

EXHIBIT B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Implementation of Session Law 2003-91,) ORDER CLARIFYING RULING
Senate Bill 814 Titled "An Act to Clarify the) ON PROMOTIONS AND
Law Regarding Competitive and Deregulated) DENYING MOTIONS FOR
Offerings of Telecommunications Services") RECONSIDERATION AND STAY

BY THE COMMISSION: On December 22, 2004, the Commission issued *Order Ruling on Motion Regarding Promotions*. On February 18, 2005, BellSouth Telecommunications, Inc. ("BellSouth") filed a Motion for Reconsideration or, in the Alternative, for Clarification, and for Stay. Also on February 18, 2005, Image Access, Inc. d/b/a New Phone ("New Phone") filed a Petition to Intervene and Comment Out of Time. The Commission granted New Phone's Petition to Intervene on March 3, 2005, and accepted New Phone's Comments for the record, but did not otherwise address them. This Order addresses both New Phone's comments and BellSouth's motion.

New Phone's Comments

A. The Commission's forecast and 47 C.F.R. 51.613(a)(2)

In its comments, New Phone complains that the Commission considered a specific promotion, which BellSouth offered in excess of 90 days, and forecasted that the Commission would be inclined to find that a restriction on the resale of the promotion was reasonable and nondiscriminatory. New Phone notes that the Commission's forecast was *dictum*, based in part on the Commission's perception that Competing Local Providers ("CLPs") did not object to BellSouth's refusal to offer the promotion for resale since no CLP filed comments or objections. New Phone explains that it and other CLPs were not indifferent on this issue, but failed to file comments or objections because the Commission's July 7, 2004 *Order* seeking comments did not indicate that specific BellSouth promotions of more than 90 days' duration would be considered or approved. According to New Phone, without regard to whether a CLP files an objection, Federal Communications Commission ("FCC") Rule 47 C.F.R. 51.613(a)(2) establishes that it is unreasonable and discriminatory for an ILEC to refuse to resell telecommunications services at the promotional rate minus the percentage wholesale discount when the promotional rate is offered to retail customers for more than 90 days.

DISCUSSION

First, the Commission does not agree that its July 7, 2004 *Order* failed to provide CLPs with notice that BellSouth's 1FR + 2 Cash Back promotion could be under consideration. The Public Staff's motion for a ruling on promotions made express mention of the 1FR + 2 Cash Back promotion, the dispute with BellSouth regarding the availability of the promotion for resale, and the start and end dates for the nine-month promotion. In addition, the Public Staff's motion was an attachment to the Commission's *Order*, and the Public Staff again specifically identified and discussed the 1FR + 2 Cash Back promotion in the comments it filed on August 6, 2004 pursuant to the Commission's *Order*. Thus, the Commission believes that New Phone and other CLPs had adequate notice that the Commission could address the 1FR + 2 Cash Back promotion in examining and clarifying BellSouth's resale obligations. Nevertheless, the Commission granted New Phone's Petition to Intervene and accepted New Phone's comments for the record. Because New Phone's comments were not filed in time to be considered prior to issuance of the December 22nd *Order*, the Commission will consider them now and will treat them as a motion for reconsideration or, in the alternative, for clarification of the Commission's *Order Ruling on Motion Regarding Promotions*.

Second, the Commission generally agrees with New Phone's interpretation of 47 C.F.R. 51.613(a)(2): if a promotion involves rates that will be in effect for more than 90 days, an ILEC shall apply the wholesale discount to the special promotional rate for retail service rather than to the ordinary rate. The FCC has stated in express terms that short-term promotional prices do not constitute retail rates that are subject to the wholesale percentage discount and has defined short-term promotions to be those offered for no more than 90 days. The FCC reasoned that a promotion offered for 90 days or less has procompetitive effects that outweigh the anticompetitive effects of restricting the resale of such a promotion.¹ The clear implication of the FCC's rule and related opinions is a presumption that it is unreasonable and discriminatory for an ILEC not to resell telecommunications services at the promotional rate minus the percentage wholesale discount when the promotional rate is offered to retail customers for more than 90 days.

