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May 27, 2004

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*
Docket No. 01-00987

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's *Response to Cinergy's Motion for Summary Judgment*. Copies of the enclosed are being provided to counsel of record

Very truly yours,

Guy M. Hicks

GMH ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*

Docket No. 01-00987

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC.'S TO CINERGY'S MOTION FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc ("BellSouth") files this response to Cinergy Communications, Inc.'s ("Cinergy") May 4, 2004 *Motion for Summary Judgment* on the DSL over UNE-P issue ("Cinergy's *Motion*" or "the *Motion*").

INTRODUCTION

Cinergy's *Motion* is a thinly-veiled attempt to relitigate the DSL over UNE-P issue, an issue already settled as a matter of law by both the Federal Communications Commission ("FCC") and the Tennessee Regulatory Authority (the "Authority"). In its *Triennial Review Order* ("TRO"), the FCC unanimously rejected the CLECs' efforts to compel ILECs into providing broadband service to CLEC UNE voice customers.[1] After a three-day evidentiary hearing, the Authority rejected ITC^DeltaCom Communications, Inc.'s ("DeltaCom") arguments and ruled in a manner consistent with federal law on the DSL over UNE-P issue.[2] Cinergy now asks for the same order that DeltaCom sought in

[1] Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 17141, ¶ 270 (2003)

[2] *In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*; Docket No 03-00119

the DeltaCom arbitration – that BellSouth be compelled by the Authority to provide broadband service to CLEC UNE-P customers. There is no legal basis for the Authority to change course and reverse itself on this issue. Cinergy's *Motion* raises nothing new. The Authority, which has long recognized the importance of consistent orders, should deny Cinergy's *Motion*.

Cinergy seeks to side-step the Authority's ruling in the DeltaCom arbitration by suggesting that it is making a new argument based on the TRO. Cinergy argues that the commingling rules in the TRO compel a different result. What Cinergy fails to point out to the Authority is that DeltaCom made the same commingling argument to the Authority in the DeltaCom arbitration. None of the Directors on the panel was persuaded by that argument

Cinergy claims in its *Motion* that it is raising a new "wholesale" DSL over UNE-P issue. Cinergy claims that this is a different issue than the issue decided in the DeltaCom arbitration, which Cinergy characterizes as a "retail" DSL over UNE-P issue. Specifically, Cinergy claims that it is seeking access to BellSouth's wholesale DSL transport service. BellSouth's wholesale DSL transport service is a ***federally-regulated interstate service subject to federal tariffs and thus within the exclusive jurisdiction of the FCC.***[3] Moreover, Cinergy's *Motion* relies on language from BellSouth's FCC wholesale DSL tariff.[4] Clearly, this argument is a matter for the FCC, not the Authority, to resolve. As federal courts have repeatedly held, issues relating to

(the "DeltaCom arbitration") The Authority's deliberations with respect to the DSL over UNE-P issue took place on January 12, 2004 Director Ron Jones dissented from the majority's ruling

[3] *See* fn 2 at page 2 of Cinergy's *Motion*

[4] See page 6 of Cinergy's *Motion*

federal tariffs filed with the FCC must be addressed by the FCC, not by state public service commissions.

In any event, as explained below, Cinergy's commingling argument, which is the sole basis upon which Cinergy bases its *Motion*, is flatly inconsistent with the TRO itself. The TRO specifically addresses and resolves the DSL over UNE-P issue, and Cinergy's attempts to bootstrap general language from the commingling rules to undermine that specific result must fail. Moreover, by their terms, the commingling rules do not apply in this circumstance. They involve a circumstance where a CLEC wants to combine a UNE facility with a non-UNE facility. That is not what Cinergy is seeking. Instead, it wants to buy a facility as a UNE and then force BellSouth to provide service over that same facility.

Finally, there is another reason why the Authority should not grant Cinergy's *Motion* Cinergy's commingling argument is now pending at the FCC. The commingling argument made by Cinergy in its *Motion* to the Authority is exactly the same argument made by Cinergy to the FCC in response to BellSouth's December 9, 2003 *Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service by Requiring BellSouth to Provide Wholesale or Retail Broadband to CLEC UNE Voice Customers* ("*Declaratory Ruling Proceeding*").[5] The FCC, not the Authority, is the proper forum to address this argument.

[5] This matter is pending before the FCC in WC Docket No 03-251 Cinergy recently requested rocket docket treatment of a separate FCC complaint that it hopes to file with respect to the same argument

I. FEDERAL LAW PROVIDES THAT ILECS MAY NOT BE COMPELLED INTO PROVIDING BROADBAND SERVICES TO CLEC UNE VOICE CUSTOMERS.

It is now settled federal law that ILECs may not be dragooned into providing broadband service to CLEC UNE voice customers. In the TRO, the FCC expressly held that ILECs need not provide data services on CLEC UNE voice lines. In paragraph 270 of the TRO, the FCC rejected CompTel's request that the FCC establish a low-frequency portion of the UNE loop as a way of requiring BellSouth to provide DSL service to CLEC UNE voice customers. The FCC expressly concluded that, contrary to CompTel's position, forcing BellSouth to offer broadband service is not pro-competitive. Rather, competition and consumers benefit if CLECs have incentives either to develop competing broadband service themselves or to "partner" with another competitive provider "to take full advantage of an unbundled loop's capabilities."[6]

BellSouth cannot put this point any better than a federal court recently did in rejecting a class-action complaint based on BellSouth's DSL over UNE-P policy.

> [T]he FCC, in its *Triennial Review Order*, has already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customer, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus harm consumers [7]

Recent comments filed by other parties in the FCC's *Declaratory Ruling Proceeding* underscore this Although Americatel opposes BellSouth's request for relief in that proceeding, Americatel forthrightly concedes that, in the TRO, the FCC decided

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[6] 18 FCC Rcd at 17141, ¶ 270

[7] *Levine v BellSouth Corp*, 302 F Supp 2d 1358, 2004 U S Dist LEXIS 23253 at p 9 (attached as Exhibit 1) Consistent with the Authority's ruling in the DeltaCom Arbitration, the *Levine* Court also squarely determined that BellSouth's practice does not constitute an illegal "tying" arrangement The FCC also rejected CompTel's "tying" claim in the TRO See TRO at ¶ 276

"to permit ILECs to refuse to provide DSL services to CLEC voice customers".[8] Catena, an equipment make whose sole interest in participating in the *Declaratory Ruling Proceeding* is in enhancing broadband deployment, similarly explains that the FCC has "already determined these issues" and that state commission rulings compelling BellSouth to provide DSL over UNE-P are "inconsistent" with the TRO.[9]

The TRO further establishes that, where, as here, the FCC has found "no impairment", state commission decisions imposing the same obligation rejected by the FCC will almost invariably be preempted under 47 USC § 251(d)(3).[10] The TRO likewise establishes that states may not "thwart" or "frustrate" the FCC's judgment of national policy by adopting contrary requirements.[11]

Indeed, even before the TRO, the FCC repeatedly concluded that BellSouth's policy was not merely consistent with federal law, but also affirmatively nondiscriminatory. For instance, in the *Georgia Louisiana 271 Order*,[12] the FCC not only rejected claims that BellSouth's policy violated federal law, but also found that "[f]urthermore," in light of the ability to engage in line splitting, it "cannot agree" with the claims made by AT&T, CompTel, and others that the same policy at issue here is "discriminatory" [13]

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[8] Americatel at 15, *see id* at 4 in WC Docket No 03-251 (acknowledging that the FCC has "bar[red] the states from requiring ILECs to provide DSL service to CLEC customers")

[9] Catena at 6, 7, *see also* Verizon at 7-8 in WC Docket No 03-251

[10] *See id* at 17101, ¶195

[11] 18 FCC Rcd at 17099-100, ¶ 92, 94 , 196

[12] Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* 17 FCC Rcd 9018 (2002) ("*Georgia/Louisiana 271 Order*")

[13] 17 FCC Rcd at 9100-01, ¶157 & n 562

The FCC reiterated these conclusions in the *BellSouth Five-State 271 Order*,[14] where it again emphasized the ability of CLECs to engage in line splitting and again affirmatively rejected claims of discrimination. The FCC repeated its conclusion in the *Florida/Tennessee 271 Order*, rejecting claims that BellSouth's DSL over UNE-P policy was contrary to the public interest.[15]

