

intrastate jurisdiction.⁶⁴¹ This contention is erroneous. The Commission's conclusions in the *Local Competition Order* regarding the scope of the resale requirement as it applies to promotions and discounts, including CSAs, was upheld by the Eighth Circuit.⁶⁴² In upholding the Commission's determination, the court stated that the Commission's rules requiring the resale of promotions and discounts concern the "overall scope of the incumbent LECs' resale obligation" rather than "the specific methodology for state commissions to use in determining the actual wholesale rates."⁶⁴³ Additionally, in establishing BellSouth's exemption from offering CSAs to resellers at wholesale rates, the South Carolina Commission analyzed the matter as a resale restriction rather than as a pricing issue.⁶⁴⁴ BellSouth's own arguments concerning the resale of CSAs similarly analyze the issue as a resale restriction.⁶⁴⁵ Allowing incumbent LECs to set the wholesale discount for services that must be resold at a discount of zero would wholly invalidate such a wholesale pricing obligation. Moreover, there is no evidence in the record that the South Carolina Commission conducted an analysis to determine that the appropriate discount for CSAs should be zero.

220. The South Carolina Commission also contends that its policy with respect to pricing for CSAs is the only reasonable way to implement the Act's resale provisions. The South Carolina Commission states that BellSouth does not bear ordinary marketing costs for CSAs because they are individually negotiated arrangements, and that therefore the 14.8 percent resale discount applicable to BellSouth's generally available retail offerings would greatly overstate the costs avoided by BellSouth. Moreover, the South Carolina Commission contends that it would be impossible to determine on a case-by-case basis what discount is necessary to account for BellSouth's potential cost savings with respect to a particular CSA.⁶⁴⁶ We do not believe, however, that such a process would be necessary. Because similar marketing, billing, and other costs would be avoided for all CSAs, we believe that it would be feasible, and sufficiently accurate, to calculate a single discount rate that would apply to all CSAs.⁶⁴⁷ A single discount rate based on the costs avoidable through offering CSAs at wholesale could be applied easily and would ensure that BellSouth was made no worse off by the resale of its services. AT&T states that neither BellSouth nor the South Carolina Commission has provided any analysis to show that the 14.8 percent discount rate would

⁶⁴¹ BellSouth Reply Comments at 60; South Carolina Commission Comments at 11.

⁶⁴² *Iowa Utils. Bd.*, 120 F.3d at 819.

⁶⁴³ *Id.*

⁶⁴⁴ See *AT&T Arbitration Order* at 4-5 ("The Act indeed permits reasonable and non-discriminatory conditions or limitations on the resale of telecommunications services, and we therefore condition our ruling with respect to CSAs.").

⁶⁴⁵ See BellSouth Reply Comments at 60.

⁶⁴⁶ South Carolina Commission Comments at 10.

⁶⁴⁷ In the *Local Competition Order*, the Commission concluded that the discount rate could vary by service. *Local Competition Order*, 11 FCC Rcd at 15957-58.

overstate the avoided costs of CSAs, and in fact no such analysis appears in the record presented to us.⁶⁴⁸

221. BellSouth also argues in reply that, if it were to be required to offer CSAs to resellers at a wholesale discount, it would lose customers and their contribution to total cost recovery. This, according to BellSouth, would affect its ability to meet the goal of "maximizing access by low-income consumers to telecommunications services."⁶⁴⁹ We find unpersuasive BellSouth's claims regarding contribution loss resulting from wholesale-priced resale-based competition. Claims of lost contributions to high-cost subsidies do not justify an exception from either the resale requirements or the requirement to offer unbundled network elements of sections 251 and 271.

222. AT&T and LCI have also raised the issue of cancellation penalties that may apply when a new entrant seeks to resell the CSA contract.⁶⁵⁰ They contend that such penalties have the effect of "insulat[ing] substantial portions of the market from resale competition."⁶⁵¹ There is insufficient evidence in the record concerning the exact nature of the cancellation or transfer penalties BellSouth is charging, or seeks to include in its CSAs during negotiations with potential customers, for us to conclude at this time that such fees create an unreasonable condition or limitation on resale of the service. We are sensitive that CSAs represent agreements that provide both the LEC and the CSA customer with various benefits. Because, depending on the nature of these fees, their imposition creates additional costs for a CSA customer that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale. We, therefore, would want to review such fees and request that BOCs provide information justifying the level of cancellation or transfer fees in future applications.

223. We conclude by reemphasizing the important policy concerns that make restrictions on resale undesirable. BellSouth's CSA restriction may have significant competitive effects. Resale is one of the three mechanisms Congress developed for entry into the BOCs' monopoly market. BellSouth's restriction on CSAs may have the effect of impeding this entry vehicle. The Commission found in the *Local Competition Order* that:

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

⁶⁴⁸ AT&T Reply Comments at 21. AT&T asserts that CSAs might require a higher discount rate because certain costs, such as those associated with the special billing arrangements often required by high-volume end users, are typically quite substantial.

⁶⁴⁹ BellSouth Reply Comments at 61.

⁶⁵⁰ AT&T/LCI Motion to Dismiss at 18.

⁶⁵¹ AT&T Comments, App., Ex. G, Affidavit of Patricia A. McFarland (AT&T McFarland Aff.) at para 35.

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.⁶⁵²

224. The Commission also concluded that the presumption against resale restrictions is necessary specifically for promotional or discounted offerings, such as CSAs, because otherwise incumbent LECs could "avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."⁶⁵³ The evidence in the record suggests that these concerns are realized in South Carolina. AT&T and LCI claim that BellSouth has already filed more than twice as many CSAs in 1997 (141) as it did in 1996 (66), thus insulating a substantial portion of its market from resale competition.⁶⁵⁴ AT&T further claims that BellSouth's revenues from existing CSA contracts will amount to over \$300 million over the next three to five years.⁶⁵⁵ BellSouth thus appears to be attempting to avoid its statutory resale obligation by shifting its customers to CSAs. By foreclosing resale of CSAs, BellSouth can prevent resellers from competing for large-volume customers, thus hindering local exchange competition in South Carolina.

E. Nondiscriminatory Access to 911 and E911 Services

225. Section 271(c)(2)(B)(vii)(I) of the competitive checklist requires BellSouth to offer "nondiscriminatory access to . . . 911 and E911 services."⁶⁵⁶ The Commission concluded in the *Ameritech Michigan Order* that "section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, *i.e.*, at parity."⁶⁵⁷ In particular, the Commission found that a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains

⁶⁵² *Local Competition Order*, 11 FCC Rcd at 15966.

⁶⁵³ *Id.* at 15970.

⁶⁵⁴ *AT&T/LCI Motion to Dismiss* at 18. An affidavit filed with the motion to dismiss contends that, "[i]n 1996, BellSouth filed 66 CSAs with the SCPSC. For 1997, through September 26, 1997, the number of BellSouth-filed CSAs increased to at least 141, with 32 being filed in March 1997 alone." *AT&T/LCI Motion to Dismiss*, Tab C, Affidavit of Louise B. Hayne on Behalf of AT&T Corp. at para. 3. BellSouth, on the other hand, states in an affidavit that "[i]n 1997 BellSouth has reported twenty CSAs to the South Carolina PSC and has negotiated three additional CSAs that will be included in BellSouth's next report." *BellSouth Varner Reply Aff.* at para. 41.

⁶⁵⁵ AT&T Comments at 43.

⁶⁵⁶ 47 U.S.C. § 272(c)(2)(B)(vii)(I). Enhanced 911 or "E911" service enables emergency service personnel to identify the approximate location of the party calling 911.

⁶⁵⁷ *Ameritech Michigan Order* at para. 256.

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BellSouth Louisiana Order

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

In the Matter of)

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)

CC Docket No. 97-231

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1998

Released: February 4, 1998

By the Commission:

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customers at the pre-ordering stage, because BellSouth does not experience the same delays in processing orders that competing carriers currently experience.²⁰⁸

58. BellSouth could ameliorate this pre-ordering problem by correcting the deficiencies in its ordering systems and by providing equivalent access to OSS functions through its current systems. We therefore do not suggest that BellSouth must modify its pre-ordering systems to meet the requirement that it offer nondiscriminatory access to due dates. We only conclude, as we did in the *BellSouth South Carolina Order*, that BellSouth's pre-ordering system for providing access to due dates does not, at the present time, offer equivalent access to competing carriers.

