

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

In the Matter of)	
)	
Petition of Image Access, Inc.)	
d/b/a NewPhone for Declaratory Ruling)	WC Docket No. 06-129
Regarding Incumbant Local Exchange)	
Carrier Promotions Available for Resale)	
Under the Communications Act of 1934)	
As Amended, and Sections 51.601 et seq.)	
Of the Commission's Rules)	

**COMMENTS OF COMPTTEL IN SUPPORT OF
NEWPHONE'S PETITION FOR DECLARATORY RULING**

COMPTTEL respectfully submits these comments, pursuant to the Federal Communications Commission's ("Commission") *Public Notice* released on July 10, 2006 (DA 06-1421), in support of the Petition for Declaratory Ruling filed, on June 13, 2006, by Image Access, Inc. d/b/a NewPhone ("NewPhone") in the above-referenced docket.

NewPhone, in its petition, asks the Commission to declare the following:

- an incumbent local exchange carrier's ("ILEC") refusal to make cash-back, non-cash-back, and bundled promotional discounts available for resale at wholesale rates is an unreasonable restriction on resale and is discriminatory in violation of the Act and the Commission's rules and policies;
- for all promotions greater than 90 days, ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion;
- the effective retail rate for a giveaway or discount shall be determined by subtracting the face value of the promotion from the ILEC-tariffed rate for the service that is the subject of the promotion, and the value of the discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months;

- for all ILEC promotions greater than 90 days, ILECs shall make available for resale the telecommunications services contained within mixed-bundle promotions (promotions consisting of both telecommunications and non-telecommunications services) and apply the wholesale avoided cost discount to the effective retail rate of the telecommunications service contained within the mixed bundle;
- the effective retail rate of the telecommunications service component(s) of a mixed-bundle promotion shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the bundle if added together at their retail, unbundled component prices; and
- telecommunications carriers shall be able to resell ILEC promotions greater than 90 days in duration as of the first day the ILEC offers the promotion to retail subscribers.¹

The Commission should grant NewPhone’s petition in its entirety.

I. INTRODUCTION

Section 251(c)(4) requires ILECs to make their retail services available for resale without unreasonable or discriminatory conditions or limitations.² As the Commission has found, section 251(c)(4) “makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings.”³ Exempting discount or promotion offerings from the resale obligation “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.”⁴

Although the Commission has previously and unambiguously articulated the resale obligations of incumbent LECs, NewPhone’s Petition demonstrates that it has once again become necessary for the Commission to reinforce - through a Declaratory

¹ Petition of NewPhone for Declaratory Ruling, WC Docket No. 06-129 (filed June 13, 2006)(“NewPhone Petition”).

² 47 U.S.C. 251(c)(4).

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carrier and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 1, ¶948 (rel. Aug. 8, 1996)(“*Local Competition Order*”).

⁴ *Id.*

Ruling – the law relating to ILEC resale obligations. Specifically, the Commission must reiterate that resale obligations “expressly encompass service packages.”⁵ Additionally, the Commission must remind incumbent LECs that “...federal law exempts [from the wholesale discount resale obligation] *only* promotional offerings lasting fewer than 91 days.”⁶

As described by NewPhone, BellSouth’s current practice of refusing to make its retail bundled service offerings available for resale at the wholesale rate, and its failure to include the same discount or promotion that is offered to retail customers (or alternatively to account for the value of such discount or promotion) in its wholesale offerings to requesting carriers pursuant to section 251(c)(4) of the 1996 Act, are discriminatory conditions or limitations prohibited by the 1996 Act and Commission rules.

The Commission has repeatedly disciplined BellSouth for engaging in practices designed to circumvent its resale obligations.⁷ It is imperative that the Commission continue to enforce ILEC resale obligations to the fullest degree.

II. BELLSOUTH’S RESALE PRACTICES VIOLATE THE 1996 ACT AND COMMISSION RULES AND POLICIES

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

⁵ *Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, Memorandum Opinion and Order, 14 FCC Rcd 21579, ¶51 (1999)(“Arkansas Preemption Order”).

⁶ *Id.*, ¶47. Federal law obligates ILECs to resell promotions lasting fewer than 90 days, but they are not required to offer a wholesale discount.