As BellSouth noted at the outset, a federal court has recently explained that the TRO resolved this question. In dismissing with prejudice a class-action complaint challenging the same BellSouth policy at issue here, the federal court concluded that "the FCC, in its TRO, has already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus harm consumers".[16] The court thus properly read the TRO as "actively examin[ing] and affirmatively reject[ing] the claimed *competitive* benefits" of imposing a "regulatory duty" on BellSouth to offer broadband service to CLEC voice customers.[17] Also, as acknowledged by Cinergy in its *Motion*, BellSouth's wholesale DSL transport service is a federally-regulated and federally-tariffed interstate service [18]

Federal law is clear that state agencies lack authority to regulate interstate telecommunications services; that is emphatically the case as to services offered under

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[14] Memorandum Opinion and Order, *Joint application by BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, 17 FCC Rcd 17595 (2002) ("*BellSouth Five-State 271 Order*")

[15] *See* 17 FCC Rcd at 17683, ¶164, *see also* Memorandum Opinion and Order, *Application by BellSouth Corporation, et al , for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 25825 (2002) ("*Florida/Tennessee 271 Order*"), and 17 FCC Rcd at 25922, ¶178

[16] *Levine*, slip op at 21

[17] *Id*

[18] *See* fn 2 at page 2 of Cinergy's *Motion*

a federal tariff filed with the FCC. BellSouth's wholesale DSL transport service is provided under such an interstate tariff, and thus it is subject to the exclusive jurisdiction of the FCC. State commission decisions that purport to interpret federal tariffs or that impose terms and conditions on that tariffed wholesale service either by itself or as a component of BellSouth's FastAccess® service are thus unlawful.

On December 9, 2003, BellSouth filed its *Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers.*[19] BellSouth requested that the FCC issue an expedited declaratory ruling to provide relief from certain state commission decisions that are directly contrary to the TRO, as well as other sources of federal law. The comment cycle in that matter is complete, and the parties are awaiting a decision from the FCC.

In its *Comments* to the FCC filed in response to BellSouth's *Request*, Cinergy argues that the commingling rules in the TRO require BellSouth to provide wholesale DSL over UNE-P,[20] the same argument it is now relying upon in its *Motion*. Cinergy claims in its *Comments* to the FCC that BellSouth is violating its federal DSL Transport tariff and thus the FCC must review this claim.[21] Cinergy's commingling argument to the Authority is based on the same false premise, that BellSouth's DSL over UNE-P policy violates FCC BellSouth Tariff FCC No. 1, BellSouth's wholesale DSL transport tariff. Cinergy's *Motion* states.

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[19] *See* FCC WC Docket No 03-251 The TRO invited parties to file petitions for declaratory ruling to address improper state decisions *See* ¶195 of TRO BellSouth filed its *Request* in response to that explicit invitation as a result of rulings made by PSCs in three other states

[20] *See Comments of Cinergy Communications in Opposition to Emergency Request for Declaratory Ruling* ("Comments") filed January 30, 2004 in WC Docket 03-251 at pp 2-4, 12-13

[21] *See* Cinergy's *Comments* in FCC WC Docket No 03-251 at p 13-14

> DSL is a tariffed, special access service which Cinergy wishes to purchase and "combine" with an unbundled loop carrying voice traffic. ***Based on the language in BellSouth's tariff***, Cinergy is now entitled to request, and BellSouth is obligated to provide, that DSL/UNE combination. (emphasis added)[22]

BellSouth's DSL Transport tariff is obviously a federal, not a state tariff. Cinergy's *Motion* is an invitation for the Authority to rule on an ***interstate*** service based on an argument that BellSouth is not complying with a ***federal*** tariff. The Authority should decline this invitation. The FCC's determination that BellSouth's wholesale DSL transport service be federally tariffed necessarily means the Authority lacks jurisdiction over that tariff.

Of particular relevance here, the FCC has concluded that wholesale DSL transmission service, when used for Internet access, is jurisdictionally interstate under the 10% rule applicable to such special access services.[23] The FCC thus concluded that DSL transmission for Internet access is an interstate "special access service...warranting ***federal*** regulation", and in particular, federal tariffing.[24]

As federal courts have repeatedly held, state commissions have no authority to regulate the terms and conditions of services offered under a federal tariff; indeed, if they did, that would undermine the uniformity that a federal tariff is intended to create.

As the Second Circuit has explained, "[t]he published tariff rate will not be uniform if the service for which a given rate is charged varies from state to state

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[22] *See* Cinergy's *Motion*, p 6
[23] *See GTE Tariff Order*, 13 FCC Rcd at 22476, ¶19
[24] *Id* at 22480, ¶25 (emphasis added)

> from investigation and regulating quality of service for federally tariffed special access services.[29]

Similarly, the New York Public Service Commission decided to seek a delegation of authority from the FCC because it lacked independent authority to regulate interstate special access.[30]

This same analysis applies in the present case as well. Because DSL, a form of interstate special access, is subject to the exclusive authority of the FCC, it cannot be regulated by the states.

Indeed, Cinergy's request that the Authority require BellSouth to provide DSL over CLEC UNE loops is unlawful for the additional reason that it not only adds a term or condition to BellSouth's federally tariffed service, but also affirmatively contradicts BellSouth's filed tariff. BellSouth's DSL Transport tariff specifies that the "designated end-user premises location" must be "served" by an "existing, in-service, Telephone Company provided exchange line facility."[31] "Telephone Company" is a defined term in the tariff and it refers to BellSouth.[32] When a CLEC provides voice service to a customer using an unbundled loop, that customer is not being served by a "BellSouth-provided" exchange line facility. Indeed, the FCC has specifically determined that, when a CLEC leases a loop, it, ***not*** the incumbent carrier, controls that facility, and has the exclusive right to use

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[29] *Id* , at *18-*19

[30] *See* New York Pub Serv Comm'n Press Release, *PSC Strengthens Verizon's Service Quality Standards for "Special Services"* (May 23, 2001) (describing letter requesting FCC delegation of authority)

[31] BellSouth Tariff F C C No 1, § 7 2 17(A)

[32] *See* BellSouth Tariff F C C No 1, § 1 1 (Dec 16, 1996)

it.[33] BellSouth cannot be "providing" a facility that it does not control and that another party has the exclusive right to use.

BellSouth's FCC Tariff is fully consistent with the TRO. Cinergy is asking the Authority to order BellSouth to provide DSL broadband service to Cinergy's UNE voice customers. Clearly, any such order would fly in the face of the FCC's holding in the TRO that incumbents are not required to provide broadband services over the same UNE loops that CLECs use to provide voice services.[34] The FCC explained that, because voice CLECs can either provide voice and data services to their customers or engage in line splitting with other CLECs, incumbents should not be forced to provide broadband services to CLEC UNE voice customers.[35] In any event, this issue involves an interstate, federally tariffed service that is subject to the FCC's jurisdiction.

Finally, there is no substance to Cinergy's assertion that BellSouth has violated the TRO's commingling requirements. As the FCC has explained, "commingling" in this context "mean[s] the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling ..., or the combining of a UNE or UNE combination with one or more such wholesale prices."[36] But this issue does not involve "connecting", "attaching", or "combining" a UNE and a tariffed facility. Cinergy is not, for instance, trying to link a UNE loop to a special access transport facility. Rather, Cinergy is leasing a facility as a UNE, and

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[33] *See*, 47 C F R § 51 309; First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 15635, ¶268 (1996) ("[A] telecommunications carrier purchasing access to an unbundled network facility is entitled to ***exclusive*** use of that facility ") (emphasis added) (subsequent history omitted).

[34] *See* 18 FCC Rcd at 17141, ¶270

[35] *See Id*

[36] 18 FCC Rcd at 17342, 579

asking BellSouth to provide a tariffed service over the facility that the CLEC has leased. The commingling rules do not deal with that situation. Even if they did, the FCC's specific judgment in paragraph 270 would trump any more general determination in a separate part of the same order. It is telling that no other CLECs, including AT&T, have adopted Cinergy's position in the *Declaratory Ruling Proceeding* that the commingling rules in the TRO trump paragraph 270 of the TRO.