B. Resale of Contract Service Arrangements

1. Background

59. 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)."²⁰⁹ In its *BellSouth South Carolina Order*, this Commission determined that BellSouth failed to comply with checklist item (xiv) by, *inter alia*, refusing to offer contract service arrangements at a wholesale discount.²¹⁰ Contract service arrangements are contractual agreements made between a carrier and a specific, typically high-volume, customer, tailored to that customer's individual needs. Contract service arrangements may include volume and term arrangements, special service arrangements, customized telecommunications service agreements, and master service agreements.²¹¹

60. The Commission's rules on resale restrictions state 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."²¹² Section 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

²⁰⁸ See *supra* Section IV.A.2.a.1.

²⁰⁹ 47 U.S.C. § 271(c)(2)(B)(xiv).

²¹⁰ *BellSouth South Carolina Order* at paras. 215-24. In its *Louisiana Commission Resale Order*, the Louisiana Commission established a general wholesale discount of 20.72 percent to be applied to BellSouth's retail services offered for resale. *Louisiana Commission Resale Order* at 15.

²¹¹ *BellSouth South Carolina Order* at para. 212. According to BellSouth, "[a] contract service arrangement is simply a price negotiated with a particular customer (that is subject to competition) for telecommunications services that BellSouth makes separately available under its tariffs." *BellSouth Louisiana Reply, App., Tab 13, Reply Affidavit of Alphonso J. Varner (Varner Reply Aff.)* at para. 41.

²¹² 47 C.F.R. § 51.605(b).

to the state commission that the restriction is reasonable and nondiscriminatory.²¹³ The United States Court of Appeals for the Eighth Circuit specifically upheld the Commission's findings that determinations on resale restrictions are within the Commission's jurisdiction and also upheld the Commission's resale restriction rules as a reasonable interpretation of the 1996 Act.²¹⁴

61. As in South Carolina, BellSouth does not make contract service arrangements available at a wholesale discount in Louisiana through either its interconnection agreements or its SGAT (Statement of Generally Available Terms and Conditions).²¹⁵ For example, in its arbitrated interconnection agreement with AT&T, BellSouth states that it will not offer for resale at a wholesale discount contract service arrangements it has entered into after the effective date of the *AT&T Arbitration Order*²¹⁶ (i.e., after January 28, 1997).²¹⁷ Pursuant to

²¹³ *Id.* § 51.613(b). The resale restrictions permitted under subparagraph (a) do not involve contract service arrangements. Those permissible restrictions relate to cross class-selling and short-term promotions. *Id.* § 51.613(a)(1), (a)(2).

²¹⁴ *Iowa Utils. Bd. v. FCC*, 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.

²¹⁵ See, e.g., BellSouth Louisiana Application at 66; BellSouth Louisiana Application, App. A, Vol. 5, Tab 14, Affidavit of Alphonso J. Varner: (BellSouth Varner Aff.) at para. 184.

²¹⁶ BellSouth Louisiana Application, App. C-2, Vol. 21, Tab 180, *In Re: In the Matter of the Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. of the Unresolved Issues Regarding Cost-Based Rates for Unbundled Network Elements, Pursuant to the Telecommunications Act Number 47 U.S.C. 252 of 1996*, Docket U-22145, Order U-22145 at 4 (decided Jan. 15, 1997, issued Jan. 28, 1997) (*AT&T Arbitration Order*).

²¹⁷ BellSouth Louisiana Application, App. B, Vol. 9, Tab 76, Arbitrated Interconnection Agreement Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. (approved by the Louisiana Commission on Oct. 23, 1997) (*AT&T Arbitrated Agreement*) § 25.5.1. According to the *AT&T Arbitrated Agreement*, "BellSouth [contract service arrangements] which are in place as of January 28, 1997, shall be exempt from mandatory resale. [Contract service arrangements] entered into by BellSouth after January 28, 1997, or terminating after January 28, 1997, shall be available for resale, at no discount." *Id.* We note that the Louisiana Commission also amended its regulations to incorporate the contract service arrangement resale restriction adopted in the *AT&T Arbitration Order*. See BellSouth Louisiana Application, App. C-2, Vol. 22, Tab 186, *In re: Amendments to General Order dated March 15, 1996, as Amended October*

its resale agreement with ACSI, which applies to all of BellSouth's serving territory including South Carolina and Louisiana, contract service arrangements are not available for resale at any price.²¹⁸ Nor is BellSouth obligated to provide contract service arrangements at a wholesale discount pursuant to the terms of its SGAT, which provides that "BellSouth contract service arrangements entered into after January 28, 1997 are available for resale only at the same rates, terms, and conditions offered to BellSouth end users."²¹⁹ In the *Louisiana Section 271 Proceeding*, the Chief Administrative Law Judge specifically rejected AT&T's contention that BellSouth's SGAT is deficient because it exempts contract service arrangements from the wholesale pricing requirement.²²⁰ The Louisiana Commission did not address BellSouth's refusal to offer contract service arrangements for resale at a wholesale discount when it approved BellSouth's SGAT.²²¹

62. The Department of Justice notes that BellSouth's restrictions on the resale of contract service arrangements are analogous to restrictions the Commission has determined violate the Act and the Commission's regulations.²²² Likewise, new entrants generally argue that BellSouth's refusal to offer contract service arrangements for resale at the general wholesale discount violates section 251(c)(4) of the Act, the Commission's rules, and the *Local Competition Order*.²²³

2. Discussion

63. The Commission recently addressed BellSouth's refusal to offer contract service arrangements for resale at a wholesale discount in its review of BellSouth's South Carolina application and concluded that BellSouth did not satisfy the competitive checklist because it

16, 1996. *In re: Regulations for Competition in the Local Telecommunications Market*, General Order at 8 (decided Mar. 19, 1997, issued April 1, 1997).

²¹⁸ BellSouth Louisiana Application, App. B, Vol. 3, Tab 13, Resale Agreement Between American Communication Services, Inc. and BellSouth Telecommunications, Inc. (approved by the Louisiana Commission on April 8, 1997) (ACSI Resale Agreement) § III.A.

²¹⁹ BellSouth SGAT § XIV.B.1.

²²⁰ *ALJ 271 Recommendation* at 43. The Chief Administrative Law Judge concluded that BellSouth's SGAT provisions relating to the resale of contract service arrangements are consistent with the Louisiana Commission's conclusions in the *AT&T Arbitration Order*. *Id.*

²²¹ See *Louisiana Commission 271 Compliance Order*, see also Louisiana Commission Comments at 19.

²²² DOJ Louisiana Evaluation at 30, n.60.

²²³ See, e.g., AT&T Comments at 59; MCI Comments at 60-61; Sprint Comments at 37-39; TRA Comments at 22-23.

did not offer contract service arrangements at a wholesale rate.²²⁴ In this Order, we reaffirm our reasoning in the *BellSouth South Carolina Order* and again conclude that BellSouth does not comply with item (xiv) of the competitive checklist because it refuses to offer at a wholesale discount contract service arrangements entered into after January 28, 1997 in Louisiana.²²⁵

a. No General Exemption for Contract Service Arrangements

64. We conclude, based on facts nearly identical to those presented in the *BellSouth South Carolina Order*,²²⁶ that BellSouth has created, through its interconnection agreements and its SGAT in Louisiana, a general exemption from the requirement that incumbent LECs offer their promotional or discounted offerings, including contract service arrangements, at a wholesale discount. In the *Local Competition Order*, the Commission concluded that resale restrictions are presumptively unreasonable and that an incumbent LEC can rebut this presumption, but only if the restrictions are "narrowly tailored."²²⁷ Moreover, the Commission specifically concluded that the Act does not permit a general exemption from the requirement that promotional or discounted offerings, including contract service arrangements, be made available at a wholesale discount.²²⁸ As we stated in the *BellSouth South Carolina Order*, neither the Act nor the Commission's resale rules contemplate that a state commission can generally exempt all contract service arrangements from the Act's requirement that retail offerings be available for resale at a discount from the retail price.²²⁹ For the reasons discussed below, we find that BellSouth's refusal to offer contract service arrangements at a

²²⁴ *BellSouth South Carolina Order* at paras. 215-24.