However, in its December 22nd *Order*, the Commission recognized that the FCC clearly intended that an ILEC may rebut this presumption as to promotions offered in excess of 90 days by proving that a restriction on resale of such promotions is reasonable and nondiscriminatory. "With respect to any restrictions on resale not permitted under paragraph (a) [e.g., a restriction on the resale of a long-term promotion that is offered for more than 90 days], an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."² That is to say, not all promotions offered for more than 90 days

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, (CC Docket 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order"), ¶¶ 949-50.

² 47 C.F.R. 51.613(b).

necessarily have anticompetitive effects that outweigh procompetitive effects. It may not always be unreasonable and discriminatory for an ILEC not to apply the wholesale discount to the 90-day-plus special promotional rate.

By its *dicta*, the Commission did not intend to suggest a change of law or to disregard existing FCC rules and orders. Instead, the Commission's discussion of the dispute implicated by BellSouth's 1FR + 2 Cash Back promotion recognized that FCC rules do permit an ILEC to restrict resale of a promotion offered at retail for more than 90 days, upon *proving* that the restriction is reasonable and nondiscriminatory. The Commission's discussion of factors an ILEC may present to establish that a restriction is reasonable and nondiscriminatory was not intended to be exhaustive nor meant to suggest that the presence of any one or all of the factors would be sufficient to prove that a given restriction is permissible under the FCC's rules. Rather, the Commission's opinion stressed that each 90-day-plus promotion, including the 1FR + 2 Cash Back promotion, would have to be examined on a promotion-by-promotion basis, and that, in the absence of an objection by a reseller, the stated factors could be considered and could have some persuasive value to the Commission in determining whether a particular restriction on resale is reasonable and nondiscriminatory.

CONCLUSIONS

To clarify, the Commission's December 22, 2004 *Order* should not be read as a change of law or policy. If the Commission is called upon to determine whether a promotion offered for more than 90 days must be offered to resellers at the promotional rate minus the wholesale discount, the Commission will follow the law as stated in 47 U.S. C. 251(c)(4) and 47 C. F. R. 51.613 (a)(2) and (b). In order to withhold the benefit of a long-term (90-day-plus) promotional rate from resellers, an ILEC is first required to "[prove] to the [Commission] that the restriction is reasonable and nondiscriminatory." The Commission's discussion of the 1FR + 2 Cash Back promotion was intended only to offer a modicum of guidance as to some of the kinds of factors the Commission might find probative, in the absence of objection, should an ILEC seek to prove that a restriction on resale is reasonable and nondiscriminatory. The burden of proving any restriction reasonable and nondiscriminatory remains with the ILEC. The factors acknowledged by the Commission were not intended to be exhaustive or necessarily sufficient to meet the ILEC's burden of proof. The Commission will consider all arguments and admissible evidence presented and decide on a promotion-by-promotion basis (with regard to promotions offered in excess of 90 days) whether an ILEC has proved that a restriction on resale is permissible pursuant to 47 C.F.R. 51.613(b). The Commission cannot authorize a restriction on resale of a long-term promotion in the absence of such proof

B. The Commission's forecast and the parties' interconnection agreement

New Phone states in its comments that it is concerned that BellSouth may rely on the Commission's forecast with respect to the 1FR + 2 Cash Back promotion to avoid its obligation to resell promotions as provided by the terms of BellSouth's interconnection

agreement with New Phone ("Agreement"). According to New Phone, the Agreement provides that BellSouth must resell all telecommunications services at the wholesale discount rate subject to a list of restrictions set forth in the Agreement. New Phone states that the Agreement provides that all promotions must be available for resale at the wholesale discount rate except those promotions, as identified in the list of restrictions, which are offered for less than 90 days. New Phone further notes that the Agreement contains Parity provisions that may be violated if BellSouth fails to resell promotions in accordance with the terms of the Agreement.

DISCUSSION AND CONCLUSION

The Commission's December 22, 2004 *Order* does not relieve any party of obligations it might have under an existing interconnection agreement. The Commission does not, based on the present record, express any opinion about the extent of any party's obligation under New Phone's interconnection agreement with BellSouth. Moreover, the Commission has no evidence before it suggesting that BellSouth has any intent to avoid the obligations established by its interconnection agreement with New Phone. Accordingly, the Commission clarifies that its December 22, 2004 *Order* relieves no party of any resale obligations it might have under an existing interconnection agreement.

