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July 11, 2006

RECEIVED

JUL 11 2006

Federal Communications Commission
Office of Secretary

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

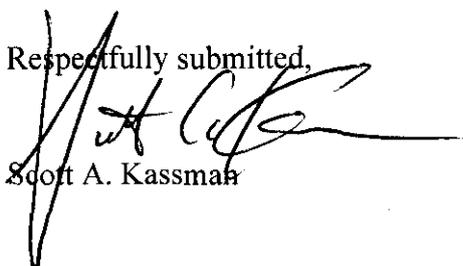
Re: **Ex Parte Notification:** Petition of Image Access, Inc. d/b/a NewPhone
for Declaratory Ruling – WC Docket No. 06-129

Dear Ms. Dortch:

On Monday, July 10, 2006, Scott Kassman of Kelley Drye & Warren LLP, on behalf of Image Access, Inc. d/b/a NewPhone, sent an e-mail to Tamara Preiss and Don Stockdale of the Wireline Competition Bureau in regard to the above-referenced matter. The e-mail included an attachment containing relevant portions of FCC orders having bearing on NewPhone's Petition for Declaratory Ruling.

In accordance with §1.1206(b)(1) of the Commission's rules, please find two copies of the e-mail and the attachment for inclusion in the public record of the above-referenced proceeding. Please feel free to contact me, if you have any questions regarding this *ex parte* notification.

Respectfully submitted,


Scott A. Kassman

SAK:koc
Enclosure

cc: Tamara Preiss
Don Stockdale

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041

Kassman, Scott A.

From: Kassman, Scott A.
Sent: Monday, July 10, 2006 3:27 PM
To: 'tamara.preiss@fcc.gov'; 'donaldkjr.stockdale@fcc.gov'; 'donald.stockdale@fcc.gov'
Cc: Heitmann, John
Subject: RE: NewPhone Petition for Declaratory Ruling

Tamara, Don:

We just realized that the document we previously sent to you was formatted incorrectly. Please find a correctly formatted version attached below. We apologize for any inconvenience.

Thank you.

Scott



SFX39C.pdf (2 MB)

-----Original Message-----

From: Kassman, Scott A.
Sent: Wednesday, June 14, 2006 12:15 PM
To: 'tamara.preiss@fcc.gov'; 'donaldkjr.stockdale@fcc.gov'; 'donald.stockdale@fcc.gov'
Cc: Heitmann, John
Subject: RE: NewPhone Petition for Declaratory Ruling

Per John's email below, please see the attached.

<< File: SFX410.pdf >>

-----Original Message-----

From: Heitmann, John
Sent: Wednesday, June 14, 2006 11:35 AM
To: 'tamara.preiss@fcc.gov'; 'donaldkjr.stockdale@fcc.gov'; 'donald.stockdale@fcc.gov'
Cc: Kassman, Scott A.
Subject: RE: NewPhone Petition for Declaratory Ruling

Tamara and Don,

NewPhone would like to come in and discuss this item with you but I suspect that it might make the most sense to do so after the comment cycle has closed. (Of course, we can discuss whenever you want -- just give me a call.) Can you please let me know when you would expect a public notice and comment cycle established?

Also, we put together a packet of excerpts of relevant FCC decisions for the EB that we had not had occasion to share with you yet, so I will ask Scott to send that your way. If you need anything else, please let us know.

Thank you.

John

-----Original Message-----

From: Kassman, Scott A.
Sent: Wednesday, June 14, 2006 11:25 AM
To: 'tamara.preiss@fcc.gov'; 'donaldkjr.stockdale@fcc.gov'; 'donald.stockdale@fcc.gov'
Cc: Heitmann, John
Subject: NewPhone Petition for Declaratory Ruling
Importance: High

Tamara, Don:

FYI - The attached Petition for Declaratory Ruling was filed yesterday with the Commission. Please let us know if you have any questions.

Thank you,

Scott A. Kassman
Associate
Kelley Drye Collier Shannon
3050 K Street, N.W.
Suite 400
Washington, DC 20007-5108**
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**Not admitted to District of Columbia bar. Practice limited to matters and proceedings before federal courts and agencies.

<< File: SFX74A.pdf >> << File: 248333.doc >>

Citations to Relevant Commission Law

1.	<i>Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 1 (1996).</i>
2.	<i>47 CFR §§ 51.605, 51.613(a)(2), 51.613(b).</i>
3.	<i>Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd 539 (1997).</i>
4.	<i>Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 6245 (1998).</i>
5.	<i>Petition 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 (2005).</i>
6.	<i>American Communications Services, Inc., MCI Telecommunications Corp., 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, 14 FCC Rcd 21579 (1999).</i>

1

Local Competition Order

network support expense. For marketing categories, 20 percent of product management, 50 percent of sales, and 50 percent of advertising expenses were considered avoidable. All uncollectibles were considered avoidable. Calculating these and other avoided costs, the New York Commission arrived at a 15 percent discount. Because the New York Commission observed that business lines produce higher overall revenue and thus artificially inflate avoided cost for business lines (and undervalue the avoided cost for residential lines), a 17 percent discount was set for residential service while only an 11 percent discount was set for business service. A uniform 13.5 percent discount was ordered for Rochester Telephone, based on a New York Commission analysis of Rochester's 1995 annual report, using principles similar to those applied to NYNEX.