⁷ *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, ¶215 (1997); *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 Louisiana*, 13 FCC Rcd 6245, ¶64 (1998).

As NewPhone explains in its Petition, BellSouth discriminates against its resale competitors via the use of cash-back and non-cash back promotions made available exclusively to its end-user retail subscribers (and not to resellers), which effectively reduce the price of the telecommunications service purchased by the subscribers by the value of the promotion. Competition via resale will not remain viable if the Commission condones BellSouth's practice of only offering resellers the telecommunication service with the wholesale discount off the tariffed rate, while offering its retail customers additional cost saving promotions not made available to resellers. The ILEC resale discount off the retail rates is designed to ensure that competitors are not paying costs that are avoided when ILEC services are resold by other carriers, and thereby create the opportunity for resellers to offer their end-users competitive prices. This competition cannot occur if the incumbent LEC uses retail promotions, discounts and package pricing to undercut the wholesale price by excluding the promotions, discounts or package pricing from its wholesale offering.

The Commission has been consistent in the principle that promotions and discounts are subject to the ILEC's resale obligations. Certain language in the Commission's *Local Competition Order*, nevertheless, has caused confusion for the U.S. District Court for the Western District of North Carolina - for which Commission clarification is needed - as to what constitutes a promotion or discount subject to the resale discount. Specifically, the North Carolina District Court, in rendering its decision on BellSouth's appeal of the North Carolina Commission's holding with respect to BellSouth's resale obligations, cited the Commission's statement that promotions refer to "price discounts from standard offerings that will remain available for resale at

wholesale rates, i.e., temporary price discounts.”⁸ Unfortunately the Court interpreted that to mean that only “bill credits or other direct reduction in the price paid for a particular service” are promotions that would be subject to BellSouth’s resale obligations.⁹

The Commission should clarify that the North Carolina Court erred in its limited interpretation of the Commission’s discussion of promotions in the *Local Competition Order*. Indeed, even the ordinary dictionary definitions of the words “price” and “discount” have a broader meaning.¹⁰ The Commission, in its *Local Competition Order*, recognized that it could not predict every potential restriction or limitation an ILEC may seek to impose on a reseller, but nonetheless recognized the probable anti-competitive effects of such actions.¹¹ As such, the Commission determined that restrictions and conditions on resale are presumptively a violation of section 251(c)(4).¹² In accordance with Commission precedent, the resale obligations must be interpreted in a manner consistent with the pro-competitive goals of the 1996 Act.¹³ The limitations on resale obligations the North Carolina Court ascribed to the Commission’s ruling would have the anti-competitive effect of allowing the ILECs to completely circumvent their resale obligations by offering promotions that effectively reduce the price to the retail customer, but not to the wholesale customer.

⁸ *Local Competition Order*, ¶948.

⁹ NewPhone Petition at 8, *citing* Order Granting BellSouth’s Motion for Summary Judgment at 6.

¹⁰ The definition of “price” includes “value or worth.” Webster’s New World College Dictionary, Third Edition, Copyright © 1997, 1996, 1994, 1991, 1988 by Simon & Schuster, Inc. The meaning of “discount” includes terms such as concession, allowance, abatement and rebates. Roget’s Desk Thesaurus, Copyright © 1995 by Random House, Inc.

¹¹ *See Local Competition Order*, ¶939.

¹² *Id.*

¹³ *See Id.*

Undoubtedly, cash back and connection fee waivers (which effectively reduces the price to zero) are price reductions subject to the resale obligations. Likewise, rewards cards and other giveaways amount to a reduction in price. When an ILEC provides a customer something of monetary value for free, along with the purchase of a service, it effectively reduces the purchase price of that service. Consumers factor in these promotions when considering and comparing the various carriers' prices for the service.