BellSouth's Motion

A. Resale Obligations and One-time Gift Promotions

In its motion for reconsideration or clarification, BellSouth argues that the Commission created a novel resale obligation for one-time incentive gifts that ILECs provide to their customers. According to BellSouth, the Commission's *Order* requires one-time upfront gifts "that are funded in whole or in part by the ILEC's regulated service operations" and offered as incentives to customers subscribing to retail services to be "made available to resellers, unless the ILEC proves to the Commission that not making [such gifts] available for resale is reasonable and nondiscriminatory." BellSouth suggests that the Commission's ruling on resale obligations is based on language in the *Order* stating that "anything of economic value paid, given, or offered to a customer to promote or induce purchase of a bundled service offering of both regulated and nonregulated telecommunications services is a promotional discount." BellSouth calls the result of the Commission *Order* "patently silly" and "bizarre" because, according to BellSouth, the *Order* would require BellSouth "to give a CLP . . . a toaster for each customer to whom the CLP resells [a given] service," if BellSouth offers a toaster to any customer subscribing to that same service. BellSouth re-asserts its initial argument that because one-time gifts offered as incentives are not themselves "telecommunications services," they are not subject to the resale obligations of the Telecommunications Act of 1996 ("TA 96"). BellSouth further complains that CLPs are not required to pass the benefit of the promotional rate on to their customers and that it will often be difficult, if not impossible, to determine the value of one-time incentive gifts, since ILECs generally do not pay face value for such gifts.

DISCUSSION

First, the Commission notes that BellSouth appears to cite language from Part A of the Commission's *Order*, which pertains to the interpretation of a state statute concerning when notice of a promotion or a bundled service offering must be filed, to complain about the Commission's holding in Part B of the *Order*, which pertains to federal resale obligations under TA 96. To clarify, the Commission's holdings with respect to resale obligations are not based on the ILEC's funding source for incentive gifts or marketing tools. The Commission's discussion of the source of funding for a promotion applies only to the interpretation of the state statute at issue in Part A of the *Order*.

Second, notwithstanding BellSouth's characterizations, the Commission's *Order* creates no new resale obligations. Section 251(c)(4) of TA 96 requires an ILEC "to offer for resale at wholesale rates any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers." Section 252(d)(3) provides that the wholesale rates are to be determined on the basis of rates charged to subscribers. The Commission's *Order* merely recognizes what the FCC found in its 1996 Local Competition Order, *i.e.*, that long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied. The FCC stated that there is to be no general exemption of promotional offerings from the wholesale requirement. However, in the same order, the FCC held that promotional offerings are exempt from the wholesale requirement if they are offered for 90 days or less because such short-term promotional offerings do not constitute the actual retail rate. The wholesale requirement, therefore, would not apply to such short-term promotions because they have been determined by the FCC not to change the actual retail rate. This bright line test was the FCC's compromise between allowing and not allowing ILECs to offer promotions that could undercut reseller pricing, so that short-term promotions, deemed procompetitive and beneficial to customers, would not have to be unnecessarily restricted.

One-time incentive gifts, including gift cards, check coupons and other merchandise, which are offered to induce customers to subscribe to telecommunications services, are promotional offerings. Therefore, if such gifts or incentives are offered for more than 90 days, as discussed in greater detail in the *Order*, they have the effect of lowering the actual, "real" retail rate. The retail rate, and thus the wholesale rate charged to resellers, must be determined on the basis of the "real" rate charged to subscribers. The Commission's *Order* does not prevent or in any way frown upon the use of such incentives as gift cards and other one-time upfront gifts. However, if the incentives, *i.e.*, promotions, are offered for more than 90 days, on the 91st day, resellers are entitled to have the benefit of the promotion reflected in the wholesale rate, meaning that the wholesale discount must be applied to the promotional rate—not to some other theoretical listed rate which has been undercut by a long-term promotional rate that is generally available to subscribers in the telecommunications marketplace. If an ILEC does not want to offer resellers a wholesale rate based on a retail rate adjusted

to reflect the effect of a promotion on the actual retail price, then the ILEC must not offer the promotion for more than 90 days.

