com

Kenneth S. Ruth
Florida Director CWA
2180 West State Road 434
Longwood, FL 32779
Tel. No. (407) 772-0266
Fax. No. (407) 772-2516
Kruth@cwa-union.org

Marilyn H. Ash
MGC Communications, Inc.
3301 N. Buffalo Drive
Las Vegas, NV 89129
Tel. No. (702) 310-8461
Fax. No. (702) 310-5689

Rodney L. Joyce
Shook, Hardy & Bacon, L.L.P.
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005-2004
Tel. No. (202) 639-5602
Fax. No. (202) 783-4211
rjoyce@shb.com
Represents Network Access Solutions

Ms Rose M. Mulvany
Birch Telecom
2020 Baltimore Avenue
Kansas City, MO 64108-1914
Tel. No. (816) 300-3731
Fax No. (816) 300-3350
rmulvany@birch.com

Michael Gross/Charles Dudley
FCTA, Inc.
246 E. 6th Avenue
Suite 100
Tallahassee, FL 32303
Tel. No. (850) 681-1990
Fax. No. (850) 681-9676
mgross@fcta.com

Nanette Edwards
ITC Delta Com
4092 South Memorial Parkway
Huntsville, AL 35802
Tel. No (256) 382-3856
Fax. No. (256) 382-3969
Represented by Hopping Law Firm

Donna McNulty
MCI WorldCom
325 John Knox Road
Suite 105
Tallahassee, FL 32303-4131
Tel. No. (850) 422-1254
Fax. No. (850) 422-2586
donna.mcnyulty@wcom.com

Network Access Solutions Corp.
100 Carpenter Drive
Suite 206
Sterling, VA 20164
Tel. No. (703) 742-7700
Fax. No. (703) 742-7706
Represented by Shook, Hardy & Bacon

Karen Camechis
Pennington Law Firm
215 South Monroe Street
2nd Floor
Tallahassee, FL 32301
Tel. No. (850) 222-3533
Fax. No. (850) 222-2126
Represents Time Warner
pete@penningtonlawfirm.com

Rythms Links, Inc.
6933 South Revere Parkway
Suite 100
Englewood, CO 80112
Tel. No. (303) 476-4200
Represented by Hopping Law Firm

Benjamin Fincher
Sprint/Sprint-Metro
3100 Cumberland Circle
#802
Atlanta, GA 30339
Tel. No. (404) 649-5144
Fax. No. (404) 649-5174
Represented by Ervin Law Firm

Carolyn Marek
Time Warner
Regulatory Affairs, SE Region
233 Bramerton Court
Franklin, TN 37069
Tel. No. (615) 376-6404
Fax. No. (615) 376-6405
carolyn.marek@twtelecom.com
Represented by Pennington Law Firm

James Falvey
ACSI
131 National Business Parkway
Annapolis Junction, MD 20701
Represented by Messer Law Firm

Katz, Kutter Law Firm
Charles J. Pellegrini/Patrick Wiggins
106 E. College Avenue
Tallahassee, FL 32301
Tel. No. (850) 224-9634
Fax.No. (850) 224-9634
pkwiggins@katzlaw.com

Lori Reese
Vice President of Governmental Affairs
NewSouth Communications
Two Main Street
Greenville, South Carolina 29609
Tel. No. (864) 672-5177
Fax. No. (864) 672-5040

Genevieve Morelli
Andrew M. Klein
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
Represents KMC

John D. McLaughlin, Jr.
KMC Telecom
1755 North Brown Road
Lawrenceville, GA 30043

Suzanne F. Summerlin, Esq.
1311-B Paul Russell Road
Suite 201
Tallahassee, Florida 32301
Tel. No. (850) 656-2288
Fax. No. (850) 656-5589
Represents IDS Telecom

Henry C. Campen, Jr.
Parker, Poe, Adams & Bernstein, LLP
P.O. Box 389
First Union Capital Center
150 Fayetteville Street Mall
Suite 1400
Raleigh, NC 27602-0389
Tel. No. (919) 890-4145
Fax. No. (919) 834-4564
Represents US LEC of Florida

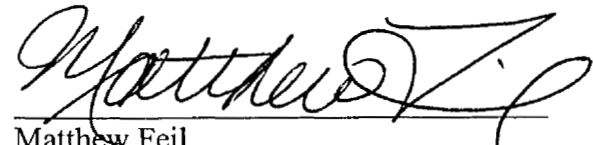
Catherine F. Boone
Covad Communications Company
10 Glenlake Parkway, Suite 650
Atlanta, GA 30328-3495
Tel. No. (678) 222-3466
Fax. No. (678) 320-0004
cboone@covad.com

Jim Lamoureux
AT&T Law & Government Affairs
1200 Peachtree Street, NE
Suite 8100
Atlanta, GA 30309
404-810-4196

Bruce Culpepper, Esq.
Akerman, Senterift & Eidson
301 S. Bronough Street
Suite 200
Post Office Box 10555
Tallahassee, FL 32302-2555
Represents AT&T

Mark D. Baxter
Stone&Baxter, LLP
557 Mulberry Street
Suite 1111
Macon, GA 31201-8256
Represents Access

Dana Shaffer
XO Communications
105 Molloy Street, Suite 300
Nashville, TN 37201-2315
dana.shaffer@xo.com



Matthew Feil
General Counsel
Florida Digital Network
390 North Orange Avenue
Suite 2000
Orlando, Florida 32801