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June 13, 2006

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

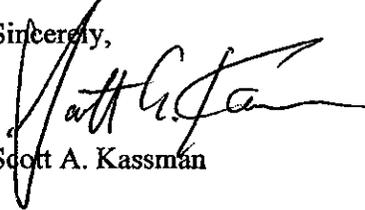
Dear Ms. Dortch:

On behalf of Image Access, Inc. d/b/a NewPhone ("NewPhone"), enclosed please find an original and four copies of NewPhone's Petition for Declaratory Relief, filed pursuant to Sections 1.1 and 1.2 of the Commission's Rules, 47 C.F.R. §§1.1, 1.2.

Also enclosed is a duplicate of this filing. Kindly date-stamp the duplicate and return it to the courier. Please contact the undersigned at (202) 342-8400, if you have any questions about this filing.

Thank you.

Sincerely,


Scott A. Kassman

SAK:koc
Enclosures

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

**In the Matter of)
)
Petition of Image Access, Inc.)
d/b/a NewPhone for Declaratory Ruling)
Regarding Incumbent Local Exchange)
Carrier Promotions Available for Resale)
Under the Communications Act of 1934,)
as Amended, and Sections 51.601 *et seq.*)
of the Commission's Rules)**

WC Docket No. _____

PETITION FOR DECLARATORY RULING

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June 13, 2006

SUMMARY

Incumbent local exchange carriers are increasingly employing sophisticated and complicated promotional discounts and bundled offerings that include local telecommunication services. As a result, it is becoming increasingly more difficult to determine the actual retail rate of the service to which the wholesale discount should apply, and disputes between incumbents and resellers are occurring more frequently and taking longer to resolve.

The failure to properly account for promotional discounts the subsequent failure to settle disputes promptly greatly affects the ability of resellers to provide service in competition with incumbents, particularly to residential customers, and thereby harms competition in those markets.

Accordingly, the instant Petition for Declaratory ruling asks the Commission to address issues related to the resale availability, pricing, and timing of incumbents' cash-back, non-cash-back, and mixed bundle promotional offerings.

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PETITION FOR DECLARATORY RULING

Image Access, Inc. d/b/a NewPhone (“NewPhone”), through undersigned counsel, pursuant to Section 1.1 and 1.2 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,¹ hereby requests that the Commission issue a declaratory ruling to ensure that resale remains a viable method of competitive entry into the local exchange market and is not stifled by incumbent local exchange carriers’ (“ILEC”) unreasonable and discriminatory practices and policies. As provided for in further detail below, NewPhone asks the Commission to remove uncertainty surrounding the resale of ILEC services subject to cash-back promotions, gift cards, coupons, checks, or other similar giveaways, and rule as to the wholesale availability and pricing of telecommunications services offered to ILEC retail customers as part of a mixed service bundle, *i.e.*, a bundle consisting of both telecommunications and non-telecommunications services.

¹ 47 C.F.R. §§1.1, 1.2.

I. INTRODUCTION

In enacting the Communications Act of 1934, as amended (“the Act”), Congress expressly recognized the import of resale as a method of competitive entry into the local exchange market. Indeed, Congress wove into the very fabric of the Act the requirement that ILECs make available for resale, at wholesale rates, any telecommunications service that the ILEC provides to its retail end-users, without any unreasonable or discriminatory restrictions or limitations.²

Relying on the ILECs’ Congressionally-mandated obligation to offer retail telecommunications services at wholesale rates, NewPhone, a Louisiana corporation, started providing pre-paid, residential local exchange services in Louisiana in 1998. NewPhone subsequently expanded its business by entering into resale agreements with BellSouth in the remaining eight BellSouth states, and today it serves approximately 12,000 residential customers throughout the region using calls centers located in New Orleans and Baton Rouge, Louisiana.

Despite BellSouth’s federally imposed obligations, NewPhone avers that BellSouth has severely restricted, and in some cases altogether prohibited, the resale of certain telecommunications services at wholesale rates through its use of various promotional discounts which are designed, in part, to eliminate its resale competition.³ BellSouth has engaged in an extensive campaign throughout its nine-state operating region to win back customers and to retain existing customers through the use of bundling, cash-back, and non-cash-back promotional

² See 47 U.S.C. §251(c)(4).