²²⁵ Because we conclude that BellSouth's refusal to offer for resale at a wholesale discount contract service arrangements entered into after January 28, 1997 renders its application deficient, we do not reach the issue of BellSouth's refusal to offer for resale at any price contract service arrangements entered into on or before January 28, 1997..

²²⁶ See *BellSouth South Carolina Order* at paras. 217-18.

²²⁷ *Local Competition Order*, 11 FCC Red at 15966.

²²⁸ *Id.* at 15970. The Commission made clear in the *Local Competition Order* that 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 incumbent LECs." *Id.* The United States Court of Appeals for 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. v. FCC*, 120 F.3d at 818-19.

²²⁹ *BellSouth South Carolina Order* at paras. 217-18.

wholesale discount is not narrowly tailored and therefore constitutes an impermissible general exemption of contract service arrangements from the wholesale discount requirement.²³⁰

65. We are unpersuaded by BellSouth's related claims that (1) the wholesale discount should not be applied to contract service arrangements because contract service arrangements are offerings that BellSouth has already discounted in order to compete for a particular end user customer,²³¹ and (2) its refusal to offer contract service arrangements at a wholesale discount does not restrict new entrants' ability to resell such services because new entrants may purchase each of the tariffed services that make up the contract service arrangement separately at the wholesale rate.²³² In the *Local Competition Order*, the Commission specifically considered and rejected incumbent LECs' claims that the wholesale rate obligation should not apply to high volume rate offerings because they are already discounted.²³³ The Commission instead concluded 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.²³⁴ Because contract service arrangements are discounted retail service offerings that are not exempt from the statutory resale requirement in section 251(c)(4), we reiterate that BellSouth must offer contract service arrangements for resale at a wholesale discount to new entrants.

66. As in our *BellSouth South Carolina Order*,²³⁵ we also reject BellSouth's contention that application of the wholesale discount to contract service arrangements would greatly overstate the costs avoided by BellSouth because BellSouth does not bear ordinary marketing costs for contract service arrangements, which are individually negotiated arrangements.²³⁶ Neither BellSouth nor the Louisiana Commission has offered any evidence that the general wholesale discount rate would overstate the avoided costs of contract service

²³⁰ BellSouth does not dispute that, pursuant to the terms of its ACSI Resale Agreement, AT&T Arbitrated Agreement, and its SGAT, it refuses to resell contract service arrangements at a discount. See ACSI Resale Agreement § III.A; AT&T Arbitrated Agreement § 25.5.1; and SGAT § XIV.B.1.

²³¹ BellSouth Louisiana Application at 66-67. According to the Louisiana Commission, "[r]equiring BellSouth to offer already discounted contract service arrangements for resale at wholesale prices would create an unfair advantage for AT&T." *AT&T Arbitration Order* at 4.

²³² BellSouth Louisiana Reply at 67.

²³³ *Local Competition Order*, 11 FCC Rcd at 15971; see also *BellSouth South Carolina Order* at para. 217.

²³⁴ *Local Competition Order*, 11 FCC Rcd at 15971 ("If a service is sold to end users, it is a retail service, even if it is already priced as a volume-based discount off the price of another retail service").

²³⁵ *BellSouth South Carolina Order* at para. 220.

²³⁶ See BellSouth Varner Reply Aff. at para. 41; BellSouth Louisiana Reply at 68-69.

arrangements, as BellSouth contends.²³⁷ Moreover, as we stated in the *BellSouth South Carolina Order*, the state commission need not apply the general wholesale discount rate, in this case 20.72 percent, to the resale of contract service arrangements, and may instead apply a single discount rate based on the costs avoidable by offering contract service arrangements at wholesale.²³⁸ Because similar marketing, billing, and other costs would be avoided for all contract service arrangements, it would be feasible, and sufficiently accurate, to calculate a single wholesale discount rate to be applied to all contract service arrangements.²³⁹ Such a wholesale discount for contract service arrangements encourages efficient competition because a reseller may compete with an incumbent LEC and facilities-based competitive LECs only to the extent that the reseller can perform marketing and billing services more efficiently and therefore at lower cost.²⁴⁰

67. We are not persuaded by BellSouth's assertion that, if it is required to offer contract service arrangements to resellers at a wholesale discount, it will lose business customers and their contribution to BellSouth's total cost recovery, thus disrupting the balance between residential and business rates and affecting BellSouth's ability to meet the goal of "maximizing access by low-income consumers to telecommunications services."²⁴¹ We specifically rejected BellSouth's identical claims that it would lose profit as a result of wholesale-priced, resale-based competition in the *BellSouth South Carolina Order*.²⁴² In that Order, we concluded that claims of lost contributions to high-cost subsidies do not justify an exception from either the resale requirements or the requirement to offer unbundled network elements of sections 251 and 271.²⁴³ We further determine that, because the wholesale discount is limited to avoidable costs, BellSouth should lose no more contribution from resold contract service arrangements made available to resellers at an appropriate wholesale discount than it would lose from the resale of tariffed offerings at the general wholesale discount.

68. We also take this opportunity to reiterate the important policy concerns that make restrictions on resale undesirable. In the *BellSouth South Carolina Order*, we expressed

²³⁷ AT&T contends that, in fact, the opposite might be true: contract service arrangements might require a higher wholesale discount rate because certain costs, such as those associated with the special billing arrangements often required by high-volume end users, are typically quite substantial. AT&T Comments at 62, n.36.

²³⁸ *BellSouth South Carolina Order* at para. 220.

²³⁹ *Id.*

²⁴⁰ *Contra* BellSouth Louisiana Reply at 69.

²⁴¹ BellSouth Louisiana Application at 68 (citing *Local Competition Order*, 11 FCC Rcd at 15975).

²⁴² *BellSouth South Carolina Order* at para. 221.

²⁴³ *Id.*

concern that BellSouth's failure to offer contract service arrangements for resale at a discount in South Carolina impedes competition for its large-volume customers and thus impairs the use of resale as a vehicle for competitors to enter BellSouth's market.²⁴⁴ As the Commission recognized in the *Local Competition Order*, "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."²⁴⁵ We are therefore concerned that BellSouth's refusal to offer contract service arrangements at a wholesale discount in Louisiana may impede one of the three methods Congress developed for entry into the BOCs' monopoly market.

69. We remain concerned that, as discussed in the *BellSouth South Carolina Order*, BellSouth might seek to convert customers to contract service arrangements in order to "evade" the Louisiana Commission's wholesale discount.²⁴⁶ In the *Local Competition Order*, the Commission concluded that the presumption against resale restrictions is necessary specifically for promotional or discounted offerings, such as contract service arrangements, in order to prevent incumbent LECs from "avoid[ing] the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."²⁴⁷ We concluded in the *BellSouth South Carolina Order* that BellSouth "appears to be attempting to avoid its statutory resale obligation in South Carolina by shifting its customers to contract service arrangements."²⁴⁸ AT&T contends that, unlike in South Carolina, it is "impossible" to determine whether BellSouth is attempting to evade the resale requirement in Louisiana because BellSouth is not required to disclose contract service arrangements that it has entered into with customers in Louisiana unless the customer "requests and/or consents to the disclosure."²⁴⁹ AT&T contends, however, that, in other states

²⁴⁴ *Id.* at paras. 223-24.

²⁴⁵ *Local Competition Order*, 11 FCC Rcd at 15966.

²⁴⁶ *BellSouth South Carolina Order* at 224.

²⁴⁷ *Local Competition Order*, 11 FCC Rcd at 15970.

²⁴⁸ *BellSouth South Carolina Order* at para. 224.