906. *Ohio*: The Ohio Commission has established rules for pricing wholesale services for resale, but has not publicly released calculations of specific discounts for particular services.²¹⁹⁰ The Ohio Commission established a presumption that all expenses contained in the following USOA accounts will be avoided: 5300 (uncollectible revenue), 6611 (product management), 6612 (sales), 6613 (product advertising), 6621 (call completion service), 6622 (number services expense), and 6623 (customer service).²¹⁹¹ The Ohio Commission's rules require resellers seeking to avoid additional costs to prove that such costs would be avoided in wholesale operations. Beyond the avoided expenses discussed above, the Ohio Commission requires avoided costs to include "direct and indirect costs of all activities eliminated due to the wholesale provisioning."

5. Discussion

907. Resale 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. Resale will also be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks. In light of the strategic importance of resale to the development of competition, we conclude that it is especially important to promulgate national rules for use by state commissions in setting wholesale rates. For the same reasons discussed in Section II.D of the Order, we believe that we have legal authority under the 1996 Act to articulate principles that will apply to the arbitration or review of wholesale rates. We also believe that articulating such principles will promote expeditious and efficient entry into the local exchange market. Clear resale rules will create incentives for parties to reach agreement on resale arrangements in voluntary negotiations. Clear rules will also aid states in conducting arbitrations that will be administratively workable

²¹⁹⁰ *Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996).

²¹⁹¹ The Ohio Commission also lists account 6610, which is the summary account for marketing expenses (accounts 6611-6613).

and will produce results that satisfy the intent of the 1996 Act. The rules we adopt and the determinations we make in this area are crafted to achieve these purposes. We also note that clear resale rules should minimize regulatory burdens and uncertainty for all parties, including small entities and small incumbent LECs.²¹⁹²

908. The statutory pricing standard for wholesale rates requires state commissions to (1) identify what marketing, billing, collection, and other costs will be avoided by incumbent LECs when they provide services at wholesale; and (2) calculate the portion of the retail prices for those services that is attributable to the avoided costs. Our rules provide two methods for making these determinations. The first, and preferred, method requires state commissions to identify and calculate avoided costs based on avoided cost studies. The second method allows states to select, on an interim basis, a discount rate from within a default range of discount rates adopted by this Commission. They may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate.

909. We adopt a minimum set of criteria for avoided cost studies used to determine wholesale discount rates. The record before us demonstrates that avoided cost studies can produce widely varying results, depending in large part upon how the proponent of the study interprets the language of section 252(d)(3). The criteria we adopt are designed to ensure that states apply consistent interpretations of the 1996 Act in setting wholesale rates based on avoided cost studies which should facilitate swift entry by national and regional resellers, which may include small entities.²¹⁹³ At the same time, our criteria are intended to leave the state commissions broad latitude in selecting costing methodologies that comport with their own ratemaking practices for retail services. Thus, for example, our rules for identifying avoided costs by USOA expense account are cast as rebuttable presumptions, and we do not adopt as presumptively correct any avoided cost model.

910. Based on the comments filed in this proceeding and on our analysis of state decisions setting wholesale discounts, we adopt a default range of rates that will permit a state commission to select a reasonable default wholesale rate between 17 and 25 percent below retail rate levels. A default wholesale discount rate shall be used if: (1) an avoided cost study that satisfies the criteria we set forth below does not exist; (2) a state commission has not completed its review of such an avoided cost study; or (3) a rate established by a state commission before release of this Order is based on a study that does not comply with the criteria described in the following section. A state commission must establish wholesale rates based on avoided cost studies within a reasonable time from when the default rate was selected. This approach will enable state commissions to complete arbitration proceedings within the statutory time frames even if it is infeasible to conduct full-scale avoided cost studies that comply with the criteria

²¹⁹² See Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

²¹⁹³ See *Id.*

employed avoided cost studies have produced wholesale discount rates somewhat below the low end of this range. Furthermore, it has been argued that smaller incumbent LECs' avoided costs are likely to be less than those of the larger incumbent LECs, whose data was used by MCI. Therefore, to allow for these considerations, we select 17 percent as the lower end of the range.²²⁰⁹ We select 25 percent as the top of the range because it approximates the top of the range of results produced by the modified MCI model. This range gives state commissions flexibility in addressing circumstances of incumbent LECs serving their states and permits resale to proceed until such time as the state commission can review a fully-compliant avoided cost study.