II. CINERGY IS SEEKING TO RELITIGATE THE SAME ISSUE PREVIOUSLY ADDRESSED BY THE AUTHORITY IN THE DELTACOM ARBITRATION.

Cinergy is seeking to relitigate the same issue previously addressed by the Authority in the DeltaCom Arbitration – whether BellSouth should be forced to continue providing DSL-based services on CLEC UNE lines. Cinergy relies on a single footnote in its *Motion* in an attempt to distinguish the relief sought in its *Motion* from the DSL over UNE-P issue previously decided by the Authority. This is a distinction without a difference, as demonstrated by the fact that Cinergy seeks the ***same relief*** sought by DeltaCom.[37]

Specifically, in its *Motion*, Cinergy asks the Authority to compel BellSouth to provide DSL over UNE-P voice lines.[38] Cinergy further states that this is the same issue the CLECs addressed in the Tennessee 271 Settlement Agreement. Cinergy states in its cover letter to the Authority that

> this same issue was recently raised in TRA Docket 97-00309 (BellSouth's 271 Application). The 271 Settlement Agreement states that the CLECs may request that the TRA open a generic contested case proceeding to address expeditiously ***the issue of***

[37] In fact, a Cinergy witness, Robert A Bye, testified in support of DeltaCom's position during the DeltaCom arbitration hearing

[38] *See* Cinergy's cover letters accompanying its *Motion* dated May 4, 2004 and September 9, 2002

BellSouth's provision of DSL service to CLEC voice customers
...[39]

While Cinergy states in its cover letter that the CLECs never sought such a generic proceeding based on "a number of reasons," it is likely that the FCC's subsequent unanimous decision in the TRO with respect to DSL over UNE-P was reason enough to dampen the CLECs' enthusiasm for a generic proceeding

Issue 25 from the DeltaCom Arbitration is the same issue addressed in both Cinergy's *Motion* and the 271 Settlement Agreement. Specifically, Issue 25 in the DeltaCom Arbitration was:

> Should BellSouth continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end-user on that same line?[40]

It is clear that Cinergy's *Motion* seeks the same result that DeltaCom sought in its arbitration – a result the Authority correctly declined to adopt in the DeltaCom Arbitration.

After hearing three days of testimony, including pre-filed testimony and extensive cross-examination on the DSL over UNE-P issue, the Authority ruled in January of this year that BellSouth was not required to provide DSL where DeltaCom provides UNE-P local voice service.[41] Both BellSouth and DeltaCom submitted numerous legal arguments in support of their respective positions on this issue. The Authority deliberated and decided, consistent with federal law, not to compel BellSouth to provide DSL to UNE or UNE-P voice customers of DeltaCom – the same relief Cinergy seeks in

[39] *See* p 3 of Settlement Agreement signed in August 2002 in Docket No 97-00309 (emphasis added)
[40] *See* Issues Matrix updated January 13, 2004 in Docket No 03-00119 at p 4
[41] *See* p 10 of transcript of Authority deliberations of January 12, 2004 in Docket 03-00119

its *Motion*. Now Cinergy wants the Authority to reverse course based solely upon the dubious commingling argument.

DeltaCom made the same commingling argument in its arbitration that Cinergy relies upon exclusively in its *Motion*. In its Post-Hearing Brief, DeltaCom argued that under the Authority's new commingling rules, CLECs may purchase DSL from BellSouth's interstate tariff and combine that service with UNE-P. DeltaCom relied specifically on Paragraph 579 of the TRO, the same paragraph Cinergy now relies upon in its *Motion*.[42] None of the Authority Directors on the DeltaCom arbitration panel was persuaded by this argument.[43] In its *Motion*, Cinergy argues the same thing – that paragraph 579 of the TRO " .. give[s] Cinergy the right to purchase DSL service from BellSouth at the tariffed rate and 'combine' that service with an unbundled loop or a combination of UNEs, such as a UNE-P circuit."[44]

Cinergy seeks to side step the DeltaCom ruling by arguing that Issue 25 in that proceeding addressed a "retail" DSL over UNE-P issue, while Issue 12 in the Cinergy proceeding addresses a "wholesale" DSL issue. Actually, Issue 12 in the Cinergy arbitration makes no reference to a wholesale DSL over UNE-P issue. Issue 12 is

> Should BellSouth be required to offer line splitting access to the High Frequency Portion of the Loop (HFPL) when Cinergy purchases UNE-P loops from BellSouth to provide local service?[45]

Neither this issue statement nor Cinergy's accompanying position statement makes any mention of a "wholesale" DSL over UNE-P issue. Cinergy's position

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[42] *See* p 21-22 of DeltaCom's Post-Hearing Brief in Docket No 03-00119

[43] While Director Jones dissented from the majority's view, he did not rely on DeltaCom's commingling argument in his dissent

[44] *See* p 2 of Cinergy *Motion*

[45] *See* Issues Matrix filed by the parties on March 27, 2002 in Docket No 01-00987 BellSouth provides line splitting to CLECs in accordance with FCC requirements

statement seeks the same relief DeltaCom sought in its arbitration. DeltaCom requested that the Authority compel BellSouth to provide DSL service to their UNE-P voice customers.[46] Cinergy is now asking the Authority to compel BellSouth to provide DSL service to Cinergy's UNE-P customers It has been the Authority's practice not to relitigate arbitration decisions. When an issue previously ruled upon is raised again in subsequent arbitration proceedings, the Authority has consistently declined to hear the issue again in the subsequent proceeding. Cinergy should not be permitted to relitigate this issue under the guise of calling it a new wholesale issue while seeking the same result sought by DeltaCom.

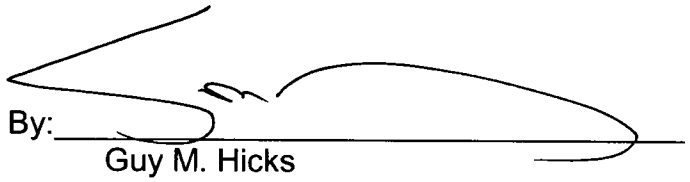
CONCLUSION

The Authority's ruling in the DeltaCom arbitration is fully consistent with the FCC's unanimous judgment in the TRO that ILECs should not be compelled into providing broadband service to CLEC's UNE-P voice customers. Cinergy's *Motion* seeks the same relief DeltaCom sought. There is no reason or legal basis for the Authority to reverse its earlier decision. Cinergy's commingling argument is not new – DeltaCom raised the same argument and none of the Directors in the DeltaCom arbitration was persuaded by it. The commingling argument, which is currently pending at the FCC, is based on the false premise that BellSouth's DSL over UNE-P policy is inconsistent with its federal DSL Transport tariff. The FCC, not the Authority, should address this argument. In any event, Cinergy's commingling argument is flatly inconsistent with the TRO itself. For all of these reasons, BellSouth requests that the Authority deny Cinergy's *Motion for Summary Judgment.*

[46] *Id*

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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302 F Supp 2d 1358, *, 2004 U S Dist LEXIS 2353, **,
2004-1 Trade Cas (CCH) P74,306, 17 Fla L Weekly Fed D 311

1 of 1 DOCUMENT

RICHARD LEVINE, on behalf of himself and others similarly situated, Plaintiff, vs. BELLSOUTH CORPORATION, Defendant.