²⁴⁹ BellSouth Louisiana Application, App. C-2, Vol. 23, Tab 191, *In Re: In the Matter of the Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., of the Unresolved Issues Regarding Cost-Based Rates for Unbundled Network Elements, Pursuant to the Telecommunications Act Number 47 U.S.C. 252 of 1996*, Docket U-22145, Order U-22145-A at 3-4 (decided on June 10, 1997, issued June 12, 1997) (*Second AT&T Arbitration Order*). The Louisiana Commission reasoned that, "[r]equiring BellSouth to produce copies of each and every contract service arrangement it has entered into would constitute the release of 'non-public customer information regarding a customer's account or calling record' for a specified class, which is prohibited by this Commission's General Order dated March 15, 1996, entitled *Louisiana Public Service Commission Regulations for the Local Telecommunications Market*, § 1201(B)(11)." *Id.* at 4. We do not consider whether such a nondisclosure requirement complies with the requirements of the competitive checklist. See 47 U.S.C. § 271(c)(2)(B)(xiv).

in which contract service arrangements are publicly disclosed, BellSouth has increased its reliance on contract service arrangements.²⁵⁰ Although we make no specific finding that, in Louisiana, BellSouth is attempting to avoid its statutory resale obligation by shifting its customers to contract service arrangements, we remain concerned that, because many of BellSouth's contract service arrangements apply throughout BellSouth's service territory, BellSouth may impede the development of competition in Louisiana by preventing resellers from competing for large-volume users.

b. State Jurisdiction

70. We further conclude that BellSouth's refusal to offer contract service arrangements at a wholesale discount is not a local pricing matter within the exclusive jurisdiction of the state commission.²⁵¹ We rejected this contention in the *BellSouth South Carolina Order*, noting that the United States Court of Appeals for the Eighth Circuit upheld the Commission's conclusions in the *Local Competition Order* regarding the scope of the resale requirement as it applies to promotions and discounts, including contract service arrangements.²⁵² In upholding the Commission's determination, the court stated that the Commission's rules requiring the resale of promotions and discounts concern the "overall scope of the incumbent LECs' resale obligation" rather than "the specific methodology for state commissions to use in determining the actual wholesale rates."²⁵³ Moreover, as we stated in the *BellSouth South Carolina Order*, allowing incumbent LECs to set the wholesale discount for services subject to the resale requirement at a discount of zero would wholly invalidate such a wholesale pricing obligation. We note that the Louisiana Commission appears to have treated the resale restriction as a matter separate from its establishment of the general wholesale discount and did not conduct an analysis to determine that the appropriate

²⁵⁰ AT&T Comments, App. Vol. VI, Tab I, Affidavit of Patricia A. McFarland (AT&T McFarland Aff.) at 17. For example, AT&T claims that BellSouth has already filed more than twice as many contract service arrangements in 1997 as it did in 1996, thus insulating a substantial portion of its market from resale competition. According to AT&T, "[i]n 1994 and 1995, prior to the advent of the Act, BellSouth filed with the South Carolina [Commission] only 47 and 41 contract service arrangements respectively. In 1996, with the advent of the Act, BellSouth filed 66 contract service arrangements in South Carolina. And as of September 30, 1997, BellSouth has filed 141 contract service arrangements in South Carolina, more than twice as many as it did in all of 1996." *Id.* AT&T further claims that BellSouth's revenues from existing contract service arrangement contracts will amount to over \$300 million over the next three to five years. *Id.* at 17-18.

²⁵¹ See AT&T Comments at 61; Sprint Comments at 38; *but see* BellSouth Louisiana Application at 67; BellSouth Louisiana Reply at 68.

²⁵² *Iowa Utils. Bd. v. FCC*, 120 F.3d at 819; *see also* AT&T Comments at 61; Sprint Comments at 38.

²⁵³ *Iowa Utils. Bd. v. FCC*, 120 F.3d at 819.

wholesale discount for contract service arrangements should be zero.²⁵⁴ We are thus unconvinced by BellSouth's claim that the Louisiana Commission properly determined that no wholesale discount should be applied to contract service arrangements.

V. COMPLIANCE WITH SECTION 271(c)(1)(A)

71. For the Commission to approve a BOC's application to provide in-region, interLATA services, that BOC must demonstrate that it satisfies the requirements of either section 271(c)(1)(A) or section 271(c)(1)(B) of the Act.²⁵⁵ In this instance, BellSouth argues that its agreements with three Personal Communications Services (PCS) providers, PrimeCo Personal Communications, L.P., Sprint Spectrum, L.P., and MereTel Communications L.P., "qualify BellSouth to file this application for authority to provide interLATA service in Louisiana under section 271(c)(1)(A)."²⁵⁶

72. Given our conclusion that BellSouth does not meet the competitive checklist, we need not and do not decide in this Order whether, for purposes of section 271(c)(1)(A), the PCS carriers listed above are "competing providers of telephone exchange service" in the State of Louisiana. Nevertheless, we do wish to provide BellSouth and others with as much guidance as possible, consistent with the limitations of the 90-day deadline and the large number of section 271-related issues on which various parties have presented contrasting interpretations and arguments. In this regard, we note that the exclusion in the final sentence of subparagraph 271(c)(1)(A) excludes only cellular carriers, and not PCS carriers, from being considered "facilities-based competitors." The final sentence states: "For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.)²⁵⁷ shall not be considered to be telephone exchange services." The rules governing PCS services are contained in part 24 of the Commission's

²⁵⁴ In the *Louisiana Commission Resale Order*, the Louisiana Commission established the general wholesale discount of 20.72 percent to be applied to BellSouth's resold retail services. *Louisiana Commission Resale Order* at 15. The Louisiana Commission exempted contract service arrangements from the wholesale discount requirement, however, in the arbitration of the AT&T and BellSouth interconnection agreement and its review of BellSouth's SGAT. See *AT&T Arbitration Order* at 4; *Louisiana Commission Compliance Order* at 14.

²⁵⁵ 47 U.S.C. §§ 271(c)(1)(A) and (B).

²⁵⁶ BellSouth Louisiana Application at 8-9.

²⁵⁷ We note that subpart K of part 22 of our rules, which formerly governed cellular service, no longer exists. Effective January 1, 1995, the Commission replaced former subpart K ("Domestic Public Cellular Radio Telecommunications Service") with subpart H ("Cellular Radiotelephone Service"). In the *Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, Report and Order, 9 FCC Rcd 6513 (1994). Both the pre-1995 cellular rules of former subpart K and the revised cellular rules of subpart H begin at section 22.900, 47 C.F.R. § 22.900. Because these rule changes preceded passage of the 1996 Act, we conclude that Congress intended the language in section 271(c)(1)(A) -- "subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.)" -- to mean "subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq. (1994), as amended)."

5

Qwest Forbearance Order

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

In the Matter of)	
)	
Petition of Qwest Corporation for Forbearance)	WC Docket No. 04-223
Pursuant to 47 U.S.C. § 160(c) in the Omaha)	
Metropolitan Statistical Area)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2005

Released: December 2, 2005

By the Commission: Chairman Martin issuing a separate statement; Commissioners Copps and Adelstein concurring and issuing a joint statement.

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telecommunications carriers.²¹⁹ We do not believe it would be in the public interest to grant Qwest forbearance from this duty, particularly when the requesting telecommunications carrier would remain subject to the obligations of section 251(c)(1). Nor are we convinced that the other prongs of section 10(a) are satisfied. In the absence of evidence to the contrary, we believe that section 251(c)(1) remains necessary to ensure just and reasonable and nondiscriminatory pricing and practices in this market.

88. *Resale.* We deny Qwest's Petition to the extent it seeks forbearance from the resale obligations of section 251(c)(4).²²⁰ Qwest contends that competitors in the Omaha MSA no longer depend on section 251(c)(4) resale, and argues that to the extent such reliance remains necessary, its competitors could rely instead on resale offered pursuant to section 251(b)(1).²²¹ 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 consumers' interests and the public interest are protected under section 10(a). Particularly because we have determined to forbear from section 251(c)(3) loop and transport element unbundling obligations,²²² we conclude that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible.²²³ As Qwest itself states:

[R]esale of Qwest's existing retail services represents a non-capital intensive means for CLECs to enter the market and build a core customer base, albeit with profit margin potential lower than that available via delivery of service via CLEC-owned facilities or wholesale network facilities leased from Qwest. . . . [E]specially for new market entrants, resale remains a viable option as a means to quickly and with little investment enter any portion of the Omaha-Council Bluffs market to

²¹⁹ See 47 U.S.C. § 251(c)(1).

²²⁰ See, e.g., Petition at 21, 23, and 26; see also Qwest Reply at 32; Petition at 24 ("It is clear that the Commission cannot maintain resale . . . [and other] requirements that are uniquely imposed on ILECs and BOCs in markets where competition has developed to the point where the LEC/BOC is just one of several facilities-based competitors.").