934. We have considered the economic impact of our rules in this section on small incumbent LECs. For example, Bay Springs, *et al.*, argues that national wholesale pricing rules will insufficiently consider operational differences between small and large incumbent LECs.²²¹⁰ We take this into consideration in setting the default discount rate and in requiring state commissions to perform carrier-specific avoided cost studies within a reasonable period of time that will reflect carrier-to-carrier differences. We believe, however, that the procompetitive goals of the 1996 Act require us to establish a default discount rate for state commissions to use in the absence of avoided cost studies that comply with the criteria we set forth above. The presumptions we establish in conducting avoided cost studies regarding the avoidability of certain expenses may be rebutted by evidence that certain costs are not avoided, which should minimize any economic impact of our decisions on small incumbent LECs. We also note that certain small incumbent LECs are not subject to our rules under section 251(f)(1) of the 1996 Act, unless otherwise determined by a state commission, and certain other small incumbent LECs may seek relief from their state commissions from our rules under section 251(f)(2) of the 1996 Act.

C. Conditions and Limitations

935. Section 251(c)(4) requires incumbent LECs to make their services available for resale without unreasonable or discriminatory conditions or limitations. This portion of this Order addresses various issues relating to conditions or limitations on resale. It first discusses restrictions, generally, in Section VIII.C.1. Next, it turns to promotional and discounted offerings and the conditions that may attach to such offerings in Section VIII.C.2., and then to refusals to resell residential and below-cost services in Section VIII.C.3. Limitations on the categories of customers to whom a reseller may sell incumbent LEC services are discussed in VIII.C.4. Resale restrictions in the form of withdrawal of service are discussed in VIII.C.5. Finally, Section VIII.C.6. discusses resale restrictions relating to provisioning.

1. Restrictions, Generally, and Burden of Proof

²²⁰⁹ See Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

²²¹⁰ Bay Springs, *et al.*, comments at 17. .

a. Background and Comments

936. In the NPRM, we asked whether incumbent LECs should have the burden of proving that restrictions on resale are reasonable and nondiscriminatory.²²¹¹ We stated our belief that, given the pro-competitive goals of the 1996 Act and the view that restrictions and conditions were likely to be evidence of an exercise of market power, the range of permissible restrictions should be quite narrow.²²¹²

937. A number of parties, including IXCs, resellers, and some state commissions, agree that incumbent LECs should have the burden of justifying any restrictions they impose on the resale of their services.²²¹³ For example, Jones Intercable proposes a requirement that incumbent LECs prove that a proposed condition or restriction will directly advance an important public policy objective and that the benefits of the condition plainly outweigh its anticompetitive effects.²²¹⁴ Many add the caveat that the only permissible restriction should be the cross-class restriction, section 251(c)(4)(B), prohibiting resellers that obtain at wholesale rates telecommunications services that are available at retail only to a category of subscribers from offering such services to a different category of subscribers.²²¹⁵ The Texas Public Utility Counsel suggests that the relevant determination is whether an incumbent LEC could impose the condition in question in a competitive market.²²¹⁶

938. Incumbent LECs support various restrictions and limitations.²²¹⁷ BellSouth and the Ohio Consumers' Counsel further suggest that the burden of justifying restrictions and limitations

²²¹¹ NPRM at para. 175.

²²¹² *Id.*

²²¹³ See, e.g., ACSI comments at 60; California Commission comments at 35-37; CFA/CU comments at 17; Citizens Utilities comments at 27; Colorado Commission comments at 52-53; Jones Intercable comments at 24; MFS comments at 70; NEXTLINK comments at 30; Pennsylvania Commission comments at 36; Ohio Commission comments at 62; TCC comments at 43; Telecommunications Resellers Ass'n comments at 20; Washington Commission comments at 32.

²²¹⁴ Jones Intercable comments at 32-33.

²²¹⁵ See, e.g., CFA/CU comments at 17; Citizens Utilities at 27; Colorado Commission comments at 52-53; TCC comments at 43. Many of these parties offer a narrow interpretation of section 251(c)(4)(B), which will be discussed, *infra*.

²²¹⁶ Texas Public Utilities Counsel reply at 42.

²²¹⁷ See, e.g., BellSouth comments at 66.

should not be placed on LECs.²²¹⁸

b. Discussion

939. We conclude that resale restrictions are presumptively unreasonable. Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored. Such resale restrictions are not limited to those found in the resale agreement. They include conditions and limitations contained in the incumbent LEC's underlying tariff. As we explained in the NPRM, the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4). This presumption should reduce unnecessary burdens on resellers seeking to enter local exchange markets, which may include small entities, by reducing the time and expense of proving affirmatively that such restrictions are unreasonable.²²¹⁹ We discuss several specific restrictions below including certain restrictions for which we conclude the presumption of unreasonableness shall not apply. We also discuss certain restrictions that we will presume are reasonable.

2. Promotions and Discounts

a. Background and Comments

940. In the NPRM, we asked whether an incumbent LEC's obligation to make their services available for resale at wholesale rates applies to discounted and promotional offerings and, if so, how.²²²⁰ We also asked, if the wholesale pricing obligation applies to promotions and discounts, whether the reseller entrant's customer must take service pursuant to the same restrictions that apply to the incumbent LEC's retail customers.²²²¹

²²¹⁸ BellSouth comments at 65; Ohio Consumers' Counsel comments at 35.

²²¹⁹ See Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

²²²⁰ NPRM at para. 175.