Third, the Commission did not create a novel approach or new law when it held that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate . . . such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering [rate] is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." As discussed above with respect to New Phone's comments, FCC Rule 51.613(b), read in tandem with Rule 51.613(a)(2), has long provided for the possibility that an ILEC could avoid applying the wholesale discount to the special promotional rate if the ILEC is able to prove that withholding the availability of the promotional rate from the reseller is reasonable and nondiscriminatory.

Fourth, the Commission is not persuaded by BellSouth's argument that one-time incentive gifts such as gift cards and toasters are not "telecommunications services" required to be resold pursuant to TA 96. The *Order* does not require that non-telecommunications services, such as gift cards, check coupons, or merchandise, be resold. Such items do, however, have economic value. In recognition of this fact, the *Order* requires that telecommunications services subject to the resale obligation of Section 251(c)(4) be resold at rates that give resellers the benefit of the change in rate brought about by offering one-time incentives for more than 90 days. The *Order* does not require ILECs to provide CLPs with toasters, phones, knife sets, hotel accommodations, gift cards, *etc.* that they might provide to their customers as an incentive to purchase services. The *Order* does require that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers by applying the wholesale discount to the lower actual retail price.

Fifth, BellSouth complains that the Commission did not determine the value of various gift incentives or provide guidance on making such determinations, given that the ILECs' costs to acquire incentive gifts are likely not the same as the face value or actual value of the gifts to the customers. The Commission did not address determining the value of the benefit of an incentive gift promotion nor did it attempt to set strict guidelines for determining the actual rate for a service based on the value of any particular type of incentive gift. The Commission intentionally left this matter open so that the parties would be free to negotiate and arrive at a mutually agreed upon real retail rate. Irresolvable disputes in this area may be brought to the Commission for decision. However, to the extent that it is impossible either to reach a fair accommodation or agreed upon rate based on the promotional offer, or to provide the benefit of the promotional rate to resellers because it is too difficult to calculate such a

rate, then, in the absence of contrary proof, such 90-day-plus promotions would be unreasonable and discriminatory and could not be approved.³

Finally, BellSouth complains that CLPs will not be required to pass on the benefit of the promotional rate to their customers. According to BellSouth, a CLP would have every incentive to keep the benefit for itself as a windfall over and above the wholesale discount it already receives. The resale obligation of TA 96 permits a CLP to use the wholesale discount in a way that is beneficial to it without requiring the benefit to be passed directly to end users, so it is possible that a reseller could choose not to pass the promotional rate on to its customers. However, the Commission believes such an outcome is unlikely because the reseller's success is based on being able to sell services at prices that are competitive with the ILEC's prices in the marketplace. If the ILEC offers a long-term promotion and that promotional rate continues to be generally available in the market after the 90th day of a promotion, the reseller will need to offer its services at a competitive price and will likely want to maintain the price differential it usually maintains between the ILEC's retail rates and the rates it charges customers. Moreover, BellSouth's argument seems to contemplate that the gift would be provided directly to the CLP, e.g., if a \$100 coupon was offered to BellSouth's customers, BellSouth would have to provide resellers with a \$100 cash payment for each of its customers. However, as discussed above, the *benefit* (not the gift itself) would be delivered to the reseller through the wholesale price charged to the reseller, thus, further reducing the likelihood of undue windfall as described by BellSouth.

CONCLUSION

The Commission's *Order* regarding resale obligations applicable to one-time gift promotions, pursuant to TA 96, is clarified in accordance with the foregoing discussion.

B. Resale obligations with respect to mixed bundles

BellSouth complains that, with respect to mixed bundles of telecommunications services and non-telecommunications services, the Commission's *Order* requires ILECs to make the regulated services in the bundle available for resale at a "super discount." According to BellSouth, this super discount results because the *Order* requires the wholesale discount to be applied to the difference between the tariff rate for the telecommunications services in the mixed bundle and the entire price of the bundle, whenever the bundle is offered for a total price that is less than or equal to the stand-alone tariff price for the regulated telecommunications service. Thus, BellSouth believes the *Order* requires ILECs to resell piece-meal portions of mixed bundles at a "super discount." BellSouth argues that it should not be made to break apart such bundles. An ILEC has no obligation to resell either non-telecommunications services

³ Prior approval is not required under N.C.G.S. 62-133.5(f), but starting on the 91st day of a promotional offering, "an incumbent LEC may impose a restriction [on the resale obligation] only if it [has proved] to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. 51.613(b).

that it provides, or any services (telecommunications or non-telecommunications services) that are provided by entities other than the ILEC.