²²¹ See, e.g., Petition at iv (stating that "the competition in the Omaha MSA is mature and does not rely on resale"); *id.* at 26.

²²² See *supra* Part III.D.1.

²²³ Some competitors in the Omaha MSA currently rely on section 251(c)(4) resale to compete. For example, while McLeodUSA today has constructed some of its own facilities in the Omaha MSA, see Qwest May 20, 2005 *Ex Parte* Letter at Attach. 1, Tab 3, Map 3B (showing McLeodUSA fiber routes), McLeodUSA also relies on section 251(c)(4) resale in order to compete in this market. See McLeodUSA Comments at 8; Qwest Teitzel Aff. at 18; CompTel Comments at 3 (reporting that McLeodUSA competes in part through resale). In addition, we find that forbearing from section 251(c)(4) resale requirements likely would restrict the ability of new entrants to enter the telecommunications market in the Omaha MSA in the future. See *Local Competition Order*, 11 FCC Rcd at 15499, 15954, para. 907 (stating that "[r]esale will be an important entry strategy for many new entrants"); *cf.* also Petition at 16-17 ("With the adoption of the 1996 Act, Congress implemented a comprehensive system of market-opening provisions that benefit both facilities-based carriers and pure resellers. This flexibility allows competitive providers to increase their market presence through resale beyond the reach of their existing networks. It also allows them to increase their market share more quickly than would be possible solely through expansion of their own networks."); Qwest Teitzel Aff. at 5-6.

attract a customer base of sufficient size to justify further investment in CLEC-owned switches and facilities.²²⁴

89. We are not persuaded by Qwest's argument that section 251(c)(4) resale is unnecessary in the Omaha MSA because competitors would still have a right to resell Qwest's services pursuant to section 251(b)(1).²²⁵ Under the Act, all LECs must allow the resale of their telecommunications services and not place unreasonable or discriminatory conditions or limitations on that resale.²²⁶ However, unlike the section 251(c)(4) resale obligation, section 251(b)(1) has no wholesale pricing requirement. Despite the amount of retail competition in the Omaha MSA, particularly for narrowband voice services, Qwest has not demonstrated that resale at avoided-cost discount is no longer necessary to competition in the Omaha MSA. Unlike access obtained under a facilities unbundling regime, in a resale service situation the incumbent LEC continues to have control of the physical lines, making it difficult for competitive LECs to distinguish their resale offering from the offering of the incumbent LEC on the basis of innovative products or features. Hence, if a competitive LEC is unable to distinguish its resale service on the basis of price, the value of a resale option to the creation of competitive markets is diminished. In addition, because the incumbent LEC continues to receive a high percentage of the revenue from resale pursuant to section 251(c)(4), we find that resale does not impose costs similar to those that accompany unbundling pursuant to section 251(c)(3).²²⁷ Moreover, we granted Qwest forbearance from its section 251(c)(3) loop and transport unbundling obligations in part due to competitive LECs' continued right to access certain regulated wholesale services in the Omaha MSA, including resale pursuant to section 251(c)(4). We conclude that Qwest therefore has not shown that section 251(c)(4) is no longer necessary to protect consumers' interests or ensure just and reasonable and nondiscriminatory pricing, and has not shown that forbearing from section 251(c)(4) would enhance competitive market conditions.²²⁸

E. Forbearance from 271(c)(2)(B) Checklist Requirements

90. For the reasons discussed below, we decline pursuant to section 10(a) to forbear from the requirements of section 271(c)(2)(B) as they apply to Qwest in the Omaha MSA with the exception of section 271(c)(2)(B)(ii). Section 271(c)(2)(B) sets forth what commonly are referred to as the competitive checklist requirements. Before a BOC lawfully may provide interLATA services in a state, it must demonstrate that it satisfies these competitive checklist items.²²⁹ In addition, after a BOC has obtained such authority, it must continue to satisfy the competitive checklist requirements of section

²²⁴ See *Qwest Teitzel Aff.* at 5-6.

²²⁵ See *Petition at 26*; see also *Qwest Reply at 32-33*; 47 U.S.C. §§ 251(b)(1), (c)(4).

²²⁶ 47 U.S.C. § 251(b)(1).

²²⁷ See *Telecommunications Competition Survey for Retail Local Voice Services in Iowa*, Iowa Utils. Bd. January 2004 Report, at 12 (reporting that in Iowa Qwest receives 89.73 percent of its tariffed retail rate when a competitive LEC resells Qwest's residential basic exchange access lines).

²²⁸ In light of other relief the Commission recently has given for broadband services, it is likely that we could find the obligation to offer resale of broadband services under section 251(c)(4) unnecessary on a more developed record.

²²⁹ 47 U.S.C. § 271(a) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section."); see also *id.* § 271(d).

271(c)(2)(B).²³⁰ Because Qwest is a BOC that has received section 271 authority in Nebraska and Iowa,²³¹ it is subject to the section 271 competitive checklist requirements.

91. We conduct our section 10 analysis in light of the Act's overall goals of promoting local competition and encouraging broadband deployment.²³² The Commission previously has considered "the statutory language, the framework of the 1996 Act, its legislative history, and Congress's policy objectives," to conclude that the Act "directs [the Commission] to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services."²³³ The statutory language and framework of the 1996 Act, along with other factors, also reveal that with regard to legacy elements, which already are ubiquitously deployed, Congress's primary aim is to foster a competitive marketplace for telecommunications services provided over those facilities. Our analysis below is informed by and remains faithful to the direction we have received from Congress. The Commission already has granted Qwest substantial forbearance relief from obligations arising under section 271 related to certain broadband facilities; we decline to grant Qwest comparable relief if it now seeks related to certain legacy elements.

1. Forbearance Analysis

92. Section 10(a) of the Act requires that we forbear from applying the section 271(c)(2)(B) checklist requirements to Qwest if we determine that each of three statutory forbearance criteria is satisfied. Qwest seeks forbearance from seven of the fourteen competitive checklist items contained in section 271(c)(2)(B), namely checklist items 1 through 6 and 14. In our analysis below, we group these requirements into three categories. The first category consists of checklist items 1, 2, and 14, which each incorporate obligations of section 251(c) by reference. The second category consists of checklist item 3, which incorporates the obligations of section 224 by reference. The third category consists of checklist items 4 through 6, which are independent obligations under the Act. Except as specifically provided below, we conclude with respect to all three categories and based on the current record that forbearance is not warranted.

a. Checklist Items 1, 2 & 14 (Interconnection, UNEs & Resale)

93. We conclude that Qwest has demonstrated that it is entitled to forbearance from its obligations to provide interconnection, UNEs and resale pursuant to section 271(c)(2)(B)(i), (ii), and (xiv) (i.e., checklist items 1, 2, and 14) only to the same extent that it has demonstrated that it is entitled to forbearance from the requirements of sections 251(c)(2)-(4).²³⁴ Therefore, we grant Qwest's Petition to

²³⁰ 47 U.S.C. §§ 271(c)(2)(B) (competitive checklist requirements), (d)(6) (ongoing nature of requirements).

²³¹ See *Qwest I/ANE Section 271 Order*, 17 FCC Rcd 26303 (2002).

²³² See Preamble to the 1996 Act, 110 Stat. 56, 56 (1996); see also Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 (Section 706).

²³³ *Advanced Services Order*, 13 FCC Rcd 24012, 24047, para. 77 (1998) (discussing the relationship between section 10 and section 706).

²³⁴ Checklist item 1 requires Qwest to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(i). Checklist item 2 requires Qwest to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and (continued....)

the extent it seeks forbearance from checklist item 2 as that requirement applies to UNE loops and transport in the 9 wire centers where we have granted relief from the analogous section 251(c)(3) obligation. In all other respects, we decline to grant Qwest forbearance from the application of checklist items 1, 2, and 14.

94. The scope of the requirements of checklist items 1, 2, and 14 is coextensive with specific requirements set forth in section 251(c) and section 252(d). Specifically, under checklist items 1, 2, and 14, a BOC must provide interconnection, UNEs and resale "in accordance with the requirements of" the relevant subsections of 251(c) and 252(d).²³⁵ As a result, as the Commission and reviewing courts previously have stated, if a BOC must provide interconnection, UNEs or resale pursuant to sections 251(c)(2)-(4), it must also provide interconnection, UNEs or resale pursuant to checklist items 1, 2, and 14 of section 271(c)(2)(B).²³⁶ Therefore, it would not make sense for the Commission to forbear from sections 271(c)(2)(B)(i), (ii), and (xiv) while the obligations of sections 251(c)(2)-(4) remain in effect. Similarly, it would not make sense for the Commission to deny forbearance from sections 271(c)(2)(B)(i), (ii), and (xiv) if a carrier has no corresponding obligations under sections 251(c)(2)-(4).