³ Upon information and belief, AT&T and other ILECs engage in some similar discriminatory conduct.

schemes which disguise promotional price discounts to retail subscribers, or prohibit resale in the first instance.⁴

NewPhone contends that such conduct is unreasonable and discriminatory and asks the Commission to declare the same.

Specifically, NewPhone requests that the Commission declare that:

- (1) ILECs' refusal to make telecommunications services subject to cash-back, non-cash-back, and bundled promotional discounts available for resale at wholesale rates is an unreasonable restriction on resale and is discriminatory in violation of the Act and the Commission's rules and policies;
- (2) for all ILEC promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, ILECs are required to *either*
 - (i) offer to telecommunications carriers the value of all cash-back, check, gift card, coupon, or other similar giveaways or discounts in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion; *or*
 - (ii) apply the wholesale discount to the "effective retail rate" of the telecommunications service that is the subject of the ILEC's retail promotion;
- (3) the "effective retail rate" for cash-back, check, gift card, coupon, or other similar giveaway or discounts shall be determined by subtracting the face

⁴ Examples of BellSouth promotions attached hereto as *Exhibit A*.

- value of the promotional discount from the ILEC tariffed rate for the telecommunications service that is the subject of the ILEC promotional offering and the value of such discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months;
- (4) for all ILEC promotions greater than 90 days in duration, ILECs shall make available for resale the telecommunications service component(s) contained within "mixed bundle" promotions, *i.e.*, bundles consisting of both telecommunications service and non-telecommunications service, such as information services, and apply the wholesale avoided cost discount to the "effective retail rate" of the telecommunications services contained within the mixed bundle;
 - (5) the "effective retail rate" of the telecommunications service component(s) of a mixed service bundle shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their retail unbundled component prices; and
 - (6) telecommunications carriers shall be entitled to resell ILEC promotions of greater than 90 days in duration as of the first day the ILEC offers the promotion to retail subscribers.

II. BACKGROUND

A. PROCEDURAL HISTORY

NewPhone and BellSouth are parties to resale agreements in several states, including the state of North Carolina. Pursuant to the terms and conditions of that agreement, NewPhone is entitled to withhold from BellSouth all disputed charges. Accordingly, NewPhone

has withheld payment from BellSouth as it relates to the wholesale rates that BellSouth has charged NewPhone for reselling promotions lasting more than 90 days in which BellSouth offers its retail subscribers cash-back, check, gift card, coupon, or other such promotional discount.

On June 25, 2004, the Public Staff of the North Carolina Utilities Commission (“NCUC”) filed a Motion with the NCUC seeking guidance on the question of whether local exchange carriers (“LECs”) are required to offer for resale to telecommunications resellers special offerings of telecommunications service that feature gift items as part of the bargain, *e.g.*, gifts such as a check or coupon or gift card, if the special offering is made to retail subscribers for longer than 90 days.⁵ The NCUC sought and received comments from interested parties including the Public Staff and BellSouth. After considering the parties’ comments, the NCUC issued an Order on December 22, 2004, in which it stated:

Despite the ILECs’ argument that gift card type promotions are incentives and/or marketing tools used to distinguish their services in the marketplace, these promotions are in fact promotional offers subject to the FCC’s rules on promotions. While these promotional offerings 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, they do result in a savings to the customers who subscribe to the regulated service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the ‘real’ retail rate available in the marketplace.⁶

In that same order, the NCUC concluded that

⁵ *In the Matter of Local Exchange and Local Exchange Access Telecommunications Competition, Motion for Order Concerning Eligibility of Promotions for One-Day Notice and ILECs’ Obligations to Offer Promotions to Resellers, North Carolina Utilities Commission Docket No. P-100, Sub. 72b, filed June 25, 2004.*

⁶ *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled, “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,” North Carolina Utilities Commission Docket No. P-100, Sub 72b, Order Ruling on Motion Regarding Promotions, at 11 (December 22, 2004) (“First Resale Order”), attached hereto as *Exhibit B*.*

[t]he promotion reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway. 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. Thus, the ILEC could use the promotion as a *de facto* rate charge without charging its tariff pricing.⁷