CASE NO. 03-20274-CIV-GOLD/SIMONTON

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

302 F. Supp. 2d 1358; 2004 U.S. Dist. LEXIS 2353; 2004-1 Trade Cas. (CCH) P74,306; 17 Fla. L. Weekly Fed. D 311

January 27, 2004, Decided
January 27, 2004, Filed

DISPOSITION: [**1] Defendant's motion to dismiss granted Plaintiff's second amended complaint dismissed with prejudice All pending motions denied as moot

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: FOR PLAINTIFFS Kevin Love, Esq , Coral Gables, Florida

FOR PLAINTIFFS Scott Bursor, Esq , Nadeem Faruqi, Esq , New York, NY

FOR DEFENDANTS William Hamilton, Esq , Sanford Bohrer, Esq , and Scott D Ponce, Esq , Tampa, Florida

JUDGES: HONORABLE ALAN S GOLD, UNITED STATES DISTRICT JUDGE

OPINIONBY: ALAN S GOLD

OPINION:

[*1360] **ORDER ON DEFENDANT'S MOTION TO DISMISS**

THIS CAUSE is before the Court upon Defendant's Motion to Dismiss (DE # 44, filed October 15, 2003) Plaintiff's Second Amended Complaint (DE # 40, filed September 8, 2003) Plaintiff filed a Response (DE # 47) on November 14, 2003, and Defendant filed its Reply (DE # 50) on December 5, 2003 Oral Argument was held before the Court on Friday, January 9, 2003 The transcript of the proceedings (filed January 27, 2004) is referred to in this Order by the designation "Transcript at" followed by the cited page number

On August 11, 2003, the Court issued an Order granting Defendant's Motion to Dismiss (DE # 39) the Amended Class Action Complaint (DE # 5, filed March 12, 2003) [**2] The Order ("original Order") dismissed all three counts of the Amended Class Action Complaint ("First Amended Complaint") Count I for violations the Sherman Act, *15 USC § 1*, Count II for violations of the Sherman Act, *15 USC § 2*, and Count III for violations of the Communications Act, *47 USC § 202(a)* The First Amended Complaint was dismissed without prejudice

On September 8, 2003, Plaintiff filed a Second Amended Complaint, alleging the same three counts on behalf of purchasers of Digital Subscriber Line service from BellSouth based upon violations of federal law for anti-competitive practices Defendant seeks dismissal of the First Amended Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted The Court has jurisdiction pursuant to *28 USC § 1331*, federal question jurisdiction

Upon careful consideration of the parties' briefs, Plaintiff's allegations in the Second Amended Complaint, and applicable case and statutory law, the Court GRANTS Defendant's Motion to Dismiss with prejudice n1

n1 Plaintiff has already received one chance to amend his complaint to allege standing and state a claim for relief Although the Eleventh Circuit recently changed the rule regarding when a district court should dismiss a complaint with prejudice, this change has not altered the fact that district courts need only give a plaintiff one opportunity to amend a complaint to state a

claim *Cf Bank v Pitt, 928 F 2d 1108, 1112 (11th Cir 1991)* ("Where a more carefully crafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice "), *overruled by Wagner v Daewoo Heavy Indus America Corp , 314 F 3d 541, 542 (11th Cir 2002)* Accordingly, I am dismissing the Second Amended Complaint with prejudice

Under the old rule regarding dismissal with prejudice, district courts were required to dismiss complaints without prejudice when it appeared that a more carefully drafted complaint might state a claim upon which relief could be granted *Id* This rule applied even where the plaintiff never sought leave to amend *Id* Under the new rule, however, "[a] district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court " *Wagner v Daewoo Heavy Indus America Corp , 314 F 3d 541, 542 (11th Cir 2002)* Plaintiff is represented by counsel and has not requested leave to amend the Second Amended Complaint These factors simply add to my decision to dismiss the Second Amended Complaint without prejudice

[**3]

[*1361] **I. Background**

Plaintiff's Second Amended Complaint purportedly brings a class action on behalf of purchasers who bought Digital Subscriber Line ("DSL") service in areas where BellSouth Corporation ("BellSouth") or a BellSouth affiliate is the incumbent local exchange carrier ("ILEC") Second Amended Complaint P1 As in the First Amended Complaint, Plaintiff states that BellSouth markets DSL service and local phone service through an illegal tying arrangement whereby customers wishing to purchase BellSouth's DSL service are forced to purchase local phone service from BellSouth *Id* Plaintiff alleges that this prevents customers from obtaining lower-priced local phone service from competitors (competitive local exchange carriers or "CLECs") and enables BellSouth to maintain a monopoly on local phone service where it is the ILEC *Id*

Plaintiff brings three counts in his Second Amended Complaint Count I for tying in violation of Section 1 of the Sherman Act, *15 USC § 1*, Count II for monopolization of local phone service in violation of Section 2 of the Sherman Act, *15 USC § 2*, and Count III for violation of Section 202(a) [**4] of the Communications Act (or the "1996 Act"), *47 USC § 202(a)* Plaintiff seeks injunctive and declaratory relief against the allegedly anticompetitive practices, and seeks to recover monetary damages for the difference in price between BellSouth's local phone service and lower-priced alternatives provided by competitors or the price that would obtain in a competitive market

The Second Amended Complaint makes new allegations regarding (1) "separate standalone loops," (2) the ability to enter into agreements with CLECs, (3) the definition of the market for DSL services, and (4) the differences in services Defendant offers to different consumers First, Plaintiff states that one way for BellSouth to provide DSL services to subscribers who choose to purchase local telephone service from CLECs, besides entering into a line sharing arrangement with the CLECs, is to provide DSL service over a separate standalone loop Second Amended Complaint P13 BellSouth allegedly has this capability because it "almost always" has more than one loop connecting a customer's premises to BellSouth's network, and CLECs "almost always" lease only one of the loops *Id* Plaintiff [**5] states that BellSouth already provides DSL service on a separate standalone loop to customers [*1362] of Florida Digital Network, Inc ("FDN") n2 *Id* at P22

n2 This case, however, arose before the Florida Public Service Commission ("FPSC"), under Florida statutes, as a result of a specific agreement between BellSouth and Florida Digital Network, Inc ("FDN") under which FDN petitioned for arbitration The FPSC stated in its 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 " brought by competitors based on specific agreements Exhibit A of Plaintiff's Opposition to Motion to Dismiss First Amended Complaint

Second, Plaintiff alleges that there is "no *bona fide* issue with regard to BellSouth's ability to obtain access to CLEC-leased loops for purposes of providing DSL service over those loops *Id* at P15 Plaintiff states that he is "not aware of any [**6] CLEC denying BellSouth permission to do so" and that several CLECs have petitioned the Federal Communications Commission ("FCC") to compel BellSouth to provide DSL service over CLEC-leased loops *Id* Plaintiff states that "MCI and Sprint, as well as other CLECs offering service's in Levine's area, would have agreed to allow BellSouth to

continue to provide DSL service to Levine in the event that Levine switched his local phone service" from BellSouth to a CLEC. *Id* at P49 Further, Plaintiff states that BellSouth can easily reach interconnection agreements with any CLEC because these agreements are "largely contracts of adhesion drafted by the ILEC " *Id* at P16 In the event that there is difficulty reaching an agreement, the Communications Act, *47 U S C § § 251-252*, provides for compulsory arbitration Second Amended Complaint P19 Plaintiff also argues that an interconnection agreement specifically addressing line-sharing is unnecessary, and as support, attaches a letter from Jerry Hendrix, Assistant Vice President for BellSouth Interconnection Services, to CLECs *Id* at P 18; Plaintiff's Exh A The letter states that pursuant to an order issued [**7] by the Louisiana Public Service Commission, BellSouth will accept DSL access over loops from CLECs operating in Louisiana via manual processing n3 Plaintiff's Exh A Plaintiff argues that an interconnection agreement specifically addressing line-sharing was unnecessary between Ameritech Michigan, another ILEC, and CLECs Second Amended Complaint P20 Ameritech was allegedly able to provide DSL service to CLEC customers "by employing a simple procedure requiring only a single phone call to switch a customer over to a CLEC's local phone service while continuing Ameritech's DSL service " *Id* at P20 According to Plaintiff, "Ameritech created a second billing telephone number for the high frequency portion of the loop, and billed the customer's DSL service to that number, while transferring the billing telephone number assigned to the low frequency portion of the loop to the CLEC " *Id*

n3 During Oral Argument, however, Defendant pointed out that the letter attached to the Second Amended Complaint further states, "If a CLEC does not have the terms and conditions in its BellSouth interconnection agreement, the CLEC should contact its BellSouth contract negotiator to amend its contract " Transcript at 32 Thus, Defendant argued, a specific interconnection agreement with a CLEC *is* necessary before BellSouth can provide DSL service over a CLEC-leased loop *Id* at 33

[**8]

Third, Plaintiff makes several new allegations regarding the market for DSL service, which it alleges is defined as the sales of services employing the DSL technology described in the Second Amended Complaint *Id* at PP23-40 Plaintiff states that cable modem service, satellite-based broadband service, and wireless broadband service are not interchangeable substitutes [*1363] for DSL service and do not compete directly with DSL service *Id* Plaintiff states that the market for local telephone service is defined as the sales of voice telephony services over the wireline local exchange network *Id* at P 41