DISCUSSION

At the outset, the Commission notes that its *Order* addressed the Public Staff's specific questions, which focused on resale obligations with respect to *regulated* telecommunications services that were part of a gift card promotion or that were part of a bundle of regulated and nonregulated services. Therefore, the *Order* generally discussed resale obligations regarding component services in a mixed bundle in terms of regulated and nonregulated services. However, pursuant to Section 251(c)(4), an ILEC is required "to offer for resale at wholesale rates any telecommunications service that [the ILEC] provides at retail to subscribers who are not telecommunications carriers." It follows from Section 251(c)(4) that an ILEC must resell all telecommunications services, whether regulated or nonregulated, at the true retail price minus the wholesale discount. Thus, an ILEC must offer the reseller any regulated telecommunications services it provides at retail (the tariff list price) for the wholesale rate, and it must also offer the reseller any nonregulated telecommunications services it provides at retail (the retail list price) for the wholesale rate. Accordingly, hereinafter, the Commission will discuss the resale obligation in terms of telecommunications services and non-telecommunications services, not in terms of regulated and nonregulated services.

BellSouth correctly states that an ILEC is not required to resell either non-telecommunications services that it provides or any services that are provided by an entity other than the ILEC. The Commission's *Order* imposed no resale obligation in conflict with this stated principle. The *Order* does not require an ILEC to resell a mixed bundle that contains inside wire maintenance (a non-telecommunications service) nor a mixed bundle that contains long distance service (a telecommunications service) supplied by a non-ILEC such as BellSouth Long Distance, Inc. However, the Commission's *Order* does require that an ILEC make any telecommunications services provided by it and offered as a component of a mixed bundle available for resale on a stand-alone basis for the wholesale rate, which must be determined by applying the wholesale discount rate to the actual, retail, marketplace rate. Accordingly, with respect to mixed bundles of telecommunications services and non-telecommunications services or telecommunications services and services offered by non-ILECs, determining the actual retail rate of any ILEC-provided telecommunications services that are in the bundle is crucial to calculating the wholesale rate a reseller must pay to resell such telecommunications services. As discussed in the *Order*, short-term promotional rates offered for 90 days or less do not constitute retail rates for telecommunications services, but long-term promotional rates offered for 91 days or more do constitute the retail rates that must be used to determine the reseller's wholesale rate.

In its discussion of a "super discount" resale obligation, BellSouth has misunderstood the Commission's *Order*, which the Commission finds should be clarified with respect to resale obligations relating to telecommunications services offered as part

of a mixed bundle. When a package or bundle of a telecommunications service and a non-telecommunications service is offered in excess of 90 days for a total price that equals the price of the telecommunications service, *i.e.*, the price of the telecommunications service is not lowered but the customer receives added value for the price of the telecommunications service alone, the real retail rate in the market for the ILEC-provided telecommunications service must be determined by accounting for the value of the services in the bundle that are not telecommunications services provided by the ILEC. In this situation, the price for the telecommunications service provided by the ILEC is reduced by the value received in the form of additional non-telecommunications services and/or non-ILEC provided services. Thus, if Telecommunications Service 1 ("TS1") retails for \$50 and a mixed bundle consisting of TS1, a Non-Telecommunications Service, and Satellite Television provided by a non-ILEC entity retails for \$50, then TS1 is being discounted by the value of the other services in the bundle (which may appear to be provided as a free gift). If this mixed bundle is offered for 91 days or more, then the wholesale rate that the reseller must pay for TS1 is determined by applying the wholesale discount (to be determined in accordance with the discussion on Pages 6-7 above) to the promotional rate for TS1, which is determined by subtracting the value (benefit) of the giveaways (the Non-Telecommunications Service and the non-ILEC provided Satellite Television Service) from the tariff or retail list price for TS1.