The NCUC also determined that BellSouth's bundled promotional offering consisting of telecommunications service provided at no less than the tariffed retail rate and non-telecommunications service provided free of charge, when offered for more than 90 days, should be treated no differently than gift card promotions, as the value of the free service effectively reduces the retail rate of the other service.⁸ Thus, the NCUC required BellSouth to provide the telecommunications service component at the effective retail rate, which is determined by applying the wholesale discount to the discounted promotional rate.⁹

After the NCUC issued the *First Resale Order*, BellSouth filed a Motion for Reconsideration on February 18, 2005.¹⁰ The NCUC subsequently issued a second order on June 3, 2005 in which it denied BellSouth's Motion for Reconsideration. In that second order, the NCUC once again explained its position on BellSouth's resale obligation with regard to its promotional offerings:

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

⁷ *Id.*

⁸ *Id.* at 14.

⁹ *Id.* at 15.

¹⁰ *Implementation of Session Law 2003-91, Senate Bill 814 Titled, "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"* BellSouth Motion for Reconsideration or, in the Alternative, for Clarifications, and for a Stay, North Carolina Utilities Commission Docket No. P-100, Sub 72b, filed Feb. 18, 2005.

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.¹¹

The NCUC's *Second Resale Order* also clarified how the true wholesale rate should be determined for BellSouth's mixed bundle promotions lasting more than 90 days.¹²

On August 2, 2005, BellSouth filed with the U.S. District Court for the Western District of North Carolina a Complaint for Declaratory and Injunctive Relief and Motion for Temporary Restraining Order and Preliminary Injunction seeking to restrain enforcement of certain portions of the NCUC orders on the grounds that they conflict with the Act and federal regulations.¹³ On that same day, the court granted BellSouth an *ex parte* temporary restraining

¹¹ *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled, "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"* North Carolina Utilities Commission Docket No. P-100, Sub 72b, Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, at 5-6 (June 3, 2005) ("*Second Resale Order*"), attached hereto as *Exhibit C*. NewPhone disagrees with the NCUC's pronouncement that resellers must wait until the 91st day to avail themselves of BellSouth's promotions. NewPhone contends that the benefit of such promotions lasting longer than 90 days should be available to resellers on day one, not day 91.

¹² *Id.* at 7-10.

¹³ BellSouth's Complaint was levied against the individual NCUC commissioners in their official capacity. See *BellSouth Telecommunications, Inc. v. North Carolina Utilities Comm'n et al.*,

order.¹⁴ The court granted BellSouth's Motion for Preliminary Injunction at hearing on August 11, 2005.¹⁵ Notably, the District Court's order only restrained the NCUC from enforcing its conclusion as to gift card promotions and the application of the wholesale discount to the effective retail rate of those promotions.¹⁶

On February 16, 2006, BellSouth and the NCUC filed cross Motions for Summary Judgment, and on May 15, 2006, the Court issued an order granting BellSouth's Motion for Summary Judgment and denying the NCUC's Motion for Summary Judgment.¹⁷ In that order, the court held, in pertinent part:

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 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. ***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

W.D.N.C. Case 3:05-cv-00345, Complaint For Declaratory and Injunctive Relief, filed Aug. 2, 2005. *See also*, BellSouth's Motion for Temporary Restraining Order and Preliminary Injunction, filed Aug. 2, 2005. The aforementioned documents are attached hereto as *Exhibit D*.

¹⁴ *See* Temporary Restraining Order attached hereto as *Exhibit E*.

¹⁵ *See* Order Granting Temporary Restraining Order attached hereto as *Exhibit F*.

¹⁶ *Id.* at 7.

¹⁷ *See* Order Granting BellSouth's Motion for Summary Judgment ("*Summary Judgment Order*") attached hereto as *Exhibit G*.

contrary to the plain language of the statute and the FCC implementing regulations.¹⁸

Notably, the District Court's order did not *expressly* address BellSouth's cash-back promotions, which effectively reduce the price paid for a particular service. The court also did not address issues concerning BellSouth's mixed bundle promotional offerings, as BellSouth did not appeal that aspect of the NCUC's orders.¹⁹ Despite that the NCUC's orders remain in effect as to BellSouth's bundled promotional offerings, BellSouth refuses to comply with the terms of those orders.