²²²¹ *Id.*

941. Incumbent LECs and Time Warner argue that they should not be required to offer discounted and promotional offerings at wholesale rates.²²²² These parties argue that promotions and discounts are merely subsets of standard offerings, or that promotions and discounts are only devices for marketing underlying "telecommunications services."²²²³ Thus, these parties argue, a discounted and promotional offering is not in itself a "telecommunications service" that is subject to the resale requirement as long as the standard offering is made available for resale at wholesale rates.²²²⁴

942. Incumbent LECs argue that requiring promotions and discounts to be made available at wholesale rates will discourage such offerings. According to incumbent LECs, promotions and discounts serve as a means by which incumbent LECs differentiate their services from resellers' offerings.²²²⁵ Furthermore, they contend that establishing a system where resellers' service and pricing options track incumbent LECs' promotions and discounts would promote collusion rather than competition.²²²⁶ SBC notes that resellers will have access to volume discounts (through aggregating) that will allow them to compete with promotions and discounts offered by incumbent LECs.²²²⁷ Incumbent LECs argue that many promotions, such as offering installation at no charge for new customers for limited periods, are short-term and used as marketing tools.²²²⁸ Some parties suggest that the wholesale rate obligation should, at least, not attach to offerings that are only available for a limited period of time.²²²⁹ Specifically, some parties recommend that we not permit incumbent LECs not to offer wholesale rates for offerings that are only available for 120 days or less.²²³⁰

²²²² See, e.g., Ameritech comments at 57; Bell Atlantic comments at 46; MECA comments at 60; NYNEX comments at 76; SNET comments at 34; Time Warner comments at 73; U S West comments at 67; USTA comments at 72. Some parties commented only with respect to promotional offerings. See, e.g., BellSouth comments at 66; Cincinnati Bell comments at 34; PacTel comments at 87; SBC comments at 72.

²²²³ See, e.g., Ameritech comments at 57; NYNEX comments at 76.

²²²⁴ See, e.g., Bell Atlantic reply at 23-24; GTE comments at 50; MECA comments at 60; NYNEX comments at 76; Time Warner comments at 73.

²²²⁵ See, e.g., BellSouth comments at Attachment (Interconnection and Economic Efficiency), p. 22; Cincinnati Bell comments at 33; USTA comments at Attachment (Affidavit of Jerry Hausman), p.14.

²²²⁶ GTE comments at 50.

²²²⁷ SBC comments at 72-73.

²²²⁸ See, e.g., NYNEX comments at 76 (promotions are merely short term waivers of nonrecurring charges).

²²²⁹ Ameritech comments at 56-57; GTE reply at 27 n.49; Ohio Consumer's Counsel comments at 36; PacTel reply at 45.

²²³⁰ See, e.g., Ameritech comments at 57.

943. Some parties also contend that section 251(c)(4) resale obligations should not apply to contract,²²³¹ trial,²²³² or community service offerings.²²³³ GTE and U S West argue that high volume rate offerings should not be subject to the wholesale rate obligation because they are already discounted.²²³⁴ Ameritech and Bell Atlantic argue that contract offerings are not subject to resale because they are not made generally available.²²³⁵

944. IXCs, resellers, and DoJ argue that if incumbent LECs are not required to offer promotions and other discounts at wholesale rates, incumbent LECs will be able to undercut rates that resellers offer.²²³⁶ They contend that services, classes of customers, or even individual customers could be strategically targeted by the incumbent LECs.²²³⁷ The Telecommunications Resellers Association and others argue that price reductions that are designed to drive competitors from the market do not produce long-term gains for consumers.²²³⁸ The Ohio Consumers' Counsel argues that, if the Commission were to exempt short-term promotional offerings, 120 days is too long to be considered short-term.²²³⁹ IXCs and resellers contend that contract offerings should be made available for resale.²²⁴⁰

945. Incumbent LECs, some state commissions, and the Ohio Consumers' Counsel argue that if promotions and discounts are subject to wholesale pricing, reseller end-users must take

²²³¹ BellSouth comments at 66; USTA comments at 72.

²²³² Bell Atlantic reply at 23-24; SBC comments at 71; USTA comments at 72.

²²³³ J. Staurulakis comments at 7. LDDS advocates that resale of community service offerings be limited to the class of subscribers eligible to receive such offerings. LDDS comments at 84.

²²³⁴ GTE comments at 49-50; U S West comments at 68.

²²³⁵ Ameritech reply at 47; Bell Atlantic reply at 24.

²²³⁶ See, e.g., AT&T comments at 83; Cable & Wireless comments at 37; Telecommunications Resellers Ass'n reply at 13; DoJ comments at 54-55. For this reason, the Washington Commission made its support of promotional and discount resale restrictions contingent on rules that would prevent incumbent LECs from pricing such offerings below rates offered to resellers. Washington Commission comments at 32.

²²³⁷ See, e.g., Telecommunications Resellers Ass'n reply at 13.

²²³⁸ Telecommunications Resellers Ass'n reply at 13.

²²³⁹ Ohio Consumers' Counsel reply at 30.