When a package or bundle of a telecommunications services and a non-telecommunications service is offered in excess of 90 days for a total price that is less than the price of the telecommunications service, the real retail rate for the telecommunications service is the total price of the bundle. That is to say, when the total bundle price is less than the telecommunications service in the bundle, the ILEC has determined the value of the discount from the tariff or retail list price and has thereby determined that the actual retail rate for the telecommunications service is the price of the total mixed bundle. (There is no requirement that discounts applicable to individual components sold together in a bundle be determined or passed on to resellers.) For example, if TS1 retails for \$50 and Telecommunications Service 2 ("TS2") retails for \$75, while a mixed bundle consisting of TS1, TS2, a Non-Telecommunications Service, and Satellite Television is offered for \$60, then TS2 is actually available in the marketplace for a real retail rate of \$60. A customer whose goal is to acquire TS2 for the best price in the market can do so by paying \$60 for the bundle rather than the retail list price of \$75, although he must also accept additional services in order to acquire TS2 at the lower rate. Therefore, the wholesale rate that the reseller must pay for TS2 is determined by applying the wholesale discount to \$60, the promotional rate for TS2. In this example, the mixed bundle sells for more than the retail price for TS1, so TS1 is not available in the marketplace for less than the tariff or retail list price of \$50. The customer whose goal is to purchase TS1 for the best price in the market would not purchase the \$60 mixed bundle just to acquire TS1, because he can purchase TS1 for less at the retail list price. Accordingly, an ILEC is only obligated to resell TS1 at the retail list price minus the wholesale discount.

In another example, if TS2 again retails on a stand-alone basis for \$75 and a Non-Telecommunications Service retails for \$10, while a mixed bundle of TS2 and the Non-Telecommunications Service is offered for more than 90 days for \$25, then TS2 would be available in the market for a real retail rate of \$25 even though a subscriber would have to accept the entire bundle to obtain TS2 for that price. Thus, TS2 should be offered to the reseller at the wholesale rate, which would be determined by applying the wholesale discount to the TS2 promotional rate of \$25.

Looking at BellSouth's example on Page 7 of its Motion for Reconsideration, where telecommunications service A retails for \$30, telecommunications service B retails for \$10, and a bundle of both A and B is priced at \$25 for a period in excess of 90 days, a reseller must pay \$25 minus the wholesale discount for service A, since a customer could purchase service A for less than \$30 by purchasing the bundle for \$25. That is to say, the real retail rate for service A would be \$25. For service B, the reseller must pay \$10 minus the wholesale discount because the real retail rate for service B remains at \$10, *i.e.*, a customer cannot acquire service B for less than \$10 by purchasing the bundle. The reseller would not be entitled to purchase service A alone for \$15 (\$40 [A + B] minus \$25 = \$15) minus the wholesale discount as BellSouth apparently believed was required by the Commission's *Order*. It should be noted that if service B is changed to a non-telecommunications service or to a non-ILEC provided service, the ILEC would have no obligation to offer service B to a reseller at the wholesale rate.

Finally, to reiterate, as was noted above and in the *Order*, when the entire mixed bundle is offered for a price that is more than an end-user subscriber would pay for a telecommunications service if purchased alone at the retail list price, an ILEC is not required to resell the telecommunications services in the bundle for a price that is lower than the retail list price minus the wholesale discount. Instead, the ILEC is only required to resell such telecommunications services at the listed retail price minus the wholesale discount. For example, TS1 retails for \$50, while a mixed bundle of TS1, a Non-Telecommunications Service and Satellite Television supplied by a non-ILEC is offered at \$80. In this example, the mixed bundle cannot be purchased as a lower cost means of acquiring TS1. Thus, the wholesale rate for TS1 would continue to be determined by applying the wholesale discount to the tariff or retail list price for TS1, not the promotional rate that a customer might receive for TS1 if it is purchased as part of the bundle. To clarify further, the Commission's *Order* does not require an ILEC to calculate internal discount prices of components offered in a bundle and then "pick apart" the bundle to offer those internal discounts applicable to telecommunications services (discounts that are never offered to retail customers on a stand-alone basis) to resellers.

CONCLUSION

The Commission's *Order* regarding federal resale obligations applicable to mixed bundles is clarified in accordance with the foregoing discussion.