Emboldened by the district court's decision, BellSouth has filed a complaint against NewPhone with the same court, seeking in excess of \$2 million for what BellSouth alleges *inter alia* is NewPhone's breach of its obligation to pay BellSouth under the parties' 2002 and 2006 interconnection agreements.²⁰

On June 12, the NCUC filed a notice with the District Court, appealing the District Court's May 15, 2006 Summary Judgment Order to the U.S. Court of Appeals for the Fourth Circuit.²¹

B. ACTUAL CONTROVERSY

Section 1.2 of the Commission's rules provides that "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own

¹⁸ *Id.* at 6 (emphasis added).

¹⁹ *Id.*

²⁰ *BellSouth Telecommunications, Inc. v. Image Access d/b/a NewPhone*, W.D.N.C. Case 3:06-cv-00157, Complaint, filed April 4, 2006, attached hereto as *Exhibit H*. NewPhone's Answer is due on June 14, 2006 and it plans to file a Motion to Dismiss at that time.

²¹ *See* NCUC Notice of Appeal attached hereto as *Exhibit I*.

motion issue a declaratory ruling terminating a controversy or removing uncertainty.”²² As the procedural history cited above illustrates, this dispute is not merely academic. NewPhone and BellSouth have been engaged in a series of disputes over these very issues before the NCUC and the U.S. District Court in North Carolina. Accordingly, the instant Petition represents an actual controversy which the Commission should terminate in accordance with Section 1.2 of the Commission’s rules. The Commission is best suited to resolve this matter -- not the courts -- by removing uncertainty surrounding the core resale competition issues presented herein.²³

III. ARGUMENT

A. **RESALE IS AN IMPORTANT METHOD OF LOCAL EXCHANGE COMPETITION AND MUST BE PRESERVED**

Congress expressly recognized that resale is an important method of competitive entry into the local exchange market. The resale obligations are woven into the very fabric of the market opening provisions of the Act by imposing distinct obligations upon different categories of carriers. First, Section 251(b)(1) of the Act, which applies to all local exchange carriers, provides that no local exchange carrier shall “impose unreasonable or discriminatory conditions or limitations on [] the resale of its telecommunications services.”²⁴ By contrast, the resale obligations under Sections 251(c)(4) and 271(c)(2)(B)(xiv), apply only to ILECs and RBOCs, respectively. Section 251(c)(4) requires ILECs:

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) *not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service*, except that a State commission may, consistent with regulations prescribed by

²² 47 C.F.R. §1.2.

²³ See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 818-19.

²⁴ 47 U.S.C. §251(b)(1).

the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.²⁵

Section 271(c)(2)(B)(xiv) provides that, in order for a Bell Operating Company to provide in-region interLATA services, it must offer telecommunications services for resale in accordance with section 251(c)(4) and the avoided cost pricing standard enunciated in Section 252(d)(3).²⁶

In the *Local Competition Order*, the Commission explained “the strategic importance of resale to the development of competition,” by stating that “[r]esale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term.”²⁷ Indeed, resale allows competitive providers the flexibility to increase their market presence through resale beyond the reach of their existing networks. It also allows competitive providers to increase their market share more quickly than would be possible solely through expansion of their own networks.

The Commission reemphasized the important policy concerns that make restrictions on resale undesirable in granting BellSouth Section 271 authority. In its *South Carolina 271 Order*, the Commission stated, “[r]esale is one of three mechanisms Congress

²⁵ 47 U.S.C. §251(c)(4) (emphasis added).

²⁶ 47 U.S.C. §271(c)(2)(B)(xiv). 47 U.S.C. §252(d)(3) provides, in pertinent part, “a State commission shall determine wholesale rates 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.”

²⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶907 (rel. Aug. 8, 1996) (“*Local Competition Order*”).

developed for entry in the BOCs' monopoly market."²⁸ The Commission cited to its *Local Competition Order*, in which it found that

[t]he ability of [I]LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by [I]LECs to preserve their market position. In a competitive market, an individual seller (an [I]LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that [I]LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale.²⁹

The Commission also recently reaffirmed the importance of resale in its *Qwest Omaha Forbearance Order*.³⁰ In that order, the Commission granted, in part, and denied, in part, Qwest's petition for forbearance from numerous statutory and regulatory obligations related to Qwest's provision of service in the Omaha Metropolitan Statistical Area ("MSA"). In denying Qwest's petition for forbearance from the resale obligations of Section 251(c)(4), the Commission stated that "Qwest has not persuaded us that section 251(c)(4) resale is no longer necessary in the Omaha MSA to ensure reasonable and nondiscriminatory pricing, and ensure that customers' interests are protected . . . [W]e conclude that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible."³¹

Given the Commission's recent series of orders limiting ILEC unbundling obligations, resale is now an even more important method of local exchange competition. Central to this reality, however, is that the barriers to resale entry remain low and that resellers

²⁸ *In the Matter of Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd 539, ¶223 (rel. Dec. 24, 1997) ("*South Carolina 271 Order*").

