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EX PARTE OR LATE FILED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

July 18, 2002

EX PARTE

Marlene Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation
CC Docket Nos. 01-337; 02-33; 01-338; 98-10; 95-20; 96-98; 98-147

Dear Ms. Dortch:

On July 17, 2002, Dave Baker, Vice President, EarthLink, and the undersigned, of Lampert & O'Connor, attended three meetings with FCC staff. The first meeting was with Michelle Carey, Brent Olson, Jeremy Miller, Robb Tanner, Brad Koerner, and Pam Arluk, all of the Wireline Competition Bureau, as well as Richard Hovey and Jerry Stanshine of the Office of Engineering and Technology. The second meeting was with Kyle Dixon of Chairman Powell's office, and the third meeting was with Robert Pepper and Simon Wilkie of the Office of Plans and Policy.

In these meetings, EarthLink described generally its business, including its broadband subscriber base. EarthLink also made several points that it has previously filed in comments and reply comments in the above-referenced dockets. Specifically, EarthLink stressed that it and other independent ISPs offer varied and valuable benefits to the public, and that accordingly the Commission should endeavor to preserve, not harm, competition among ISPs. ISPs differentiate among themselves in a variety of ways to meet the varied needs and desires of the public, including: price, privacy (both policy and security), email, pop-up ads, network capabilities (*e.g.* offering static IP, etc.), spam control, content, caching, corporate identity (*e.g.* some ISPs are run by members of the specific community the ISP serves), customer service, and number of local access numbers or availability of 800 service when travelling.

EarthLink discussed the importance of *Computer Inquiry* rules to its ability to obtain incumbent LEC wholesale DSL service, the potential for incumbent LEC discrimination against independent ISPs, and the legal underpinnings of common carrier status of incumbent LEC services as explained in its prior filings. EarthLink explained that incumbent LECs have offered

DSL services to ISPs for several years, and ISPs have served to promote incumbent LEC DSL and advanced services. In EarthLink's view, the incumbent LEC commenters have not provided sufficient reason for prospective elimination of *Computer Inquiry* principles, although EarthLink has recommended in prior comments several improvements to the *Computer Inquiry* obligations.

EarthLink also discussed the inadequacies of intermodal competition in the current market for wholesale broadband access, including that satellite and fixed wireless represent a very small and, in the case of fixed wireless, seemingly diminishing portion of that market. While EarthLink is "platform agnostic" and it uses available broadband access platforms, the vast majority of its broadband customers use either DSL or cable. During the meetings, and as an example of EarthLink's position that consumers in many markets have access only to DSL or limited cross-platform competition, EarthLink discussed the study described in the Reply Comments filed by the California Public Utilities Commission in CC Docket 01-337 (April 22, 2002).

In the first meeting, with the WCB and OET staff, EarthLink also referenced a decision of the Florida Public Service Commission finding that BellSouth was using its self-provisioned DSL-based Internet access service to "create a barrier to competition in the local telecommunications market." The relevant section of the Florida decision is attached hereto. Also during the first meeting, Richard Hovey asked EarthLink about its experience with split billing in Texas, based upon his recollection of filed comments. EarthLink responded that it was not aware that its practice was to avoid split billing. In a follow-up emailed message, Mr. Hovey explained that he had a different ISP in mind, not EarthLink. Mr. Hovey's email is attached hereto.

In the second and third meetings, EarthLink distributed the attached bullet sheet setting forth its major points. EarthLink also discussed incumbent LECs' incentives to continue to deploy DSL facilities in the absence of regulatory changes.

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, 16 copies of this Notice are being provided to you for inclusion in the public record in the above-captioned proceedings. Should you have any questions, please contact me.

Sincerely,

Kenneth R. Boley

CC: Michelle Carey
Jeremy Miller
Brad Koerner
Richard Hovey
Kyle Dixon
Simon Wilkie
Brent Olson
Robb Tanner
Pam Arluk
Jerry Stanshine
Robert Pepper

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.	DOCKET NO. 010098-TP ORDER NO. PSC-02-0765-FOF-TP ISSUED: June 5, 2002

The following Commissioners participated in the disposition of this matter:

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

APPEARANCES:

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

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

FELICIA R. BANKS, ESQUIRE and JASON FUDGE, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

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I. CASE BACKGROUND

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Florida Digital Network, Inc. (FDN) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on January 24, 2001. On February 19, 2001, BellSouth filed its Response to FDN's petition for arbitration. On April 9, 2001, FDN filed a Motion to Amend Arbitration Petition. On April 16, 2001, BellSouth filed its Response In Opposition to the Motion. FDN filed its Reply to BellSouth's Opposition to Motion to Amend Arbitration Petition on April 30, 2001. On May 22, 2001, Order No. PSC-01-1168-PCO-TP was issued granting FDN's Motion to Amend Arbitration Petition.