²²⁴⁰ See, e.g., LDDS reply at 43; Telecommunications Resellers Ass'n reply at 14.

such promotions and discounts under the same conditions as incumbent LEC end users.²²⁴¹ Resellers argue, however, that incumbent LECs will use this latitude to engage in anticompetitive practices by creating conditions that will have an unnecessarily greater impact on typical reseller end users than incumbent LEC end users.²²⁴²

946. Incumbent LECs also seek to limit reseller end user eligibility to purchase resold incumbent LEC high-volume offerings to those eligible to receive such offerings directly from the incumbent LEC.²²⁴³ Such a limitation would prevent high-volume services from being resold to low-volume customers. MFS argues that such restrictions should be considered per se unreasonable because this is a significant source of the resellers' competitive advantage.²²⁴⁴ The Ohio and Pennsylvania Commissions also support resellers' rights to aggregate low volume customers to take advantage of the resulting buying power.²²⁴⁵

947. U S West generally argues that resellers should make the same type of purchasing commitments made by current purchasers of wholesale services.²²⁴⁶ Often, U S West argues, wholesalers are required to concentrate their purchases on services from a limited number of switches in order to receive volume discounts. U S West argues that incumbent LECs should be allowed to require the same types of commitments from resellers purchasing such services.²²⁴⁷ U S West and GTE propose allowing incumbent LECs to impose term requirements on resold offerings.²²⁴⁸ Cable & Wireless opposes both of these requirements and suggests that they be made presumptively unreasonable.²²⁴⁹

²²⁴¹ See, e.g., SBC reply at 15 n.34, PacTel comments at 45 n.95; Alabama Commission comments at 26; Ohio Consumers' Counsel comments at 35-36.

²²⁴² See, e.g., Cable & Wireless comments at 42; Telecommunications Resellers Ass'n comments at 19 n.50.

²²⁴³ See, e.g., GTE comments at 49-50; California Commission comments at 35-37; PacTel reply at 45 n.95.

²²⁴⁴ MFS comments at 70.

²²⁴⁵ Ohio Commission comments at 65; Pennsylvania Commission comments at 36. The Ohio Commission, however, specifically states that it is opposed to federal rules on this subject. Ohio Commission at 65.

²²⁴⁶ U S West comments at 67.

²²⁴⁷ *Id.*

²²⁴⁸ U S West comments at 67; GTE comments at 47.

²²⁴⁹ Cable & Wireless comments at 48-49.

b. Discussion

948. Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language 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. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.²²⁵⁰

949. There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate;" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

950. We must also determine when a promotional price ceases to be "short term" and must therefore be treated as a retail rate for an underlying service. Incumbent LEC commenters support 120 days as the maximum period for such promotions. This has been criticized as being too long. We are concerned that excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale. We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A). 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

²²⁵⁰ Limited time offerings of service are still subject to resale pursuant to *supra* Section VIII.A.

by consecutively offering a series of 90-day promotions.

951. We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.

952. We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

953. With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers.²²⁵¹ We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

3. Below-Cost and Residential Service

a. Background and Comments

954. Responding to our general questions regarding the scope of limitations that may be

²²⁵¹ See, e.g., *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 308-16 (1976) (divisions of full time private line circuits will enable smaller users to make efficient, discrete use of private line offerings, and such advantages will be in terms of cost savings and selectivity rather than technical advantages).

2

Regulations

company is authorized to offer in-region interLATA service in a state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

(c) Notwithstanding §§ 51.505, 51.511, and 51.513(d)(2) and paragraph (a) of this section, an incumbent LEC may assess upon telecommunications carriers that purchase unbundled local switching elements, as described in § 51.319(c)(1), for intrastate toll minutes of use traversing such unbundled local switching elements, intrastate access charges comparable to those listed in paragraph (b) and any explicit intrastate universal service mechanism based on access charges, only until the earliest of the following, and not thereafter:

- (1) June 30, 1997;
- (2) The effective date of a state commission decision that an incumbent LEC may not assess such charges; or
- (3) With respect to a Bell operating company only, the date on which that company is authorized to offer in-region interLATA service in the state pursuant to section 271 of the Act. The end date for Bell operating companies that are authorized to offer interLATA service shall apply only to the recovery of access charges in those states in which the Bell operating company is authorized to offer such service.

(d) Interstate access charges described in part 69 shall not be assessed by incumbent LECs on each element purchased by requesting carriers providing both telephone exchange and exchange access services to such requesting carriers' end users.

[61 FR 45619, Aug. 29, 1996, as amended at 62 FR 45687, Aug. 28, 1997]

Subpart G—Resale

§ 51.601 Scope of resale rules.

The provisions of this subpart govern the terms and conditions under which LECs offer telecommunications services to requesting telecommunications carriers for resale.

§ 51.603 Resale obligation of all local exchange carriers.

(a) A LEC shall make its telecommunications services available for resale to requesting telecommunications carriers on terms and conditions that are reasonable and non-discriminatory.

(b) A LEC must provide services to requesting telecommunications carriers for resale that are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.

§ 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates that are, at the election of the state commission—

(1) Consistent with the avoided cost methodology described in §§ 51.607 and 51.609; or

(2) Interim wholesale rates, pursuant to § 51.611.