²⁹ *Id.*, quoting *Local Competition Order*, 11 FCC Rcd at 15966, ¶939.

³⁰ *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170, rel. Dec. 2, 2005, ¶63 ("*Qwest Omaha Forbearance Order*").

³¹ *Id.*, ¶88.

are able to obtain service upon reasonable rates, terms and conditions in order to compete with the ILECs. In order to ensure that resale remains a viable alternative for competitors and consumers, the Commission must declare *inter alia* that ILECs are required under the Act and the Commission's rules to apply the wholesale avoided cost discount to the "effective" retail rate of the telecommunications service(s) which are the subject of the ILEC's cash-back, non-cash-back, and mixed service bundle promotions.

B. BELLSOUTH'S RESALE PRACTICES ARE UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF THE ACT AND THE COMMISSION'S RULES AND POLICIES

1. Cash-Back Promotions, Checks, Gift Cards, Coupons and Similar Giveaways

The first type of promotional discount used by BellSouth to discriminate against and eliminate its resale competition is a promotion lasting more 90 days which is offered to its end-user subscribers in the form of cash-back or other promotions which effectively reduce the price of the telecommunications service purchased by subscribers by the value of that promotion. Although BellSouth makes the services subject to such promotions available for resale at the applicable state commission avoided cost discount rate, BellSouth does not provide resellers with the value of the promotional discount that it provides to its own end-users, *e.g.*, cash-back, nor does BellSouth apply the state commission approved wholesale avoided cost discount to the "effective retail rate" (the tariffed retail rate minus the value of the promotional discount) of the telecommunications services offered for resale. BellSouth's extensive use of these cash-back and non-cash-back promotions enables it to disguise promotional price discounts to its

subscribers and undercut the price at which resellers are able to offer customers the same service.³²

Section 251(c)(4)(B) of the Act provides that ILECs are “not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service.”³³ Section 271(c)(2)(B)(xiv) of the Act echoes that section, requiring Bell Operating Companies providing in-region, interLATA services to provide telecommunications services for resale in accordance with Section 251(c)(4) in order.³⁴

In the *Local Competition Order*, the Commission concluded that resale restrictions are presumptively unreasonable and that an ILEC can rebut that presumption but only if the restrictions are “narrowly tailored.”³⁵ Similarly, Section 51.605(e) of the Commission’s rules provides that, “[e]xcept as provided in Sec[ti]on 51.613, an [I]LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the [I]LEC.”³⁶ Section 51.613(a), in turn, provides that the only restriction on resale that may be imposed by ILECs are those concerning cross-class selling and short term promotions of 90 days or less.³⁷

Importantly, Section 51.613(b) also states that “[w]ith respect to any restrictions on resale not permitted under paragraph (a), an [I]LEC may impose a restriction *only if it proves*

³² In some cases, BellSouth’s cash-back offers may result in a situation where the effective retail price of the service is below BellSouth’s cost. See *Local Competition Order*, 11 FCC Rcd at 15973, ¶956 (requiring ILECs to apply the wholesale discount on services at below-cost levels).

³³ 47 U.S.C. §251(c)(4)(B).

³⁴ 47 U.S.C. §271(c)(2)(B)(xiv).

³⁵ *Local Competition Order*, 11 FCC Rcd. at 15966, ¶939.

³⁶ 47 C.F.R. §51.605(e).

³⁷ See 47 C.F.R. §51.613(a). Cross-class selling, e.g., offering business customers a residential customer promotion, is only prohibited to the extent that a state commission relieves an ILEC of its resale obligations with respect to cross-class promotions.