Fourth, and finally, Plaintiff's new allegations involve violations of *§ 202(a)* of the Communications Act Plaintiff states that BellSouth offers DSL services to customers under different conditions *Id* at P75 Plaintiff alleges that BellSouth offers DSL service on separate standalone loops to FDN customers and DSL service through line-sharing arrangements with CLECs in Louisiana, but not to Plaintiff and other class members *Id* According to Plaintiff, the "differences in terms and conditions under which BellSouth offers DSL service are unreasonable " *Id* at P77 [**9]

In its Motion to Dismiss, Defendant seeks dismissal of Plaintiff's Second Amended Complaint for lack of subject matter jurisdiction pursuant to *Fed R Civ P 12(b)(1)* and for failure to state a claim upon which relief may be granted pursuant to *Fed R Civ P 12(b)(6)*

II. Standard

In its Motion to Dismiss, Defendant seeks dismissal of Plaintiff's Second Amended Complaint pursuant to both *12(b)(1)* and *12(b)(6)* Under *Fed R Civ P 12(b)(1)*, the "plaintiff bears the burden of establishing that the court has jurisdiction " *Rosner v United States, 231 F Supp 2d 1202, 1205 (S D Fla 2002)* (citing *Menchaca v Chrysler Credit Corp , 613 F 2d 507 (5th Cir 1980))* (citation omitted) n4 The Eleventh Circuit has stated that "because a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction, a court must zealously insure that jurisdiction exists over a case " *Smith v GTE Corp , 236 F 3d 1292, 1299 (11th Cir 2001)* (citations omitted) Where, as Defendant states is the [**10] case here, the defendant makes a "facial attack" upon the complaint rather than a factual attack, "the plaintiff is afforded safeguards similar to those provided in opposing a *Rule 12(b)(6)* motion -- the court must consider the allegations of the complaint to be true " *Broward Garden Tenants Ass'n v EPA, 157 F Supp 2d 1329, 1336 (S D Fla 2001)* (citation omitted)

n4 All Fifth Circuit decisions prior to October 1, 1981 are binding precedent on the Eleventh Circuit *See Bonner v Prichard, 661 F 2d 1206, 1209 (11th Cir 1981)*

To warrant dismissal of a complaint under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, it must be "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" *Blackston v Alabama, 30 F 3d 117, 120 (11th Cir 1994)* (quoting *Hishon v King & Spalding, 467 U S 69, 73, 104 S Ct 2229, 2232, 81 L Ed 2d 59 (1984))* [**11] Determining the propriety of granting a motion to dismiss requires courts to accept all the factual allegations in the complaint as true and to evaluate all inferences derived from those facts in the light most favorable to the plaintiff *See Hoffend v Villa, 261 F 3d 1148, 1150 (11th Cir 2001)* (citation omitted), *cert denied, 535 U S 1112, 153 L Ed 2d 159 (2002)* "Unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the complaint should not be dismissed on grounds that it fails to state a claim upon which relief can be granted *Beck v Deloitte & Touche, 144 F 3d 732, 736 (11th Cir 1998)* (citation omitted), *reh'g denied, 189 F 3d 487 (11th Cir 1999)* Nevertheless, to survive a motion to dismiss, a plaintiff must do more than merely "label" his claims *Excess Risk Underwriters, Inc v Lafayette Life Ins Co, 208 F Supp 2d 1310, 1313 (S D Fla 2002)* Moreover, when on the [*1364] basis of a dispositive issue of law no construction of the factual allegations will support the cause of action, dismissal of the complaint [**12] is appropriate *Id (citing Marshall County Bd of Educ v Marshall County Gas Dist, 992 F 2d 1171, 1174 (11th Cir 1993))*

III. Analysis

First, I shall describe the implications of a recent FCC order on this case which Defendant claims requires dismissal Second, I shall explain why Plaintiff's new claims regarding DSL service over CLEC-leased loops do not cure the First Amended Complaint's standing defects under the Sherman Act Third, I shall address Plaintiff's failure to state a claim for relief under the Sherman Act Finally, I shall discuss the insufficiency of Plaintiff's new allegations regarding violations of the *Section 202(a) of the Communications Act*

(A) The FCC Order

Defendant first argues for dismissal based on an order the FCC released on August 21, 2003 (the "FCC order") Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos 01-338 *et al*, FCC 03-36 (rel Aug 21, 2003), *petitions for review pending, United States Telecom Ass'n v FCC*, Nos 03-1310, *et al* (D C Cir) (excerpts attached [**13] as Def Exh A) In the order, the FCC refused to impose a duty on ILECs to provide DSL services over the same loop as a competing provider *Id* Defendant argues that the FCC, applying the standards of the 1996 Act, already rejected the claim that BellSouth should be required to provide DSL service to a CLEC voice service customer, and that BellSouth cannot be subjected to inconsistent standards under the 1996 Act and the Sherman Act Thus, according to Defendant, the antitrust claim should be dismissed Motion to Dismiss at 14 (*citing Gordon v New York Stock Exch, 422 U S 659, 682, 45 L Ed 2d 463, 95 S Ct 2598 (1975), see also Covad Communications Co v BellSouth Corp, 299 F 3d 1272 (11th Cir 2002)), reh'g denied, 314 F 3d 1282 (11th Cir 2002)* (en banc), *and vacated and cert granted,* Civ No 02-1423, *157 L Ed 2d 1040, 124 S Ct 1143, 2004 U S Lexis 670 (U S Jan 20, 2004)* Plaintiff argues that although Defendant cites several cases finding implied repeal of the antitrust laws in favor of regulation by the Securities and Exchange Commission ("SEC"), it is not aware of any court that has concluded that antitrust immunity was present based on FCC [**14] regulatory action Opposition at 9

The Eleventh Circuit concluded in *Covad* that the 1996 Act cannot create antitrust immunity. *299 F 3d 1272* In this case, the defendant sought to dismiss an antitrust claim against it The court first examined whether the 1996 Act's regulation of local telecommunications markets precludes the application of the Sherman Act so that a claim based on facts "inextricably linked" to an alleged violation can never, as a matter of law, form the basis of an independent Sherman Act claim *Id at 1279* Because the court concluded that the answer was no, it then analyzed whether the plaintiff had adequately alleged a violation of the Sherman Act *Id at 1279-1280* In addressing the first issue, the court began with the premise that although courts have determined that if two statutes are deemed to be plainly repugnant to each other, then Congress has implicitly limited one or the other, "courts should be reluctant to imply a limitation resulting in antitrust immunity" *Id at 1280* (citation omitted) The court examined the language of the 1996 Act, paying particular attention to its saving [**15] clauses

> SAVINGS CLAUSE nothing in this Act or the amendments made by this Act shall be construed to modify, impair, [*1365] or supersede the applicability of any of the antitrust laws
> NO IMPLIED EFFECT This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local laws unless expressly so provided in such Act or amendments

Id (citing Telecommunications Act of 1996, sec 601(b)(1), (c)(1), § 152 note, 110 Stat 56, 143 (1996)) Based on this language, the court concluded that "plain repugnancy" clearly could not be found between the 1996 Act and antitrust laws *Id* The court stated, "An act that expressly preserves the antitrust laws' applicability and fully subjects anticompetitive activities to them cannot be read to impliedly repeal those laws " *Id at 1280-1281* The court bolstered its conclusion with references to the legislative history indicating Congress' intention that the 1996 Act and the antitrust laws coexist *Id at 1281-1283* In reaching its conclusion, the court disagreed with *Goldwasser v Ameritech Corp , 222 F 3d 390 (7th Cir 2000),* [**16] cited by BellSouth, to the extent that "it is read to say that a Sherman Act antitrust claim cannot be brought as a matter of law on the basis of an allegation of anti-competitive conduct that happens to be 'intertwined' with obligations established by the 1996 Act " *Covad Communications, 299 F 3d at 1282*

BellSouth has properly advised that the United States Supreme Court has granted the petition for certiorari in the *Covad* case, vacated the Eleventh Circuit's decision, and remanded the cause to the Eleventh Circuit for further consideration in light of its recent decision in *Verizon Communications, Inc v Law Officers of Curtis v Trinko, LLP,* No 02-682, *157 L Ed 2d 823, 124 S Ct 872, 2004 U S LEXIS 657 (U S January 13, 2004)* ("Trinko") *See Covad, 157 L Ed 2d 1040, 124 S Ct 1143, 2004 U S Lexis 670* Accordingly, the Eleventh Circuit's *Covad* decision lacks precedential value *Whole Health Chiropractic & Wellness, Inc v Humana Med Plan, Inc , 254 F 3d 1317, 1319 n 3 (11th Cir 2001)*