DISPOSITION OF MOTIONS

WHEREUPON, the Commission disposes of the parties' motions as follows:

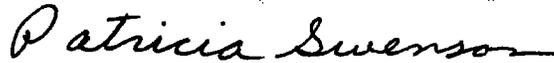
1. New Phone's Motion to Reconsider IS DENIED.
2. New Phone's alternative Motion for Clarification IS GRANTED in accordance with the foregoing discussion and conclusions stated hereinabove in the section captioned "New Phone's Comments."
3. BellSouth's Motion to Reconsider and its Motion for Stay ARE DENIED.
4. BellSouth's alternative Motion for Clarification IS GRANTED in accordance with the foregoing discussion and conclusions stated hereinabove in the section captioned "BellSouth's Motion."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of June, 2005.

NORTH CAROLINA UTILITIES COMMISSION



Patricia Swenson, Deputy Clerk

tb052305.01

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:05CV345-MU

BELLSOUTH TELECOMMUNICATIONS,)
INC.,)
)
Plaintiff,)
)
vs.)
)
JO ANNE SANFORD, Chairman; ROBERT K.)
KOGER, Commissioner; ROBERT V. OWENS,)
JR., Commissioner; SAM J. ERVIN, IV,)
Commissioner; LORINZO L. JOYNER,)
Commissioner; JAMES Y. KERR, II,)
Commissioner; and HOWARD N. LEE,)
Commissioner (in their official capacities as)
Commissioners of the North Carolina Utilities)
Commission),)
)
Defendants.)

ORDER

This matter is before the court upon cross-motions for summary judgment filed by Plaintiff BellSouth Telecommunications, Inc. (“BellSouth”) and the Defendant Commissioners of the North Carolina Utilities Commission (the “Commissioners”). It appears to the court that there are no genuine issues of material fact, and this matter is now ripe for disposition.

BACKGROUND

BellSouth is an incumbent local exchange carrier (“ILEC”). Under the Telecommunications Act of 1996 (the “Act”), BellSouth, as an ILEC, is required to offer its telecommunications services to competing local providers (“CLPs”) for resale at wholesale rates established by the North Carolina Utilities Commission (the “NCUC”). Specifically, the Act

requires ILECs to “offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” 47 U.S.C. § 251(c)(4). Wholesale rates are determined by State commissions “on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”¹ 47 U.S.C. § 252(d)(3).

The Federal Communications Commission (“FCC”) has determined that the Act’s resale obligations extend to promotional price discounts offered on retail communications services. However, the FCC has expressly limited the scope of the term “promotions” to “price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.” *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499, (rel. Aug. 8, 1996), ¶ 948 (“First Report and Order”). The FCC further concluded that “short term promotional prices,” which are defined as “promotions of up to 90 days,” “do not constitute retail rates for the underlying services and are not subject to the wholesale rate obligation.” *Id.* at ¶¶ 949 & 950. Thus, promotional prices offered for a period of 90 days or less need not be offered to resellers at a wholesale discount, whereas promotional prices offered for periods greater than 90 days must be offered for resale at the wholesale rate.

BellSouth uses certain marketing incentives in all nine states in which it operates. These incentives include gift cards or other one-time giveaways that encourage customers to subscribe

¹The NCUC has established that CLPs may purchase BellSouth’s retail telecommunications services in North Carolina at a 21.5% wholesale discount less the retail price for business services and for 17.6% less than the retail price for residential services.

to BellSouth's telecommunications services. CLPs that compete with BellSouth regularly employ similar marketing practices. These marketing incentives are redeemable only for unaffiliated, that is, non-BellSouth, goods or services. Because these types of marketing incentives originate from unaffiliated companies, BellSouth is unable to track their usage or redemption rates.

In June of 2004, the Public Staff of the NCUC filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. One of the issues on which the Public Staff sought guidance was the following: "If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?" The Public Staff took the position that marketing incentives such as gift cards, checks, etc. "effectively" constitutes a discount on telecommunications services and are subject to resale obligations. On December 22, 2004, the NCUC issued its Order Ruling on Motion Regarding Promotions (the "First Resale Order"), holding that marketing incentives "are in fact promotional offers subject to the FCC's rules on promotion," and that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days." While acknowledging that marketing incentives "are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings," the NCUC nevertheless concluded that a marketing incentive "reduces the subscriber's cost for the service by the value received in the form of a gift card or other

giveaway.” First Resale Order, p. 11. Thus, the NCUC stated, “The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the ‘real’ retail rate.” Id.