BellSouth has argued that it was forced to offer these promotions in response to the promotions of competing carriers. The point of the resale obligation is to spur competition. If BellSouth had reduced its tariff rate in response to competing carrier prices, it is indisputable that those reduced rates would be subject to the resale obligations. Instead, BellSouth attempts to evade its resale obligations. When resale obligations are offered for more than 90 days, it makes no difference if the price reduction comes in the form of cash-back or non-cash back promotions. As the North Carolina Utilities Commission explained, one-time incentive gifts, including gift cards, check coupons and other merchandise are promotional offerings which, if offered for more than 90 days, "have the effect of lowering the actual, 'real' retail rate."¹⁴ The Commission has found that "...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."¹⁵

¹⁴ NewPhone Petition, p. 7, *citing* In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled, "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services," North Carolina Utilities Commission Docket No. P-100, Sub 72b, Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, at 5-6 (June 3, 2005)("Second Resale Order").

¹⁵ *Arkansas Preemption Order*, ¶ 41.

Consequently, the Commission should grant NewPhone's petition and issue a ruling declaring that for all promotions offered by an ILEC for longer than 90 days, at the option of the requesting telecommunications carrier, the ILEC shall either provide the value of the promotion when a requesting carrier purchases the telecommunications service subject to the promotion at the wholesale avoided cost service discount, or apply the wholesale avoided cost of service discount to the "effective retail rate" of the telecommunications service that is the subject of the ILEC promotion. As NewPhone requests in its petition, the Commission should also declare that the "effective retail rate" shall be determined by subtracting the face value of the promotion from the tariffed rate, that the value of such discount shall be distributed evenly across minimum monthly payments up to a maximum of three months, and that the telecommunications carriers shall be entitled to resell ILEC cash-back and non-cash-back promotions on the first day the ILEC offers the promotion to retail subscribers.¹⁶

B.) Bundled Offerings

According to NewPhone, BellSouth is also using bundled offerings to discriminate against its resale competitors. As explained in NewPhone's petition, BellSouth has contended that the telecommunications service incorporated in a mixed service bundle, i.e., bundles consisting of both telecommunications and non-telecommunications services (such as information services), is not subject to the ILEC's resale obligations.¹⁷ Therefore, it is necessary for the Commission to clarify that ILECs must offer the telecommunications service components of bundled offerings at the wholesale rate for resale. The Commission should also clarify that the rate, to which the

¹⁶ NewPhone Petition at 17-18.

¹⁷ *Id.* at 18.

wholesale avoided cost service discount is applied, must reflect the appropriate portion of the promotional discount associated with the telecommunications component of the bundled offering. The promotional discount is the price difference between the price (value) of the local service component(s) in the bundle and the price of the local service component on a standalone basis. Alternatively, the ILEC must make the entire bundled offering available at wholesale rates that reflect the value of bundled promotional discount.

Section 251(c)(4)(B) of the 1996 Act and Section 51.605(e) of the Commission's rules specifically prohibit ILECs from refusing to provide a telecommunications service for resale. As discussed above, ILECs are also proscribed from imposing discriminatory conditions or limitations. Therefore, an ILEC's refusal to provide either the telecommunications component of the bundled products, or the entire bundled product offering, at a rate that reflects the promotional bundled offering discount violates the Act and Commission rules. The Commission has clearly stated that its rules require the availability, at wholesale rates to competing providers, of "*all* bundled retail service offerings."¹⁸ As NewPhone points out in its petition, if ILECs were not required to disaggregate the telecommunications component of such bundles or make the entire bundles available for resale at wholesale rates, the ILECs would effectively be allowed to "lock up" the telecommunications components of such bundles. Additionally, if the bundling discount is not reflected in the rate charged the reseller, as discussed above, the ILEC would be allowed to reduce its retail price, through a bundled service offering, while effectively circumventing its resale obligations.

¹⁸ *Arkansas Preemption Order*, ¶47. *Emphasis added.*

III. CONCLUSION

The Commission recently concluded “that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible.”¹⁹ The Commission should grant NewPhone’s Petition, thereby “reemphasizing the important policy concerns that make restrictions on resale undesirable.”²⁰ Moreover, ILEC resale obligations not only serve strong competitive policy purposes, they are mandated by statute, Commission rules, and Commission precedent.

Respectfully submitted,

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¹⁹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, ¶88 (2005).

²⁰ *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*, Memorandum Opinion and Order, 13 FCC Rcd. 539, ¶223 (1998).