Notwithstanding, the Supreme Court, in *Trinko,* disagreed that regulated entities, such as the Defendant, are shielded from antitrust scrutiny by the doctrine [**17] of implied immunity under the 1996 Telecommunications Act *2004 U S LEXIS at *15* The Court held that Congress "precluded that interpretation under the antitrust-specific saving clause under Section 601(b)(1) of the Act *Id* As noted by the Court, "This bars a finding of implied immunity " *Id* But the Court also held that" just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards, that would be equally inconsistent with the saving clause's mandate that nothing in the Act "modify, impair, or supersede the applicability of the antitrust laws " *Id* Accordingly, it is necessary first to determine if the Plaintiff has standing to claim a violation of those laws, and, if so, whether the activity of which Plaintiff complains violates preexisting antitrust standards

(B) Standing

I dismissed Plaintiff's First Amended Complaint for lack of constitutional standing Plaintiff's Second Amended Complaint now attempts to address the deficiencies regarding standing in the First Amended Complaint by adding two sets of allegations First, Plaintiff alleges that "every CLEC doing [**18] business in the nine states in which BellSouth is the ILEC is willing to allow BellSouth to provide DSL service over its leased loop " Thus, Plaintiff claims that there is "no bona fide issue with regard to BellSouth's ability to obtain access to CLEC-leased loops " P15 Moreover, Plaintiff alleges there is no "bona fide issue with regard to BellSouth's ability to reach an interconnection agreement with any CLEC" because such [*1366] "agreements are largely contracts of adhension drafted by by BellSouth, and accepted on a take-it-or-leave-it basis by the CLEC." P16 The Second Amended Complaint also alleges that the "Communications Act provides for compulsory arbitration should there be any difficulty reaching an agreement on the terms of an interconnection agreement " P19 Second, Plaintiff alleges that "BellSouth could also provide DSL service to CLEC customers over a separate standalone loop, regardless of whether there is an interconnection agreement in place allowing for line-sharing on the CLEC's loop " P22

Significant constitutional standing issues remain regarding providing DSL service over CLEC-leased loops Further, based on the recent *Trinko* decision, I conclude that [**19] Plaintiff lacks standing as a person to allege that BellSouth should provide DSL access over CLEC-leased loops Although the allegations concerning standalone loops may cure the standing defects, these allegations still fail to state a claim for relief under the Sherman Act, *see infra* Part III (C), and under *§ 202(a), see infra* Part III (D), as I will discuss in the next two sections

(1) Constitutional Standing

The issue of constitutional standing as to Counts I and II of the Second Amended Complaint remains a problem As in the original Order, it is important to start with what the allegations in the Second Amended Complaint do *not* involve in terms of standing First, they do not involve a claim by a competitor, or class of competitors, that BellSouth has refused to enter into "interconnection agreements" to permit consumers from having access to the competitor's voice service or Digital Subscriber Line at a cheaper rate Second, there is no allegation by a competitor, or class of competitors, that BellSouth, having entered into an interconnection agreement, has engaged in anticompetitive behavior to stifle competition Third, there is no allegation by any competitor [**20] that BellSouth has refused to provide DSL service to customers who actually have purchased

voice service over lines leased by CLECs Fourth, there are no allegations that BellSouth has engaged in any anticompetitive behavior keeping competitors from being unable to offer DSL service or voice phone service to consumers over BellSouth's leased phone lines Based on these omissions, and for other reasons, I dismissed Plaintiff's First Amended Complaint for lack of constitutional standing

The essence of Plaintiffs Second Amended Complaint rests on BellSouth's purported failure to offer DSL service to consumers who purchase voice service from CLECs It is undisputed on the face of the Second Amended Complaint that BellSouth can offer DSL service to customers only (1) over the loop leased by the CLEC or (2) over a separate standalone loop To the extent Plaintiff attempts to allege an antitrust violation by BellSouth's failure to offer DSL service over a CELC's leased loop, constitutional standing is lacking for the same reasons set forth in the original Order As I discussed in that Order, "the causation and redressability requirements for standing are not met because Plaintiff's injury [**21] 'is not fairly traceable to BellSouth alone '" Order at 8 "Plaintiff's arguments are inextricably tied to the consent of unidentified independent parties not before the Court who are under no alleged obligation to accept BellSouth's DSL service, as compared to some other DSL provider " *Id*

Plaintiff has not cured this essential standing deficiency by virtue of his amended allegations with respect to the claim that BellSouth must provide DSL service over CLEC-leased loops To have standing, a plaintiff must show (1) he has suffered an injury in fact that is (a) concrete [*1367] and particularized and (b) actual or imminent, not conjectural or hypothetical, (2) the injury is fairly traceable to conduct of the defendant, and (3) it is likely, not just merely speculative, that the injury will be redressed by a favorable decision *Kelly v Harris, 331 F 3d 817, 818 (11th Cir 2003)* (citing *Lujan v Defenders of Wildlife, 504 U S 555, 119 L Ed 2d 351, 112 S Ct 2130, 2136 (1992)*) n5 While Plaintiff alleges that "every CLEC doing business in the nine states in which BellSouth is the ILEC is willing to allow BellSouth to provide [**22] DSL service over its leased loops [P15]," Plaintiff does not allege, nor can it in good faith allege, that every CLEC would grant such permission on mutually acceptable concrete terms and conditions The terms and conditions on which BellSouth and any given CLEC might reach agreement are beyond the power of this Court to address, and, in the event of dispute, are subject to compulsory arbitration under the 1996 Act *See* P19 of the Second Amended Complaint The claim that CLECs are "willing to allow" BellSouth to provide DSL service is inherently speculative on its face because it concerns the actions of independent third parties whose behavior is not subject to any order of this Court n6 The allegation that such "interconnection agreements are largely contracts of adhesion drafted by the ILEC and accepted on a take-it-or-leave-it basis by the CLEC [P16]," is belied by the right to compulsory arbitration under the 1996 Act BellSouth simply may not compel a CLEC to accept any terms that are not consistent with the 1996 Act requirements n7 Moreover, the Plaintiff's [*1368] argument that any such arrangements that BellSouth or other incumbent LECs have made would have to comply [**23] with state-commission-imposed regulatory obligations, pending judicial challenge, negates, rather than support, Plaintiff's claim to standing The claim that state commission procedures are available to work out the terms of dealing between CLECs and ILECs emphasizes that the current lawsuit has been brought by the wrong party in the wrong forum

n5 In *Bennett v Spear, 520 U S 154, 117 S Ct 1154, 1161, 137 L Ed 2d 281 (1997)*, the Supreme Court states that "the irreducible constitutional minimum of standing contains three elements" (1) an injury in fact, (2) causation, and (3) redressability *520 U S at 167, 117 S Ct at 1163* (citation omitted). The second factor requires "a causal connection between the injury and the conduct complained of - the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court " *Id* The third factor requires "that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id* [**24]

n6 *See* original Order at 6 (*citing ASARCO, Inc v Kadish, 490 U S 605, 615, 109 S Ct 2037, 2044, 104 L Ed 2d 696 (1989)* ("Whether the [plaintiff's] claims of economic injury would be redressed by a favorable decision depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict "), *Florida Ass'n of Med Equip Dealers v Apfel, 194 F 3d 1227, 1230 (11th Cir 1999)* (causation requirement not met where allegations of harm deemed "too attenuated"), *Georgia State Conf of NAACP Branches v Cox, 183 F 3d 1259, 1264 (11th Cir 1999)* (concluding that causation not established where the injury was "attributable to the conduct and resources of private individuals, not the state"), *Region 8 Forest Serv Timber Purchasers Council v Alcock, 993 F 2d 800, 808 (11th Cir 1993)* (where it was "speculative" whether the court

could provide relief, the redressability requirement is not met)) Plaintiff's allegations of how third parties would negotiate and what type of terms they would seek in an interconnection agreement are merely speculative claims involving third parties, and thus do not sufficiently allege causation and redressability [**25]

n7 I concur with FPL's observation that the terms of such a bargain could well affect whether the alleged conduct would cause Plaintiff injury Plaintiff alleges only that BellSouth's customers "could save a few dollars on their local phone service by switching to a CLEC " Complaint, P 46 In the event the terms of dealings between BellSouth and the CLEC resulted in even minor costs to the provision of DSL service, Plaintiff's claim to injury would fail At this juncture, I have to speculate not only that there would be an agreement on terms, but that such agreement would not result in increase costs to Plaintiff and the class of customers such as to preserve the injury claim