95. With the exception of Qwest's obligation to provide unbundled access to loops and transport pursuant to section 251(c)(3) discussed separately just below, Qwest remains subject to the requirements of sections 251(c)(2)-(4). We therefore find it would not make sense for us to forbear from the obligations of checklist items 1, 2, and 14 except for the obligation to provide unbundled access to loops and transport, and we decline to do so for the reasons we state below. Our decision also is based on the section 10(a) analysis that we explained above regarding sections 251(c)(2)-(4), which is relevant to and also supports our decision regarding 271(c)(2)(B)(i), (ii), and (xiv).²³⁷ In addition, again due to the linkage between these two sets of statutory provisions, even if the Commission were to grant Qwest forbearance from the application of checklist items 1, 2 and 14 other than as applied to narrowband loops, Qwest would not obtain any material regulatory relief today. Qwest has not identified a single action it takes or obligation it incurs pursuant to sections 271(c)(2)(B)(i), (ii) or (xiv) that it would no longer need to perform or incur if we were to grant forbearance relief from the application of those checklist items if we did not also grant Qwest forbearance relief from requirements arising under section 251(c)(2)-(4). We

(Continued from previous page)

252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii). Checklist item 14 requires Qwest to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. § 271(c)(2)(B)(xiv); see also *Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17519-30, 17542, paras. 17-44, 67 (2001) (*Verizon Pennsylvania Section 271 Order*).

²³⁵ See 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiv).

²³⁶ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4742, n.374 (2005) (seeking comment on whether the statutory language regarding the duty to interconnect directly or indirectly under section 251(a) should be read to encompass an obligation to provide transit service and stating that "a determination that incumbent LECs have a transiting obligation pursuant to section 251(c)(2) would also trigger an obligation to provide such a service under section 271(c)(2)(B)(i)"); see also *Sprint Communications Co. L.P. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (stating that some of the section 271(c)(2)(B) "requirements are simply incorporations by reference of obligations independently imposed on the BOCs by §§ 251-52 of the Act").

²³⁷ For the sake of brevity, we do not restate our section 10(a) analysis in full here.

therefore deny Qwest's request for forbearance from checklist items 1 and 14, and checklist item 2 except as discussed below.

96. *Unbundled Loops and Transport Under Checklist Item 2.* Unlike network elements for which the Commission has found impairment and that Qwest must continue to provide on an unbundled basis under section 251(c)(3), loops and transport are a special case because the Commission has found impairment but in today's Order we determine not to apply to Qwest the section 251(c)(3) obligation to unbundle these elements in the Omaha MSA. Because checklist item 2 incorporates and is coextensive with section 251(c)(3), we grant Qwest forbearance from checklist item 2 requirements for loops and transport.²³⁸ Just as it would not make sense to forbear from this checklist item if Qwest's correlative obligation in section 251(c)(3) remains in effect, now that we have forbore from section 251(c)(3) as applied to loops and transport, it also would not make sense to decline to forbear from checklist item 2. As explained above, the scope of these obligations is identical because checklist item 2 simply requires Qwest to provide UNEs in accordance with the requirements of sections 251(c)(3) under the applicable pricing requirement set forth in section 252(d)(1). We stress, however, that Qwest remains subject to the obligation to provide wholesale access to loops as required by checklist item 4 and to provide wholesale access to transport as required by checklist item 5. As we discuss below, the scope of checklist items 4 and 5 and the pricing requirements that apply to those obligations differ from the scope and pricing standard of checklist item 2. In addition, part of the reason we are able to grant Qwest forbearance from section 251(c)(3) unbundling obligations for loops and transport is because a comparable wholesale access obligation exists under section 271(c).

b. Checklist Item 3 (Poles, Ducts, Conduits, and Rights of Way)

97. We deny Qwest's Petition for forbearance to the extent it seeks relief from its obligations arising under checklist item 3 in the Omaha MSA, which requires Qwest to provide nondiscriminatory access to the poles, ducts, conduits, and rights of way it owns or controls at just and reasonable rates in accordance with the requirements of section 224.²³⁹ Qwest has not asked for relief from section 224 or section 251(b)(4),²⁴⁰ or any regulations promulgated pursuant to those statutory provisions, and we decline at the present time to grant such relief *sua sponte*.²⁴¹ Because Qwest's obligations under checklist item 3 incorporate the obligations of section 224 by reference, and are mirrored in section 251(b)(4), even if the Commission were to grant Qwest relief from its obligations under checklist item 3, Qwest would not obtain any material regulatory relief today in the absence of comparable relief under section 224 and section 251(b)(4). It therefore would not make sense for the Commission to grant such relief and we decline to do so.

²³⁸ In accord with our decision above, we do not forbear from checklist 2 requirements with respect to 911 and E911 databases or operations support systems. See *supra* note 150.

²³⁹ See 47 U.S.C. § 271(c)(2)(B)(iii).

²⁴⁰ 47 U.S.C. § 251(b)(4) (providing that all LECs have the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224"); see also Qwest July 27, 2005 *Ex Parte* Letter, Attach. 1, at 1 (stating that Qwest "is not seeking relief from the normal rules applicable to other LECs . . . under Section 251(b)").

²⁴¹ See, e.g., 47 C.F.R. §§ 1.1401-18; see also 47 U.S.C. § 160(a) (granting the Commission authority to grant forbearance if certain criteria are satisfied).

6

Arkansas Preemption Order

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

In the Matter of)	
)	
American Communications Services, Inc.)	
)	
MCI Telecommunications Corp.)	
)	CC Docket No. 97-100
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

Adopted: December 9, 1999

Released: December 23, 1999

By the Commission:

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the operation of those portions of the Arkansas Act. Therefore, ACSI fails to make even the threshold showing that those portions of the Arkansas Act fall within the proscription of entry barriers set forth in section 253(a) of the Communications Act.⁹⁰ Accordingly, we deny ACSI's petition insofar as it requests preemption of the enforcement of section 9(h), the first sentence of section 9(d), and the second sentence of section 9(i) of the Arkansas Act pursuant to section 253 of the Communications Act.⁹¹

B. Challenged Provisions of the Arkansas Act

1. Resale of Promotional Offerings: The Second Sentence of Section 9(d) of the Arkansas Act

a. Background

39. Both Petitioners request that we preempt the second sentence of section 9(d) of the Arkansas Act pursuant to our conflict preemption authority and pursuant to section 253 of the Communications Act.⁹² The second sentence of section 9(d) provides that "[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the [incumbent] local exchange carrier to its end-user customers are not required to be available for resale."⁹³ In other words, it concerns the extent to which an incumbent LEC may restrict resale of its retail telecommunications services.

40. Section 251(c)(4) of the Communications Act⁹⁴ addresses the same general

⁹⁰ See *Troy Preemption Order*, 12 FCC Rcd at 21440, ¶ 101; *Pittencrieff Order*, 13 FCC Rcd at 1751-52, ¶ 32; *Huntington Park Preemption Order*, 12 FCC Rcd at 14207-10, ¶¶ 35-42.

⁹¹ Our denial of ACSI's petition in this regard is without prejudice. If ACSI, MCI, or any other appropriate party petitions for preemption of the enforcement of section 9(h), the first sentence of section 9(d), or the second sentence of section 9(i) of the Arkansas Act and presents a sufficient record demonstrating that the challenged provision, as applied, satisfies the conditions for preemption set forth in section 253 of the Communications Act, the Commission may preempt. For example, if in the future the Arkansas Commission clearly holds that one or more of these provisions of the Arkansas Act precludes it from imposing on incumbent LECs any interconnection, unbundling, or resale obligation not specified in our rules, we may revisit the propriety of preemption.