At the issue identification meeting, the parties identified ten issues to be arbitrated. Prior to the administrative hearing, the parties resolved all of those issues except one. An administrative hearing was held on August 15, 2001. On September 26, 2001, FDN filed a Motion to Supplement Record of Proceeding. BellSouth filed a timely opposition to FDN's motion on October 3, 2001. On December 6, 2001, Order No. PSC-01-2351-PCO-TP was issued denying FDN's Motion to Supplement Record of Proceeding.

Although the parties were not able to reach a complete settlement, we commend the good faith efforts of the parties to continue the negotiation process throughout this proceeding.

In this arbitration, FDN requests that this Commission order BellSouth to (1) end the practice of insisting that consumers who buy BellSouth's Digital Subscriber Line (DSL) service also purchase BellSouth voice; (2) unbundle the packet switching functionality of the Digital Subscriber Line Access Multiplexers (DSLAMs) that BellSouth has deployed in remote terminal facilities throughout its network and offer a broadband unbundled network element (UNE) consisting of the entire transmission facility from the customer's premises to the central office; and (3) permit the resale of the DSL transmission services that BellSouth provides to Florida consumers at retail. This Order addresses these requests.

II. JURISDICTION

Pursuant to Chapter 364, Florida Statutes, and Section 252 of Act, we have jurisdiction to arbitrate interconnection agreements,

and may implement the processes and procedures necessary to do so in accordance with Section 120.80 (13)(d), Florida Statutes.

III. BELLSOUTH DSL OVER FDN VOICE LOOPS

We have been asked to decide whether BellSouth should be required to continue to provide its FastAccess Internet Service when its customer changes to another voice telecommunications provider. FDN seeks relief from what it claims to be BellSouth's "anticompetitive practice of leveraging its control of the DSL market in Florida to injure competitors in the voice market." FDN witness Gallagher explains that when customers of BellSouth's voice and FastAccess Internet Service seek to switch their voice service to FDN, BellSouth will disconnect their FastAccess Internet Service. He states that because FDN is unable to offer DSL and voice service over the same telephone line in most cases, customers are likely to lose interest in obtaining voice services from FDN.

BellSouth witness Ruscilli confirms that BellSouth will not offer its FastAccess Internet Service to a voice customer of another carrier. Witness Ruscilli explains that the only way a voice customer of FDN could obtain or maintain BellSouth's FastAccess Internet Service would be for FDN to convert that customer from facilities-based service to a resale service, in which FDN would resell BellSouth's voice service to that customer. BellSouth witness Williams states that in the situation in which FDN resells BellSouth's voice service, BellSouth would still be considered the voice provider, and therefore, BellSouth would continue to provide FastAccess Internet Service to that customer.

Witness Williams contends that in any event BellSouth is not required to provide DSL service over a loop if BellSouth is not providing voice service over that loop. In support of this position, he cites the FCC's *Line Sharing Reconsideration Order*,[1] which states in ¶16:

> We deny, however, AT&T's request that the Commission clarify that incumbent LECs must continue to provide xDSL service in the event customers choose to obtain service

[1] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order No. FCC 01-26; 16 FCC Rcd 2101 (2001).

> from a competing carrier on the same line because we find that the *Line Sharing Order* contained no such requirement.

Witness Williams states that "the FCC then expressly stated that its *Line Sharing Order* 'does not require that [LECs] provide xDSL service when they are no longer the voice provider'."

Witness Williams also suggests several "business reasons" for BellSouth's decision not to offer DSL over FDN voice loops. First, witness Williams states that the systems BellSouth uses to provide DSL service do not currently accommodate providing DSL service over an ALEC's UNE loop. He states that prior to provisioning DSL service over a given loop, BellSouth must determine whether that loop is DSL capable. He explains:

> In order to make this determination, BellSouth has developed a database that stores loop information for inventoried working telephone numbers. When an ALEC like FDN provides dial tone from its own switch, the ALEC (not the end user) is BellSouth's customer of record, and the ALEC (not BellSouth) assigns a telephone number to the end user. BellSouth's database, therefore, does not include loop information for facilities-based UNE telephone numbers, and BellSouth cannot use the database to readily determine whether a facilities-based UNE loop is ADSL compatible.