(b) For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

(c) For purposes of this subpart, advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

(d) Notwithstanding paragraph (b) of this section, advanced telecommunications services that are classified as exchange access services are subject to the obligations of paragraph (a) of this section if such services are sold on a retail basis to residential and business

end-users that are not telecommunications carriers.

(e) Except as provided in §51.613, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

[61 FR 45619, Aug. 29, 1996, as amended at 65 FR 6915, Feb. 11, 2000]

§ 51.607 Wholesale pricing standard.

The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, less avoided retail costs, as described in section 51.609. For purposes of this subpart, exchange access services, as defined in section 3 of the Act, shall not be considered to be telecommunications services that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.

[65 FR 6915, Feb. 11, 2000]

§ 51.609 Determination of avoided retail costs.

(a) Except as provided in §51.611, the amount of avoided retail costs shall be determined on the basis of a cost study that complies with the requirements of this section.

(b) Avoided retail costs shall be those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier.

(c) For incumbent LECs that are designated as Class A companies under §32.11 of this chapter, except as provided in paragraph (d) of this section, avoided retail costs shall:

(1) Include as direct costs, the costs recorded in USOA accounts 6611 (product management and sales), 6613 (product advertising), 6621 (call completion services), 6622, (number services), and 6623 (customer services) (§§32.6611, 32.6613, 32.6621, 32.6622, and 32.6623 of this chapter);

(2) Include, as indirect costs, a portion of the costs recorded in USOA accounts 6121-6124 (general support expenses), 6720 (corporate operations ex-

penses), and uncollectible telecommunications revenue included in 5300 (uncollectible revenue) (Secs. 32.6121 through 32.6124, 32.6720 and 32.5300 of this chapter); and

(3) Not include plant-specific expenses and plant non-specific expenses, other than general support expenses (§§32.6112-6114, 32.6211-6565 of this chapter).

(d) Costs included in accounts 6611, 6613 and 6621-6623 described in paragraph (c) of this section (§§32.6611, 32.6613, and 32.6621-6623 of this chapter) may be included in wholesale rates only to the extent that the incumbent LEC proves to a state commission that specific costs in these accounts will be incurred and are not avoidable with respect to services sold at wholesale, or that specific costs in these accounts are not included in the retail prices of resold services. Costs included in accounts 6112-6114 and 6211-6565 described in paragraph (c) of this section (§§32.6112-32.6114, 32.6211-32.6565 of this chapter) may be treated as avoided retail costs, and excluded from wholesale rates, only to the extent that a party proves to a state commission that specific costs in these accounts can reasonably be avoided when an incumbent LEC provides a telecommunications service for resale to a requesting carrier.

(e) For incumbent LECs that are designated as Class B companies under §32.11 of this chapter and that record information in summary accounts instead of specific USOA accounts, the entire relevant summary accounts may be used in lieu of the specific USOA accounts listed in paragraphs (c) and (d) of this section.

[61 FR 45619, Aug. 29, 1996, as amended at 67 FR 5700, Feb. 6, 2002; 69 FR 53652, Sept. 2, 2004]

§ 51.611 Interim wholesale rates.

(a) If a state commission cannot, based on the information available to it, establish a wholesale rate using the methodology prescribed in §51.609, then the state commission may elect to establish an interim wholesale rate as described in paragraph (b) of this section.

(b) The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25

§51.613

47 CFR Ch. I (10-1-05 Edition)

percent, below the incumbent LEC's existing retail rates, and shall articulate the basis for selecting a particular discount rate. The same discount percentage rate shall be used to establish interim wholesale rates for each telecommunications service.

(c) A state commission that establishes interim wholesale rates shall, within a reasonable period of time thereafter, establish wholesale rates on the basis of an avoided retail cost study that complies with §51.609.

§51.613 Restrictions on resale.

(a) Notwithstanding §51.605(b), the following types of restrictions on resale may be imposed:

(1) *Cross-class selling.* A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.

(2) *Short term promotions.* An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(i) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.

(c) *Branding.* Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.

(1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

(2) For purposes of this subpart, unbranding or rebranding shall mean that operator, call completion, or directory assistance services are offered in such a manner that an incumbent LEC's brand name or other identifying information is not identified to subscribers, or that such services are offered in such a manner that identifies to subscribers the requesting carrier's brand name or other identifying information.

§51.615 Withdrawal of services.

When an incumbent LEC makes a telecommunications service available only to a limited group of customers that have purchased such a service in the past, the incumbent LEC must also make such a service available at wholesale rates to requesting carriers to offer on a resale basis to the same limited group of customers that have purchased such a service in the past.

§51.617 Assessment of end user common line charge on resellers.

(a) Notwithstanding the provision in §69.104(a) of this chapter that the end user common line charge be assessed upon end users, an incumbent LEC shall assess this charge, and the charge for changing the designated primary interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific end user common line charge to be assessed will depend upon the identity of the end user served by the requesting carrier.