⁹² MCI Petition at 1-2, 4-8; MCI Reply Comments at 1-5 (MCI). We note that ACSI mentions the second sentence of section 9(d) of the Arkansas Act only in its Chart. Thus, we can only speculate about the grounds on which ACSI seeks preemption of the second sentence of section 9(d). Because ACSI filed cursory comments endorsing MCI's petition as a whole, we will assume that ACSI proffers the same grounds as MCI. See ACSI Comments (MCI).

⁹³ Ark. Code Ann. § 23-17-409(d).

⁹⁴ 47 U.S.C. § 251(c)(4). We implemented the statutory requirement through our *Local Competition Order*, 11 FCC Rcd at 15930-15936, 15964-15979, ¶¶ 863-77, 935-71; 47 C.F.R. § 51.613.

subject-matter as the second sentence of section 9(d), *i.e.*, the extent to which an incumbent LEC may restrict resale of its retail telecommunications services. Section 251(c)(4) requires an incumbent LEC "to offer for resale *at wholesale rates* any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."⁹⁵ It also requires an incumbent LEC "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service. . . ."⁹⁶

41. To implement the Communications Act's prohibition of unreasonable limitations on resale, the *Local Competition Order* holds that an "incumbent LEC [must] make available [to competing carriers] at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings."⁹⁷ The *Local Competition Order* also holds that incumbent LECs must apply the wholesale discount rate to promotional offerings, *i.e.*, temporarily reduced prices.⁹⁸ The *Local Competition Order* so holds because "[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."⁹⁹ The *Local Competition Order* creates an exception, however, for promotions lasting no longer than 90 days. Therefore, when an incumbent LEC sells to a competing carrier a retail service offered to the incumbent LEC's end-user customers at a temporarily reduced price, the incumbent LEC must apply the wholesale discount to the special reduced rate rather than to the ordinary retail rate, unless the promotional offering is available to end-user customers for fewer than 91 days.¹⁰⁰

42. Petitioners argue that we should preempt the second sentence of section 9(d) pursuant to our conflict preemption authority, because that section of the Arkansas Act allegedly contradicts section 251(c)(4)(B) of the Communications Act and our implementation thereof in at least two ways. First, according to Petitioners, the second sentence of section 9(d) exempts all of an incumbent LEC's promotional offerings from the wholesale discount requirement, whereas federal law exempts only promotional offerings lasting fewer than 91 days.¹⁰¹ Second, according to Petitioners, the second sentence of section 9(d) allows an incumbent LEC to decline to make

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

⁹⁶ 47 U.S.C. § 251(c)(4)(B). For the purposes of these resale requirements of the Communications Act, the term "wholesale rates" means "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." 47 U.S.C. § 252(d)(3).

⁹⁷ *Local Competition Order*, 11 FCC Rcd at 15936, ¶ 877.

⁹⁸ *Local Competition Order*, 11 FCC Rcd at 15970-71, ¶¶ 948-50.

⁹⁹ *Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948.

¹⁰⁰ *Local Competition Order*, 11 FCC Rcd at 15970-71, ¶¶ 948-50; 47 C.F.R. § 51.613(a)(2).

¹⁰¹ ACSI Comments (MCI); MCI Petition at 6-8.

available to competing carriers at wholesale rates any bundled retail service offering, whereas federal law requires such availability of all bundled retail service offerings.¹⁰²

43. In Petitioners' view, these alleged inconsistencies between the second sentence of section 9(d) and federal law will make it far more difficult, if not impossible, for potential competitors to compete with incumbent LECs through resale in the manner contemplated by the 1996 Act.¹⁰³ Petitioners contend that incumbent LECs will stifle such competition by diverting retail services to bundled packages or to promotional offerings of indefinite length and then pricing these services to end-user customers at below-wholesale rates.¹⁰⁴ Petitioners maintain, therefore, that we must preempt the second sentence of section 9(d) pursuant to our conflict preemption authority in order to eliminate a state-created obstacle to the accomplishment and execution of the full purposes and objectives of Congress.¹⁰⁵ Petitioners argue that we should preempt the enforcement of the second sentence of section 9(d) pursuant to section 253 of the Communications Act, as well.¹⁰⁶

b. Analysis

44. As discussed below, we preempt the enforcement of the second sentence of section 9(d) of the Arkansas Act pursuant to our conflict preemption. Given our decision to preempt pursuant to our conflict preemption authority, we need not and do not reach the question of whether we should also preempt pursuant to section 253 of the Communications Act.

45. The second sentence of section 9(d) purports to regulate, *inter alia*, the authority of the Arkansas Commission to impose resale obligations on incumbent LECs pursuant to section 251(c)(4)(B) of the Communications Act. We have jurisdiction to implement and enforce that section of the Communications Act.¹⁰⁷ Consequently, we have jurisdiction to preempt the second sentence of section 9(d) pursuant to our conflict preemption authority to the extent that it impermissibly contradicts section 251(c)(4)(B) of the Communications Act or our implementation thereof.

¹⁰² ACSI Comments (MCI); MCI Petition at 6-8.

¹⁰³ ACSI Comments (MCI); MCI Petition at 7.

¹⁰⁴ ACSI Comments (MCI); MCI Petition at 7.

¹⁰⁵ ACSI Comments (MCI); MCI Petition at 6-8. See generally AT&T Comments at 5 (MCI); Sprint Comments at 4-6 (ACSI); TRA Comments at 3-5 (MCI).

¹⁰⁶ ACSI Comments (MCI); MCI Petition at 6-8; MCI Reply Comments at 5 (MCI); 10/29/97 MCI Ex Parte Letter at 7-8.

¹⁰⁷ See, e.g., 8th Cir. Iowa, 120 F.3d at 794 n.10, 802 n.23, 819. Thus, we reject the contrary assertions of some commenters. See Arkansas AG Comments at 14-16 (MCI); ATA Reply Comments at 8 (MCI); NATC Comments at iii, 13 (MCI).

46. As described above, the second sentence of section 9(d) permits an incumbent LEC to refrain from making available to competitors for resale any "[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the [incumbent] local exchange carrier to its end-user customers. . . ."¹⁰⁸ The second sentence of section 9(d) apparently means that an incumbent LEC need not make available to competing LECs at wholesale rates any bundled retail service offering. It also apparently means that, whenever an incumbent LEC sells to a competitor a retail service offered to the incumbent LEC's end-user customers at a promotional price, trial offering, or temporary discount, the incumbent LEC may apply the wholesale discount to the ordinary retail rate rather than to the special reduced rate. The second sentence of section 9(d) makes no express exception for promotional offerings lasting longer than 90 days.¹⁰⁹

47. The second sentence of section 9(d) thus plainly contradicts our implementation of section 251(c)(4)(B)'s prohibition of unreasonable limitations on resale. First, this portion of section 9(d) exempts all of an incumbent LEC's promotional offerings from the wholesale discount requirement, whereas federal law exempts only promotional offerings lasting fewer than 91 days. In other words, 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 section 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.¹¹⁰ Second, this portion of section 9(d) allows an incumbent LEC to decline to make available to competing carriers at wholesale rates any bundled retail service offering, whereas our rules require such availability of all bundled retail service offerings.¹¹¹

48. Section 9(d)'s inconsistency with federal law is not benign. By excluding service packages from the federal resale requirement, and by exempting *all* of an incumbent LEC's promotional or discount prices – including those lasting longer than 90 days – from the federal wholesale requirement, the second sentence of section 9(d) impedes the complete achievement of Congress' goal of assisting the efforts of new competitors seeking to enter local

¹⁰⁸ Ark. Code Ann. § 23-17-409(d).

¹⁰⁹ It merits mention that, in the arbitration proceeding between SWBT and AT&T, the Arkansas Commission ruled that SWBT must make available for resale any service that it markets to end-user customers, even a service that is the subject of a short-term promotion. *SWBT/AT&T Arbitration Order No. 5* at 7; *SWBT/AT&T Arbitration Order No. 13* at 9. No party argues that this ruling constitutes a violation or misinterpretation of the second sentence of section 9(d) of the Arkansas Act.

¹¹⁰ 47 C.F.R. § 51.613(a)(2). See *Local Competition Order*, 11 FCC Rcd at 15970-71, ¶ 950. Consequently, we reject the contention of one commenter that the Communications Act does not impose wholesale requirements on promotions. See NATC Comments at iii, 13 (MCI).