In sum, the causation and redressability requirements for constitutional standing are not met because Plaintiff's injury is not fairly traceable to BellSouth alone Plaintiff's additional line-sharing allegations fail to address with problems with causation and redressability in the First Amended Complaint

(2) Trinko Standing as a "Person"

Based on *Trinko,* I conclude that Plaintiff lacks standing as a person [**26] to allege that the Sherman Act requires Defendant to provide DSL service over CLEC-leased loops During Oral Argument, Plaintiff principally relied on the Second Circuit's decision in *Law Offices of Curtis V Trinko, LLP v Bell Atlantic Corp , 305 F 3d 89 (2nd Cir 2002), rev'd* Civ No 02-682, *157 L Ed 2d 823, 124 S Ct 872, 2004 U S LEXIS 657 (U S Jan 13, 2004),* in support of his standing argument In that case, the Plaintiff, a local telephone service customer of AT&T, claimed that it was damaged when the defendant, Bell Atlantic, denied customers of AT&T, the plaintiff's local phone service provider, equal access to its local network *Id* It filed a class action pursuant to the *Clayton Act,* alleging that Bell Atlantic violated *§ 2 of the Sherman Act Id* It sought treble damages, a remedy that *§ 4 of the Clayton Act* makes available to "any person who has been injured in his business or property " *Id* In Justice Stevens' concurring opinion in *Trinko,* he addressed the threshold question of whether the plaintiff Law Offices was a "person" within the meaning of *§ 4 2004 U S LEXIS at *32* Justice Stevens concluded that the Law Offices lacked standing, and [**27] that he would not decide the merits of the *§ 2* claim unless and until such a claim is advanced by either AT&T or a similarly situated competitive local exchange carrier *Id at *34-*35* n8

n8 In the Second Circuit's *Trinko* decision, the court upheld the district court's conclusion that the plaintiff had antitrust standing and rejected the defendant's argument that the plaintiff was essentially an indirect purchaser who cannot recover antitrust damages under *Illinois Brick Co V Illinois, 431 U S 720, 97 S Ct 2061, 52 L Ed 2d 707 (1977),* which held that a customer of a customer who is overcharged by a monopolist does not have antitrust standing *305 F 3d at 105-107.* The rationale for the *Illinois Brick* rule is that it is difficult to calculate the damages suffered by an indirect purchaser. *See 431 U S at 737, 97 S Ct at 2070* The indirect purchaser is only damaged to the extent that the direct purchaser passes on to it the overcharge resulting from the anticompetitive conduct Any such calculation would be imprecise and could result in double recovery if both the direct and indirect purchasers sue and the calculations in their suits differed

[**28]

Similar to the plaintiff in *Trinko,* Plaintiff, a local telephone customer of BellSouth, requests treble damages under the Clayton Act, *15 U S C § 15(a). See* Second Amended Complaint P 22 In my view, Justice Steven's reasoning applies, and it is necessary to determine not only constitutional standing, but whether Plaintiff has standing as a "person" under the Clayton Act To the extent the Second Amended Complaint continues to allege Plaintiff's inability to receive DSL service from BellSouth over a loop that has been leased to a CLEC, I conclude that Plaintiff is not a "person" because of there is only an indirect relationship between the Defendant's alleged misconduct and the Plaintiff's asserted injury The missing CLECs, as the more direct victim of BellSouth's [*1369] alleged misconduct, would be in a far better position than Plaintiff, as a local telephone service customer, to vindicate the public interest in the enforcement of the antitrust laws *See Trinko at *32-*35*

(C) Plaintiff's Second Amended Complaint Has Failed to State a Claim under the Sherman Act.

In the original Order, I concluded that Plaintiff had failed to state a claim under [**29] the Sherman Act The Second Amended Complaint attempts to cure this problem by adding allegations regarding standalone loops, CLEC-leased loops, and the DSL service market

As I will explain below, for the reasons set forth in the original Order, the new standalone loop allegations fail to state a claim under the Sherman Act, and the new CLEC-leased loop allegations fail to state a claim under *§ 1 of the Sherman Act*. Although the allegations regarding the DSL service market may cure some of the *12(b)(6)* defects regarding Count II, based on the *Trinko* decision, I conclude that Plaintiff has not sufficiently alleged a violation of *§ 2 of the Sherman Act*, as I will explain below

(1) The new allegations regarding standalone loops fail to state a claim under the Sherman Act

In the original Order, I addressed Plaintiff's statement during Oral Argument that Defendant can provide DSL service over a separate standalone loop Original Order at 13 I stated, "The critical point is that Plaintiff's allegations do not include sufficient factual allegations supporting Plaintiff's theoretic argument that Defendant possesses that capability" *Id* Plaintiff's Second Amended Complaint [**30] does not remedy this problem

Plaintiff alleges that BellSouth could provide DSL service to CLEC customers over a standalone loop, regardless of whether there is an interconnection agreement in place allowing for line-sharing on the CLECs loop, as it does for FDN customers Second Amended Complaint at PP 13, 22, 49 DSL for FDN consumers, however, resulted from a specific agreement between BellSouth and FDN and a petition for arbitration in which the FDN actually requested the FCC to prohibit BellSouth from requiring its phone lines for its DSL service *See* Exh A to Opposition to Motion to Dismiss First Amended Complaint, incorporated by reference in Opposition at 1 Plaintiff has not specifically stated that BellSouth would be able to provide DSL service in this manner to customers who receive voice service from other CLECs Further, the Second Amended Complaint is devoid of any allegations that BellSouth has a right of access to these standalone loops There are no allegations regarding who has control of these loops that "almost always" (Second Amended Complaint P13) exist, and thus, the Court cannot draw any inferences that BellSouth would indeed have a right to use them [**31] to provide DSL services The allegation that BellSouth "almost always" has more than one loop connecting a customer's premises to its network and that CLECs' "almost always" lease only one of the loops (*Id* at P 13) does not sufficiently allege that BellSouth has the right to provide DSL service over a separate standalone loop without the consent of third parties not involved in this action

(2) The new allegations regarding CLEC-leased loops fail to state a claim under Section 1 of the Sherman Act

In my prior Order, I concluded that "Plaintiff's allegations are insufficient to plead a tying claim because they do not sufficiently support the contention that BellSouth has the right to offer DSL service when a different carrier is providing the tied product over the same line " Order at 13 Indeed, "Plaintiff [has] conceded [*1370] that BellSouth cannot provide DSL service over a line that has been leased by a CLEC without an agreement with the CLEC " *Id* at 8 To the extent Plaintiff continues to claim that BellSouth should have offered DSL service over a line that a CLEC has leased, he continues to fail to state a tying claim There is simply no tying case where a defendant [**32] has been held liable for failing to obtain the permission of a third party to offer the supposed tying product separately

(3) Plaintiff fails to state a claim under Section 2 of the Sherman Act

Plaintiff makes a number of allegations regarding the market for DSL service, which it defines as the sale of services employing the DSL technology Second Amended Complaint PP23-40 Defendant acknowledges that these allegations "may meet the legal standard for pleading that DSL service constitutes a distinct product market " Motion to Dismiss at 10 Plaintiff, however, has failed to plead that BellSouth has an unlawful monopoly in this market and has thus failed to state a claim under *§ 2 of the Sherman Act*