Witness Williams states that BellSouth's troubleshooting, loop provisioning, and loop qualification systems would not contain telephone numbers assigned by ALECs. Therefore, he contends that these mechanized systems do not support the provisioning of DSL service over a UNE loop that an ALEC such as FDN uses to provide voice service. In addition, witness Williams argues that it would be "quite costly to try to take telephone numbers that are not resident in our system today and to put those into those multiple databases."

Further, witness Williams states that processing DSL orders from an end user served by a facilities-based ALEC would be inefficient and costly. He explains that since the ALEC has access to all the features and functionalities of a UNE loop it purchases from BellSouth, for BellSouth to provision DSL it must negotiate with each ALEC for use of the high frequency portion of these loops.

FDN witness Gallagher responds that BellSouth's "business reasons" for not providing DSL over ALEC UNE loops are not adequate grounds for denying FDN's request. He contends that when the Telecommunications Act of 1996 was adopted, "the ILECs did not have in place many of the systems that would ultimately be necessary to support the UNEs, interconnection, collocation and resale requirements of the new Act." Witness Gallagher argues that these systems were developed in response to the Act's requirements and the development of these support systems should continue to be driven by regulatory decisions and applicable law, not the other way around.

Witness Gallagher contends that BellSouth can offer no reasonable justification for its policy of not providing DSL over ALEC UNE loops. He states that this practice is apparently designed to leverage its market power in the DSL market as an anticompetitive tool to injure its competitors in the voice market. Witness Gallagher argues that with numerous competitive DSL providers folding or downsizing, if FDN does not obtain the relief it seeks in this proceeding, there is a very real possibility that BellSouth will eventually be the only DSL provider in its incumbent region in Florida. He states:

> Therefore, BellSouth's ability to exert unreasonable and unlawful anticompetitive pressures on the voice services market will continue to increase. For these reasons, BellSouth's refusal to offer xDSL service to Florida consumers who purchase facilities-based voice service from [ALECs] is unreasonable and unlawful.

In its brief, FDN argues that in the *Line Sharing Reconsideration Order* "the FCC did not find that ILECs may lawfully refuse to provide DSL service on lines on which it is not the retail voice carrier." FDN contends that the FCC simply determined that AT&T's request was beyond the scope of a reconsideration order, which was limited to consideration of the ILEC's obligation to provide line sharing as a UNE.

In addition, FDN contends that the Line Sharing Order[2] did not address, as a substantive matter, retail issues. FDN argues that

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[2] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order No. FCC 99-355; 14 FCC Rcd 20912 (1999), *remanded and vacated* line sharing rule requirement, United States Telecom Association v. FCC, No. 00-1012, Consolidated with 01-1075, 01-1102, 01-1103, No. 1015, consolidated with 00-1025, 2002 WL 1040574 (D.C. Cir. May 24, 2002).

"BellSouth cannot cite the *Line Sharing Orders* as a basis for evading its *retail* obligations. FDN UNE voice customers who wish to buy FastAccess DSL *at retail* should be permitted to do so." (emphasis in original)

We note that the *Line Sharing Order* provided that:

> In this Order we adopt measures to promote the availability of competitive broadband xDSL-based services, especially to residential and small business customers. We amend our unbundling rules to require incumbent LECs to provide unbundled access to a new network element, the high frequency portion of the local loop. This will enable competitive LECs to compete with incumbent LECs to provide to consumers xDSL based services through telephony lines that the competitive LECs can share with incumbent LECs.

Line Sharing Order at ¶4.

The *Line Sharing Order* also provided that a state commission may impose additional line sharing requirements. The FCC states:

> It is impossible to predict every deployment scenario or the difficulties that might arise in the provision of the high frequency loop spectrum network element. States may take action to promote our overarching policies, where it is consistent with the rules established in this proceeding.

Order at ¶225. The FCC further emphasized that "States may, at their discretion, impose additional or modified requirements for access to this unbundled network element, consistent with our national policy framework." *Line Sharing Order*, 14 FCC Rcd at 20917.