¹¹¹ *Local Competition Order*, 11 FCC Rcd at 15936, ¶ 877.

telecommunications markets through resale.¹¹² As the *Local Competition Order* states, exemptions such as those created by the second sentence of section 9(d) 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."¹¹³

49. Certain commenters opposing preemption argue that the terms used in the second sentence of section 9(d) (*i.e.*, "promotional," "trial," and "temporary") refer to inherently short-term activities and thereby implicitly include a 90-day ceiling.¹¹⁴ They further argue that any perceived conflict with federal law evaporates when the second sentence of section 9(d) is read in conjunction with the first sentence of section 9(d)¹¹⁵ and with several other portions of the Arkansas Act that expressly defer to the supremacy of the Communications Act.¹¹⁶ According to these commenters, when section 9(d) is read in this manner, it effectively incorporates the federal 90-day and bundled-services rules described above. In a similar vein, certain of these same commenters also urge us to refrain from preempting the second sentence of section 9(d) until the Arkansas Commission has had an opportunity to "save" it by reading into it the foregoing limitations on resale restrictions required by federal law.¹¹⁷ One commenter even contends that, in the arbitration proceeding between SWBT and AT&T, the Arkansas Commission has already

¹¹² See *Local Competition Order*, 11 FCC Rcd at 15970-15971, ¶¶ 948-53. As CPI aptly observes, "[g]iven that Congress identified service resale as one of the three modes of competitive entry, the FCC should be especially vigilant in ensuring that resale competition is permitted to develop as Congress intended." CPI Comments at 5 n.6 (MCI).

¹¹³ *Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948.

¹¹⁴ ATA Comments at 16 (MCI); ATA Reply Comments at 7 (MCI); SWBT Comments at 4 (MCI); 12/17/97 *SWBT Ex Parte Letter*.

¹¹⁵ The first sentence of section 9(d) of the Arkansas Act provides: "Except to the extent required by the Federal Act and this Act, the Commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection, or to sell unbundled network elements to a competing local exchange carrier for the purpose of allowing such competing local exchange carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service." Ark. Code Ann. § 23-17-409(d) (emphasis added).

¹¹⁶ See ATA Comments at 15-16 (MCI); ATA Reply Comments at 7 (MCI); 12/17/97 *SWBT Ex Parte Letter*. The Arkansas Act explicitly instructs the Arkansas Commission to carry out its responsibilities "[c]onsistent with the Federal Act," Ark. Code Ann. § 23-17-409(a); "to the extent required by the Federal Act," Ark. Code Ann. §§ 23-17-409(d) and 23-17-409(h); "[a]s provided in Sections 251 and 252 of the Federal Act," Ark. Code Ann. § 23-17-409(f); "as permitted by the Federal Act," Ark. Code Ann. § 23-17-40 9(g); "to the extent permitted by the Federal Act," Ark. Code Ann. § 23-17-409(g); "pursuant to Section 252 of the Federal Act," Ark. Code Ann. § 23-17-409(j); "in accordance with the Federal Act," Ark. Code Ann. § 23-17-410(a); and "consistent with and complementary to the Federal Telecommunications Act of 1996," Arkansas Act § 16(111).

¹¹⁷ Arkansas AG Comments at 9 (MCI); ATA Reply Comments at 7-8 (MCI); SWBT Comments at 4 (MCI).

construed the second sentence of section 9(d) in such a saving manner.¹¹⁸

50. We reject all of these contentions. As explained above, the plain language of the second sentence of section 9(d) conflicts with important requirements of federal law. It permits an incumbent LEC to refrain from reselling service packages, and it lacks any distinction between short-term and long-term promotions. Neither the first clause of the first sentence of section 9(d), nor any other reference in the Arkansas Act to maintaining consistency with the Communications Act, expressly or unambiguously modifies these unlawful meanings of the second sentence of section 9(d). Moreover, although the terms used in the second sentence of section 9(d) connote activities of limited duration, they do not unambiguously refer to a maximum duration of 90 days. Finally, the Arkansas Commission has not (yet) construed the second sentence of section 9(d) in a manner that avoids conflict with federal law. In fact, in the arbitration proceeding between SWBT and AT&T, the Arkansas Commission observed that, although SWBT *volunteered* to limit its non-discounted promotions to those lasting less than 91 days, the second sentence of section 9(d) "does not place any limitation on the duration of such [promotional] offerings."¹¹⁹ Thus, we cannot reasonably construe the second sentence of section 9(d) as incorporating the precise limitations on resale restrictions required by federal law.

51. The Arkansas AG also contends that our rules regarding the resale of "promotions" apply only to "temporary price discounts" and thus do not reach the "promotional prices," "service packages," and "trial offerings" referenced in section 9(d) of the Arkansas Act.¹²⁰ This contention lacks merit. Our rules expressly encompass service packages,¹²¹ and we must assume (unless and until the Arkansas Commission holds otherwise) that the terms "promotional prices" and "trial offerings" should be given their ordinary meanings, which include some element of a temporary price discount. The Arkansas AG further argues that section 251(c)(4)(B) of the Communications Act reveals Congress' intent *not* to preempt state regulation of incumbent LECs' resale practices, because section 251(c)(4)(B) authorizes state commissions to permit a certain kind of resale restriction.¹²² This argument, too, lacks merit, because section 251(c)(4)(B) of the Communications Act expressly authorizes the Commission to prescribe regulations that proscribe unreasonable and discriminatory limitations on resale.¹²³

¹¹⁸ Arkansas AG Comments at 15-16 (MCI), citing *SWBT/AT&T Arbitration Order No. 5* at 7-11.

¹¹⁹ *SWBT/AT&T Arbitration Order No. 5* at 8.

¹²⁰ Arkansas AG Comments at 9 (MCI), citing *Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948.

¹²¹ *Local Competition Order*, 11 FCC Rcd at 15936, ¶ 877 (using the synonymous term "bundled service offerings").

¹²² Arkansas AG Comments at 14 (MCI).

¹²³ *8th Cir. Iowa*, 120 F.3d at 819.

52. Based on the above analysis, and pursuant to our conflict preemption authority under the Supremacy Clause, we preempt the second sentence of section 9(d) of the Arkansas Act to the extent that it permits incumbent LECs to apply the wholesale discount to the ordinary retail rate rather than to the special reduced rate with respect to promotions lasting longer than 90 days.

We also preempt the second sentence of section 9(d) pursuant to our conflict preemption authority under the Supremacy Clause to the extent that it permits incumbent LECs to refrain from making available to competing carriers at wholesale rates the same bundled service offerings made available to incumbent LECs' end-user customers. Thus, we grant MCI's petition and ACSI's petition insofar as they seek the preemption relief that we afford in this paragraph.¹²⁴

2. Resale Restrictions: The First Sentence of Section 9(g) of the Arkansas Act

a. Background

53. To implement the Communications Act's prohibition of unreasonable limitations on resale,¹²⁵ the *Local Competition Order* holds that, as a general matter, "resale restrictions are presumptively unreasonable."¹²⁶ For example, "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 minimum level of demand."¹²⁷ Our implementing rules provide, therefore, that with certain limited exceptions not applicable here, "an incumbent LEC may impose a restriction [on resale] only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."¹²⁸

54. In ACSI's view, the first sentence of section 9(g) of the Arkansas Act¹²⁹ precludes the Arkansas Commission from evaluating incumbent LECs' resale restrictions according to the

¹²⁴ Cf. *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 674 (E.D.N.C. 1998) (invalidating a section of an interconnection agreement which provided that "[s]hort-term promotions shall not be available for resale").

¹²⁵ 47 U.S.C. § 251(e)(4).

¹²⁶ *Local Competition Order*, 11 FCC Rcd at 15966, ¶ 939.

¹²⁷ *Local Competition Order*, 11 FCC Rcd at 15971, ¶ 953.

¹²⁸ 47 C.F.R. § 51.613(b).

¹²⁹ It provides: The [Arkansas] Commission shall approve, as permitted by the Federal Act, resale restrictions which prohibit resellers from purchasing retail local exchange services offered by a local exchange carrier to residential customers and reselling those retail services to nonresidential customers, or aggregating the usage of multiple customers on resold local exchange services, or any other reasonable limitation on resale to the extent permitted by the Federal Act. Ark. Code Ann. § 23-17-409(g).