The thrust of Plaintiff's *§ 2* claim is that BellSouth has achieved or maintained monopoly power by exclusionary practices, including its practice of refusing to make DSL service available to consumers who choose to purchase local phone service from CLECs *§ 71* Generally, a plaintiff can establish that a defendant violates *§ 2 of the Sherman Act* by proving two elements (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance [**33] of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident *United States v Grinnell Corp , 384 U S 563, 570-71, 86 S Ct 1698, 16 L Ed 2d 778 (1966)* Applying these principles, the district judge in Covad, relying on the Seventh Circuit's opinion in *Goldwasser v Ameritech Corp , 222 F 3d 390 (7th Cir 2000)*, dismissed the Covad Sherman Act claims, holding that allegations that are based on duties established by the 1996 Act cannot form the basis of a violation of the Sherman Act because (1) "'affirmative duties to help one's competitors . do not exist under the unadorned antitrust laws" (quoting *Goldwasser, 222 F 3d at 400*), (2) "the 'elaborate

enforcement structure' of the 1966 Act precludes suits under the Sherman Act for ILEC duties because 'antitrust laws would add nothing to the oversight already available under the 1996 laws,'" (quoting *Goldwasser, 222 F 3d at 400-01*), and (3) even if such allegations could be entirely divorced from the 1996 Act context, such claims nonetheless would not constitute "allegations of a free [**34] standing antitrust claim" because "the elaborate system of negotiated agreements and enforcement established by the 1996 Act'" should not be "brushed aside by any unsatisfied party with the simple act of filing an antitrust action'" (*quoting Goldwasser, 222 F 3d at 401) See Covad, 299 F 3d at 1278 (quoting from* the district judge's order)

In its opinion reversing the district judge, the Eleventh Circuit concluded that Covad's Sherman Act claims fall under three different categories of alleged anti-competitive behavior, namely, denial of an essential facility, refusal to deal, and illegal manipulation of BellSouth's dual role as both Covad's wholesale supplier (of local exchange elements) and its retail competitor (for DSL) by engaging in a "price squeeze " *Id at 1284* Given that the Eleventh Circuit's Covad opinion is no longer binding precedent, the question arises as to whether, under the Supreme Court's *Trinko* decision, Plaintiff's antitrust claims fail to state a *Sherman Act § 2* claim

[*1371] In Plaintiff's Notice of Filing of Supplemental Authority (DE # 58, filed January 20, 2004) Plaintiff argues that the Supreme Court merely held that [**35] a complaint that alleges only violations of an incumbent LEC's regulatory obligations created by *47 U S C § 251(c)* does not state a claim under *§ 2* of the Sherman Act Plaintiff argues that "This aspect of the *Trinko* ruling has no application to this case because Plaintiff's allegations do not concern violations of any regulatory obligations, rather, the claims are based on longstanding antitrust doctrines concerning tying and refusals to deal, which are completely independent of the 1966 Telecommunications Act " BellSouth, however, in its Notice of Supplemental Authority (DE # 59, filed January 20, 2004) suggests otherwise I concur with BellSouth It seems odd indeed that a plaintiff consumer would be able to state a Sherman Act claim for failure to provide DSL on a standalone basis under the *Trinko* analysis while a CLEC with an interconnection agreement with BellSouth cannot n9 This particularly is the case where the FCC, in its *Triennial Review Order,* has already examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and it has determined not only that such a regulatory requirement would [**36] bring no benefit, but also that it would discourage investment and innovation and thus harm consumers Evidently, no one has even challenged that determination on review *See* Defendant's Notice of Supplemental Authority at 4 Because the FCC has already actively examined and affirmatively rejected the claimed *competitive* benefits of imposing, as a regulatory duty, the obligation that Plaintiff seeks to impose under the antitrust laws, no further antitrust scrutiny is warranted -- the regulatory structure "was an effective steward of the antitrust function " *Trinko, 2004 U S LEXIS at *9*

> n9 In *Trinko,* there were allegations of a refusal to cooperate with rivals, which can, under certain circumstances constitute anticompetitive conduct and violate *§ 2* Even given those circumstances, the Supreme Court concluded that " Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents " *2004 U S LEXIS at *22* The Supreme Court rejected the argument that the 1996 Act's extensive provision for access supports antitrust liability As stated by the Court, "We think the opposite The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access " *Id at *23*

[**37]

Further, in *Trinko,* the Court noted that a refusal to cooperate with rivals constitutes a violation of *§ 2* only in limited circumstances *2004 U S Lexis at *18* In distinguishing *Aspen Skiing Co v Aspen Highlands Skiing Corp , 472 U S 585, 601, 86 L Ed 2d 467, 105 S Ct 2847 (1985),* the *Trinko* Court emphasized two factors that were present in *Aspen Skiing* (1) the defendant's unilateral termination of a voluntary (and thus presumably profitable) course of dealing with its competitor and (2) the defendant's refusal to provide to the competitor its product for the retail price *Id at *19-*21* Neither factor is present in this case First, Defendant has not terminated prior agreements with CLECs allowing BellSouth DSL service over CLEC lines, thus, there is no presumption that this arrangement would be profitable, and there is no prior conduct that sheds light upon Defendant's motivation in not providing DSL service over CLEC-leased lines Second, just as in *Trinko,* Plaintiff is demanding a product BellSouth has never offered at all -- DSL service on a standalone basis -- and, accordingly, a product for which BellSouth has never set a retail price *2004 U* [**38] *S LEXIS at *20-*21* (contrasting the *Aspen Skiing* defendant's refusal to provide [*1372] to its competitor a product that it already sold at retail with "services allegedly withheld

[that] are not otherwise marketed or available to the public ") Plaintiff cannot argue that Defendant "turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher" (*Trinko, 2004 U S LEXIS at *20*)

In my view, the refusal to deal with consumers for DSL service as alleged in the Second Amended Complaint does not fit within the limited exception recognized in *Aspen Skiing* as narrowly construed in *Trinko* Accordingly, Count II should be dismissed for a failure to state a claim under *§ 2 of the Sherman Act*

(D) Plaintiff's Communications Act claim under Count III should be dismissed on the merits.

Finally, Plaintiff's Second Amended Complaint fails to state a claim under Section 202(a) of the Communications Act, *47 U S C § 202(a)* Plaintiff alleges that BellSouth violated this law by denying BellSouth DSL customers access to local phone service offered by CLECs Second Amended Complaint PP75-79 Plaintiff [**39] alleges that BellSouth's alleged actions constitute unjust and unreasonable discrimination in the provision of such facilities in violation of the Communications Act *Id* Plaintiff's new allegations are as follows (1) BellSouth offers DSL service on separate standalone loops to FDN customers and DSL service through line-sharing agreements with CLECs in Louisiana, but not to Plaintiff and other class members and (2) the "differences in terms and conditions under which BellSouth offers DSL service are unreasonable " *Id* BellSouth argues that providing DSL services to FDN and Lousiana CLEC customers is not unreasonable because it has been ordered to provide these services by a state regulatory agency Motion to Dismiss at 24 (*citing* Plaintiff's Opposition to Motion to Dismiss First Amended Complaint at 1, 2, 18, 19)

To make a discrimination allegation under *Section 202(a)*, Plaintiff must allege that "(i) the services are 'like', (ii) if so, the carrier is offering the service to other customers at a different price or under different conditions than those offered to [the plaintiff], and (iii) if such difference exists, it is unreasonable " *Telecom Int'l Am , Ltd v AT&T Corp , 280 F 3d 175, 199 (2d Cir 2001)* [**40] (internal quotation marks and citation omitted), *Competitive Telecomms Ass'n v FCC, 302 U S App D C 423, 998 F 2d 1058, 1061 (D C Cir 1993)* (same) Upon review of Plaintiff's allegations, I conclude that Plaintiff has not sufficiently alleged the third element of a claim under *Section 202(a) of the Communications Act* It is not unreasonable to treat FDN and Louisiana-based customers differently from other customers when a state regulatory agency orders it, and despite Plaintiff's suggestion to the contrary (Opposition at 18) the Court need not accept as true Plaintiff's legal conclusion that the differences are unreasonable *See Davila v Delta Air Lines, Inc , 326 F 3d 1183, 1185 (11th Cir 2003)* ("[A complaint's] unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal ") Thus, Plaintiff's new allegations in Count III are still insufficient to state a claim under the 1996 Act

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1 Defendant's Motion to Dismiss (DE # 44) is GRANTED Plaintiff's Second Amended Complaint is DISMISSED WITH PREJUDICE

2 This case is CLOSED All pending motions [**41] are DENIED AS MOOT

DONE AND ORDERED in Chambers at Miami, Florida, this 27 day of January, 2004

THE HONORABLE ALAN S. GOLD

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
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