Recently, the *Line Sharing Order* was vacated by the U.S. Court of Appeals for the D.C. Circuit. We note that the Court addressed the FCC's unbundling analysis and concluded that nothing in the Act appears to support the FCC's decision to require unbundling of the high frequency portion of the loop "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition." United States Telecom Association v. FCC, No. 00-1012, Consolidated with 01-1075, 01-1102, 01-1103, No. 1015, consolidated with 00-1025, 2002 WL 1040574 (D.C. Cir. May 24,

2002). We note that we have not relied upon the *Line Sharing Order* for our decision set forth herein.

BellSouth witness Ruscilli contends that BellSouth's FastAccess Internet Service is an "enhanced, nonregulated, nontelecommunications Internet access service." We agree.[3] However, we believe FDN has raised valid concerns regarding possible barriers to competition in the local telecommunications voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN voice service. That is an area over which we do have regulatory authority.

We are troubled by FDN's assertions that BellSouth uses its ability to provide its FastAccess Internet Service as leverage to retain voice customers, creating a disincentive for customers to obtain competitive voice service. In its brief, FDN suggests that this practice amounts to unreasonable denial of service pursuant to Section 201 of the Act and Section 364.03(1), Florida Statutes. In addition, FDN contends that this practice unreasonably discriminates among customers, citing Section 202(a) of the Act and Sections 364.08(1) and 364.10(1), Florida Statutes. FDN also asserts that BellSouth's requirement that an end user seeking to purchase its FastAccess Internet Service must also purchase BellSouth's voice service is an anticompetitive and illegal tying arrangement, and "a *per se* violation of the antitrust laws." We believe that FDN has demonstrated that this practice raises a competitive barrier in the voice market for carriers that are unable to provide DSL service.

As set forth in Section 706 of the Telecommunications Act, Congress has clearly directed the state commissions, as well as the FCC, to encourage deployment of advanced telecommunications capability by using, among other things, "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

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[3] See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations, (Computer II Final Decision); 77 FCC 2d 384 (1980).

Furthermore, our state statutes provide that we must encourage competition in the local exchange market and remove barriers to entry. As set forth in Section 364.01(4)(g), Florida Statutes, which provides, in part, that the Commission shall, "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . .," we are authorized to address behaviors and practices that erect barriers to competition in the local exchange market. Section 364.01(4)(d), Florida Statutes, also provides, in part, that we are to promote competition. We also note that under Section 364.01(4)(b), Florida Statutes, our purpose in promoting competition is to "ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Thus, the Legislature's mandate to this Commission is clear.

As referenced above, FDN states that BellSouth's practice of disconnecting its FastAccess Internet Service when its customer changes to another voice provider unreasonably discriminates among customers, citing Section 202(a) of the Act, as well as Sections 364.08 and 364.10, Florida Statutes. Although it does not appear that Section 364.08, Florida Statutes, is directly on point, we agree that Section 202(a) of the Act and Section 364.10, Florida Statutes, are applicable. Section 364.10(1), Florida Statutes, provides that:

> A telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Similarly, Section 202 of the Act, among other things, precludes a common carrier from making any unjust or unreasonable discrimination in practices or services, directly or indirectly. BellSouth's practice of disconnecting its FastAccess service unduly prejudices or penalizes those customers who switch their voice service, as well as their new carrier. The FCC's *Line Sharing Reconsideration Order* is distinguishable here, because in this case BellSouth's practice of disconnecting its FastAccess Internet service has a direct, harmful impact on the competitive provision of local telecommunications service.

We also note that Section 251(d)(3) of the Telecommunications Act provides that the FCC shall not preclude:

> the enforcement of any regulation, order, or policy of a State commission that-
>
> (A) establishes access and interconnection obligations of local carriers;
>
> (B) is consistent with the requirements of this section [251];
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Thus, in the interest of promoting competition in accordance with state and federal law, BellSouth shall continue to provide FastAccess even when BellSouth is no longer the voice provider because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes.

It is incumbent upon us to promote competition. The evidence shows that BellSouth routinely disconnects its FastAccess service when a customer changes its voice provider to FDN, which reduces customers' options for local telecommunications service. The evidence also indicates that this practice is the result of a business decision made by BellSouth. Moreover, BellSouth has declined to eliminate this practice, contending that it would result in increased costs and decreased efficiency. The record does not, however, reflect that BellSouth cannot provision its FastAccess service over an FDN voice loop or that doing so would be unduly burdensome. As such, we find that this practice unreasonably penalizes customers who desire to have access to voice service from FDN and DSL service from BellSouth. Thus, this practice is in contravention of Section 364.10, Florida Statutes, and Section 202 of the Act. Furthermore, because we find that this practice creates a barrier to competition in the local telecommunications market in that customers could be dissuaded by this practice from choosing FDN or another ALEC as their voice service provider, this practice is also in violation of Section 364.01(4), Florida Statutes.