*to the state commission that the restriction is reasonable and nondiscriminatory.*³⁸

NewPhone is not aware of any state in which BellSouth has proven that its restrictions on resale are either reasonable or nondiscriminatory.³⁹ BellSouth's refusal to allow NewPhone to resell telecommunications service at the same rates, terms and conditions under which BellSouth offers such services to its own customers is not a "narrowly tailored" restriction. To the contrary, BellSouth's practices are discriminatory and constitute unreasonable restrictions on resale in violation of Sections 251(c)(4)(B) and 271(c)(2)(B)(xiv) of the Act, as well as Section 51.605(e) of the Commission's rules.

NewPhone's contentions regarding the application of the wholesale discount to the "effective retail rate" are further supported by the Commission's *Arkansas Preemption Order*. In that order, the Commission preempted an Arkansas statute that was contrary to the Commission's implementation of section 251(c)(4)(B), stating:

in connection with offering to competing carriers a retail service that an incumbent LEC markets to its end-user customers at a promotional price for longer than 90 days, the second sentence of 9(d) allows the incumbent LEC to apply the wholesale discount to the ordinary retail rate, whereas *our rules require the incumbent LEC to apply the wholesale discount to the special reduced rate.*⁴⁰

Moreover, NewPhone maintains that the North Carolina district court erroneously created a distinction between those promotions that *directly* reduce the retail rate of a

³⁸ 47 C.F.R. §51.613(b).

³⁹ To the contrary, as demonstrated herein, the NCUC found that BellSouth's promotions such as its cash-back offers have the effect of lowering the "real" retail rate and that BellSouth must determine that wholesale rate charged to resellers on the basis of the "real" retail rate charged to BellSouth subscribers.

⁴⁰ *In the Matter of Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, Memorandum Opinion and Order, 14 FCC Rcd 21579, ¶47 (rel. Dec. 23, 1999) ("*Arkansas Preemption Order*") (footnotes omitted) (emphasis added).

telecommunications service and certain promotions that *indirectly* reduce the retail rate.⁴¹ There is simply no basis for such a distinction under the Act or the Commission's rules. Indeed, in the *Local Competition Order* the Commission expressly recognizing that ILECs could use promotions like BellSouth's to manipulate their retail rates and effectively avoid their resale obligations. As such, the Commission found that the resale requirement of Section 251(c)(4) of the Act

*makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.*⁴²

Explaining that promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to Section 251(c)(4)(A), the Commission also stated,

To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion, *e.g.*, no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days. In addition, an incumbent LEC may not use promotional offerings to evade the wholesale obligation, for example by consecutively offering a series of 90-day promotions.⁴³

As should be evident from the above-referenced language, the Commission does not distinguish between promotions which directly reduce the retail rate of a telecommunications service and those that indirectly do so. The rules which the Commission adopted in the *Local Competition Order* plainly state that *all* promotional offerings must be made available for resale,

⁴¹ *Summary Judgment Order* at 6.

⁴² *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted) (emphasis added).

⁴³ *Id.*, ¶ 950.

other than those expressly provided for in Section 51.613 (cross-class and short term promotions), and that ILECs are prohibited from restricting, limiting or refusing in the first instance to make telecommunications service available for resale. Even assuming *arguendo* that the court decided the matter correctly with regard to indirect, non-cash discounts such as BellSouth's Walmart gift card promotions, that analysis does *not* apply to cash-back promotions which effectively reduce the price of the retail telecommunications service.

As demonstrated above, BellSouth is obligated to provide resellers with the benefit of cash-back promotions, gift cards, coupons, checks, or other similar giveaways in association with making the telecommunications service available for resale, pursuant to the Act and the Commission's rules. BellSouth's refusal to do so constitutes an unreasonable restriction on resale in violation of the Commission's rules and Sections 251(c)(4)(B) and 271(c)(2)(B)(xiv) of the Act. In light of the foregoing, the Commission should declare that for all promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, BellSouth shall *either* (i) in addition to offering the telecommunications service that is the subject of the promotion at the wholesale avoided cost service discount, offer to telecommunications carriers the value of all cash-back, check, gift card, coupon, or other similar giveaways or discounts that BellSouth provide to retail end-users; *or* (ii) apply the wholesale avoided cost service discount to the "effective retail rate" of the telecommunications service that is the subject of the AT&T or BellSouth promotion. The Commission should also declare that the "effective retail rate" shall be determined by subtracting the face value of the promotion from the tariffed rate, that the value of such discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months, and that telecommunications carriers

shall be entitled to resell ILEC cash-back and non-cash-back promotions of greater than 90 days on the first day the ILEC offers the promotion to retail subscribers.