On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, for Clarification, and for a Stay of the Commission’s December 22, 2004 Order. On June 3, 2005, the NCUC issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (the “Second Resale Order”). In this Order, the NCUC held that marketing incentives have the effect of lowering “the actual, ‘real’ retail rate.” Second Resale Order, p. 5. The NCUC further required BellSouth to determine “the price lowering impact of any such 90 day plus promotions on the real tariff or retail list price” and pass the benefit of such a reduction on to resellers through a wholesale discount on the “lower actual retail price.” Id. at p. 6.

BellSouth filed this action on August 2, 2005 seeking declaratory and injunctive relief with respect to the two Orders of the NCUC, alleging that the Orders violate the Act. BellSouth also filed a Motion for Preliminary Injunction seeking to enjoin enforcement of those provisions of the Orders requiring ILECs to take into consideration the value of gift cards and other giveaways in the same manner that rate discounts which last longer than ninety days are considered when arriving at the wholesale rate for telecommunications services for CLPs. After a hearing on August 11, 2005, this court granted BellSouth’s Motion for Preliminary Injunction. The parties have now filed their cross-motions for summary judgment.

DISCUSSION

BellSouth alleges that the NCUC's conclusions that BellSouth is required to offer CLPs a wholesale discount on marketing incentives (or the value thereof) in addition to the wholesale discount offered on its retail telecommunications services is in violation of the Telecommunications Act. The court reviews the NCUC's interpretations of the Act *de novo*. GTE South, Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999). However, "[a] 'state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes . . .'" Id. (quoting Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997)). The court has carefully reviewed the two Orders of the NCUC, the arguments of counsel, and the pertinent law, and concludes that the Orders of the NCUC are contrary to and in violation of the Act.

The first rule of statutory construction is that a court must look to the language of the statute. When examining the language of a statute, the court "must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The court may look beyond the express language of the statute only when the language of the statute is ambiguous or where a literal interpretation would thwart the purpose of the overall statutory scheme. U.S. v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978).

Looking to the language of the Act, Congress' intent is plain. Section 251 (c)(4) requires an ILEC to offer for resale "any telecommunications service" it provides at retail to subscribers who are not telecommunications carriers. There can be no argument that gift cards, checks, coupons for checks, and similar types of marketing incentives are "telecommunications services." Indeed, in its First Resale Order, the NCUC conceded that marketing incentives "are

not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service . . .” First Resale Order, p. 11.

As noted above, the FCC has determined that the Act’s resale obligations extend to *promotional price discounts* offered on retail communications services. In its First Report and Order, the FCC stated in unambiguous terms that “promotions” refers only to “*price discounts* from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.” First Report and Order, ¶ 948. Had the FCC wished to include marketing incentives such as Walmart gift cards in the definition of “promotions,” it could have easily done so. The marketing incentives at issue here do not give the customer a reduction or discount on the price of the telecommunications service provided by BellSouth. A customer receiving a Walmart gift card in exchange for signing up to receive certain services, for example, will pay the same full tariff price for the service each month as customers who subscribed to the service without the benefit of the gift card. Moreover, a customer cannot use a Walmart gift card or coupon to pay her phone bill. If the marketing incentive came in the form of a bill credit or other direct reduction in the price paid for a particular service, then the incentive would certainly be considered a promotional discount that would trigger BellSouth’s resale obligations.

The NCUC’s Orders purport to extend the definition of promotional discounts to include anything of economic value. The court believes that this interpretation is contrary to the plain language of the statute and the FCC implementing regulations. Accordingly,

IT IS THEREFORE ORDERED that BellSouth's Motion for Summary Judgment is hereby GRANTED, and the Commissioners' Motion for Summary Judgment is hereby DENIED.

Signed: May 15, 2006

A handwritten signature in cursive script, reading "Graham C. Mullen", written over a horizontal line.

Graham C. Mullen
United States District Judge