(b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access charges provided in part 69 of this chapter, other than the end user common line charge, upon interexchange carriers that use the incumbent LEC's facilities to provide interstate or international telecommunications services

3

BellSouth South Carolina Order

DC01/BARAK/243890.1

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Application of BellSouth Corporation, <i>et al.</i>)	CC Docket No. 97-208
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

Adopted: December 24, 1997

Released: December 24, 1997

By the Commission: Chairman Kennard and Commissioners Ness, Furchtgott-Roth, and Powell
issuing separate statements.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. BACKGROUND	3
A. Statutory Framework	3
B. Overview	6
III. STATE AND DEPARTMENT OF JUSTICE CONSULTATION	29
A. State Review of BOC Compliance with Section 271(c)	29
B. Department of Justice's Evaluation	33
IV. STANDARD FOR EVALUATING SECTION 271 APPLICATIONS	37
A. Burden of Proof for Section 271 Applications and Compliance with Requirement that Application be Complete When Filed	37
B. Submission of New Factual Evidence and New Arguments in Reply Comments	39
V. COMPLIANCE WITH SECTION 271(c)(1)(B)	46

use unbundled network elements to provide a telecommunications service.⁶²¹ The Eighth Circuit in *Iowa Utilities Board* also held that "under section 251(c)(3) a requesting carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services."⁶²² Because the use of unbundled network elements, as well as the use of combinations of unbundled network elements, is an important entry strategy into the local telecommunications market, we will examine carefully any similar allegations in future applications.

D. Resale of Contract Service Arrangements

I. Background

212. Section 271(c)(2)(B)(xiv) of the competitive checklist requires that telecommunications services be "available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." Section 251(c)(4), in turn, imposes upon incumbent LECs the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and . . . not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service. . . ." The Commission concluded in the *Local Competition Order* that resale restrictions are "presumptively unreasonable."⁶²³ The Commission also explicitly held that services offered through customer-specific contract service arrangements (CSAs) are "telecommunications services" subject to the wholesale discount resale requirement of section 251(c)(4)(A):

Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language 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.⁶²⁴

CSAs are contractual agreements made between a carrier and a specific, typically high-volume, customer, tailored to that customer's individual needs. CSAs may include volume

⁶²¹ *Local Competition Order*, 11 FCC Rcd at 15666. The Commission determined that such limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition. *Id.*

⁶²² *Iowa Utils. Bd.*, 120 F.3d at 815.

⁶²³ *Local Competition Order*, 11 FCC Rcd at 15966.

⁶²⁴ *Id.* at 15970; see *AT&T/LCI Motion to Dismiss* at 15 & n.12.

and term arrangements, special service arrangements, customized telecommunications service agreements, and master service agreements.

213. The Commission's rules on resale restrictions provide that, "[e]xcept as provided in § 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC."⁶²⁵ Rule 51.613 provides in pertinent part that, "[w]ith respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."⁶²⁶ The Eighth Circuit specifically held that determinations on resale restrictions are within the Commission's jurisdiction and upheld our resale restriction rules as a reasonable interpretation of the 1996 Act's terms.⁶²⁷

214. BellSouth states clearly that it will not make CSAs available at a wholesale discount.⁶²⁸ BellSouth's SGAT provides that "BellSouth's contract service arrangements are available for resale only at the same rates, terms and conditions offered to BellSouth end users."⁶²⁹

2. Discussion

215. We find that BellSouth fails to comply with item fourteen of the competitive checklist by refusing to offer CSAs at a wholesale discount. Moreover, based on evidence presented in the record, we are concerned that BellSouth's failure to offer CSAs for resale at

⁶²⁵ 47 C.F.R. § 51.605(b).

⁶²⁶ *Id.* § 51.613(b). The resale restrictions permitted under subparagraph (a) do not involve CSAs. Those permissible restrictions relate to cross-class selling and short term promotions. *Id.* § 51.613(a)(1), (a)(2).

⁶²⁷ *Iowa Utils. Bd.*, 120 F.3d at 818-19. The Eighth Circuit held:

[W]e believe that the FCC has jurisdiction to issue these particular rules and that its determinations are reasonable interpretations of the Act. . . . [S]ubsection 251(c)(4)(B) authorizes the Commission to issue regulations regarding the incumbent LECs' duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services. . . . [47 C.F.R. § 51.613] is a valid exercise of the Commission's authority under subsection 251(c)(4)(B) because it restricts the ability of incumbent LECs to circumvent their resale obligations under the Act simply by offering their services to their subscribers at perpetual "promotional" rates.

Id. at 819.

⁶²⁸ See SGAT § XIV(B)(1); see also BellSouth Application at 53; see also BellSouth Vamer Aff. at paras. 191-192.

⁶²⁹ SGAT § XIV(B)(1).

a discount impedes competition for its large-volume customers and thus impairs the use of resale as a vehicle for competitors to enter BellSouth's market.