2. Mixed Bundles

The second type of promotion used by BellSouth to discriminate against and attempt to eliminate its resale competition are promotions lasting more than 90 days in which BellSouth offers a mixed service bundle, *i.e.*, a bundle consisting of both telecommunications and non-telecommunications services, such as information services. By bundling a telecommunications service together with a non-telecommunications service, an ILEC is able, among other things, to disguise the true retail price of the telecommunications service and thereby discriminate against its resale competitors by applying the wholesale avoided cost discount to the tariffed retail rate rather than to the real rate at which BellSouth offers the bundled telecommunications service to its own subscribers (the “effective retail rate”). BellSouth, however, does not even concede that the telecommunications service incorporated within a mixed service bundle is available for resale in the first instance.

As explained above, Section 251(c)(4)(B) of the Act and Section 51.605(e) of the Commission’s rules prohibit ILECs from imposing unreasonable or discriminatory conditions or limitations on telecommunications available for resale, or refusing in the first instance to provide telecommunication services for resale. BellSouth’s practices concerning the resale of mixed bundle promotions violates both the Act and the Commission’s rules. In the *Local Competition Order*, the Commission concluded “that the plain language of the 1996 Act requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings.”⁴⁴ Although the Commission also explained

⁴⁴ *Local Competition Order*, 11 FCC Rcd at 15936, ¶877.

that “[s]ection 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services,”⁴⁵ those pronouncements were only as to bundles of “pure” telecommunications services, not mixed bundles. Indeed, the Commission recognized that by allowing ILECs to refuse to disaggregate pure telecommunications service bundles where the necessary telecommunications service component is not available as a stand-alone service, a reseller could still gain access to the necessary telecommunications component(s) by obtaining the entire bundle at wholesale rates. By contrast, if mixed bundles were not required to be disaggregated, it lawfully would allow ILECs to refuse to offer the entire mixed bundle for resale, effectively “locking up” the telecommunications components of such bundles. Surely the Commission could not have intended such a result. At a minimum, either the entire mixed service bundle must be available for resale at wholesale rates, or the telecommunications services component(s) must be made available for resale at wholesale rates. Anything less is discriminatory and is an unreasonable restriction on resale in violation of the Act and the Commission’s rules. As such, the Commission should declare that, for all ILEC promotions greater than 90 days in duration, the ILEC shall make available for resale the telecommunications services component(s) of ILEC mixed bundle promotions. The Commission should also declare that telecommunications carriers are entitled to resell bundled promotions lasting longer than 90 days as of the first day the ILEC offers the promotion to retail subscribers.

Equally as important as the availability of the telecommunications service component(s) of ILEC mixed bundle promotions, however, are the prices at which telecommunication services may be obtained for resale. In order for resellers to effectively compete against ILECs, the ILECs must make apply the wholesale avoided cost discount to the

⁴⁵ *Id.*

“effective retail rate” of the telecommunications services contained within the mixed bundle. To do otherwise would be discriminatory and would allow the ILECs to undercut their resale competitors and offer services to their customers that resellers could not offer, let alone match the price.

Accordingly, NewPhone contends that the Commission must require ILECs to offer resellers the telecommunications service component(s) of a mixed service bundle promotion at the “effective retail rate” of the telecommunications component, which should be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their retail unbundled component prices. For example, if the individual components comprising a mixed service bundle have a combined retail price of \$150 if purchased on a stand-alone basis, and the telecommunication service component has an stand-alone retail price of \$30, the telecommunications service component would have an “effective retail rate” of 20% of the total mixed service bundled price.⁴⁶

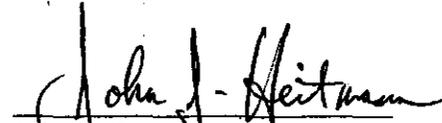
IV. CONCLUSION

Consistent with the foregoing, the Commission should act to preserve resale as a viable method of local exchange competition by granting the instant Petition for Declaratory Ruling.

⁴⁶ This calculation is generally consistent with the way taxing authorities apply a variety of taxes and policies to various components of bundled offerings.

Respectfully submitted,

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