Conclusion

This is a case of first impression and we caution that this decision should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service, but as an exercise of our jurisdiction to promote competition in the local voice market. Pursuant to Sections 364.01(4)(b), (4)(d), (4)(g),

and 364.10, Florida Statutes, as well as Sections 202 and 706 of the Act, we find that for the purposes of the new interconnection agreement, BellSouth shall continue to provide its FastAccess Internet Service to end users who obtain voice service from FDN over UNE loops.

IV. BROADBAND UNE LOOP

We have also been asked to decide whether BellSouth should be required to offer an unbundled broadband loop as a UNE to FDN. The point of controversy centers around the fact that FDN's proposed broadband loop would include the packet switching functionality of the DSLAM located in the remote terminal. BellSouth witness Williams argues that "FDN's proposed new broadband UNE is not recognized by the FCC, nor the industry, and includes functionality which the FCC and this Commission have been very clear in their intent not to require ILECs to provide on a UNE basis."

BellSouth witness Ruscilli cites the FCC's 1999 *UNE Remand Order,*[4] in which the FCC stated that "[t]he packet switching network element includes the necessary electronics (e.g., routers and DSLAMs)." *UNE Remand Order* at ¶304 He asserts that the "FCC then expressly stated 'we decline at this time to unbundle the packet switching functionality, except in limited circumstances'." (Emphasis added by witness) *UNE Remand Order* at ¶306 The "limited circumstances" in which ILECs are required by the FCC to unbundle packet switching are contained in 47 C.F.R. Section 51.319 (Rule 51.319). Rule 51.319(c)(5) states:

> (5) An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capability only where each of the following conditions are satisfied.
>
> > (i) The incumbent LEC has deployed digital loop carrier systems [DLC], including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the

[4] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Third Report and Order, Order No. FCC 99-238; 15 FCC Rcd 3696 (1999), *remanded*, United States Telecom Association v. FCC, No. 00-1012, Consolidated with 01-1075, 01-1102, 01-1103, No. 1015, consolidated with 00-1025, 2002 WL 1040574 (D.C. Cir. May 24, 2002).

From: "Richard Hovey" <RHOVEY@fcc.gov>
Date: Wed, 17 Jul 2002 12:57:19
To: <dave.baker@corp.earthlink.net>
Subject: split billing

I was mistaken in my question during this morning's ex parte meeting concerning split billing (I used the example of SBC and Earthlink). The comment on the record that I had in mind referred to SBC and Texas.net.

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513077918

Richard Hovey
FCC Office of Engineering and Technology

Ex Parte Presentation
CC Dkt. Nos. 02-33, 01-337, 01-338

EarthLink, Inc.
KEY POINTS FOR FCC MEETINGS
July 17, 2002

- EarthLink offers Internet access service across all *available* broadband platforms.
- In practice, DSL and cable modem service are virtually the only broadband options: cable is largely foreclosed to EarthLink and its customers, and more often than not DSL is the only option available to EarthLink for its customers.
- ILEC-provided wholesale DSL service is legally required under both FCC and federal court precedent to be regulated as a Title II, common carrier service, and no new facts exist to merit a different result when applying that precedent.
- ILECs have not stated specifically what difficulty the *Computer Inquiry* rules impose on them, nor have ILECs explained how elimination or amendment of specific *Computer Inquiry* rules would ameliorate such difficulty.
- ILECs have already been granted some regulatory relief as to pricing of wholesale DSL in the *Pricing Flexibility Order*.
- Both removing ILEC-provided wholesale DSL from Title II and eliminating *Computer Inquiry* protections will lead to increased discrimination against non-affiliated ISPs and their customers, resulting in less choice, higher prices, and degraded service to end-users.
- Hundreds of thousands of consumers *currently* rely on the non-discriminatory provisioning of ILEC wholesale DSL service to independent ISPs.

Contacts:

Dave Baker: 404-748-6648
Kenneth Boley: 202-887-6230