216. There is no dispute that, pursuant to the terms of the SGAT, BellSouth refuses to resell CSAs at a discount. Nor is there any dispute that CSAs constitute a retail service. The issue, therefore, is whether BellSouth's refusal to offer this particular retail service at a wholesale rate constitutes a "reasonable and nondiscriminatory" restriction.⁶³⁰ In this regard, BellSouth states that the SGAT "offers CLECs wholesale rates for any services that BellSouth offers to its retail customers, with the exception of those excluded from resale requirements in accordance with the Commission's rules and the orders of the [South Carolina Commission] . . . includ[ing] . . . contract service arrangements (which are available for resale at the same rates, terms and conditions offered to BellSouth's end user customers)."⁶³¹ BellSouth provides no explanation in its Brief in Support of its refusal to offer CSAs at wholesale rates, nor any rationale for considering the refusal reasonable or nondiscriminatory. BellSouth's supporting affidavits note that the South Carolina Commission concluded in the *AT&T Arbitration Order* that "the wholesale discount would not be applied to CSAs."⁶³² In the *AT&T Arbitration Order*, the South Carolina Commission stated that CSA's "should not receive a further discount below the contract service arrangement rate."⁶³³ The state commission justified this conclusion by arguing that "CSAs are designed to respond to specific competitive challenges on a customer-by-customer basis. As BellSouth argued, the contract price for these services has already been discounted from the tariffed rate in order to meet competition."⁶³⁴

217. By offering CSAs only at their original rates, terms and conditions, BellSouth has created a general exemption from the wholesale requirement for CSAs. The *Local Competition Order*, however, made clear that the language of section 251(c)(4) "makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings" and that, therefore, "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by

⁶³⁰ BellSouth's refusal to offer CSAs at a wholesale discount was the subject of a motion to dismiss filed by AT&T and LCI. *AT&T/LCI Motion to Dismiss* at 14. As noted above, we have treated the motion as early filed comments.

⁶³¹ BellSouth Application at 53.

⁶³² BellSouth Varner Aff. at para. 192. We note that BellSouth's failure to articulate in its Brief in Support its justification for the CSA restriction violates the procedural rules the Commission has promulgated to govern section 271 applications. The Commission has directed parties to present substantive arguments in their Brief in Support. Such arguments should not be contained solely in affidavits or supporting documentation. *Sept. 19th Public Notice*; see also *Ameritech Michigan Order* at para. 60 (arguments must be clearly stated in the brief with appropriate references to supporting affidavits).

⁶³³ *AT&T Arbitration Order* at 4.

⁶³⁴ *Id.* at 4-5.

incumbent LECs.⁶³⁵ BellSouth's justification for the general exemption is that the South Carolina Commission ruled in the *AT&T Arbitration Order* that the wholesale discount need not be applied to CSAs because they are already discounted. In the Local Competition proceeding, however, incumbent LECs raised the same argument with respect to volume discounts -- that the wholesale rate obligation should not apply to high volume rate offerings because they are already discounted.⁶³⁶ The Commission specifically considered and rejected this argument in the *Local Competition Order*, concluding that any service sold to end users is a retail service, and thus is subject to the wholesale discount requirement, even if it is already priced at a discount off the price of another retail service.⁶³⁷ Thus the only justification that BellSouth offered in its application for the SGAT's general exemption for CSAs is one which this Commission has specifically rejected.

218. The Commission's rules require a BOC to prove to the state commission that a resale restriction is reasonable for section 251 purposes.⁶³⁸ The rule does not contemplate, however, that a state commission can create a general exemption of all CSAs from the Act's requirement that retail offerings be available for resale at a discount from the retail price. Indeed, the *Local Competition Order* specifically found that the Act does not permit a general exemption from the wholesale requirement for promotional or discounted offerings, including CSAs.⁶³⁹ In adopting section 51.613(b) of the Commission's rules, the Commission explained that 51.613(b) was intended to and grants state commissions the authority only to approve "narrowly-tailored" resale restrictions that an incumbent LEC proves to a state commission are reasonable and nondiscriminatory.⁶⁴⁰ To interpret the rule to allow states to create a general exemption from the wholesale requirement for all CSAs would run contrary to the Act. Thus, BellSouth's general restriction on the provision of CSAs at wholesale rates is unlawful.

219. Following BellSouth's application, and AT&T's and LCI's motion to dismiss in part on CSA grounds, the South Carolina Commission, in their comments, and BellSouth in its reply, have provided further justifications for the CSA restriction. BellSouth and the South Carolina Commission contend, for example, that the South Carolina Commission's approval of the CSA exemption is a local pricing matter within the South Carolina Commission's

⁶³⁵ *Local Competition Order*, 11 FCC Rcd at 15970.

⁶³⁶ *Id.* at 15968.

⁶³⁷ *Id.* at 15971 ("If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service."); see also *AT&T/LCI Motion to Dismiss* at 15 & n.12.

⁶³⁸ 47 C.F.R. § 51.613(b). The Eighth Circuit held that determinations on resale restrictions are within the Commission's jurisdiction, and that our resale restriction rules are a reasonable interpretation of the terms of the 1996 Act. *Iowa Utils. Bd.*, 120 F.3d at 818-19.

⁶³⁹ *Local Competition Order*, 11 FCC Rcd at 15966, 15970.

⁶⁴⁰ *Id.* at 15966.