

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

In the Matter of

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

WC Docket No.06-129

**OPPOSITION OF  
BELLSOUTH CORPORATION**

**BELLSOUTH CORPORATION**

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July 31, 2006

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**OPPOSITION OF  
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BellSouth Corporation, on behalf of itself and its wholly-owned subsidiaries (collectively “BellSouth”), respectfully submits its opposition in response to the Commission’s *Public Notice*<sup>1</sup> seeking comment on the petition for declaratory ruling filed by Image Access, Inc. d/b/a NewPhone (“NewPhone”) on June 13, 2006.<sup>2</sup> In its Petition, NewPhone asks the Commission to impose upon incumbent local exchange carriers (“ILECs”) a number of overly broad resale requirements that not only conflict with the plain language of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (“1996 Act”), but also undermine competition by threatening to impede the ability of consumers to enjoy innovative and attractive

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<sup>1</sup> *Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Pleading Cycle Established*, WC Docket No. 06-129, *Public Notice*, DA 06-1421 (rel. July 10, 2006).

<sup>2</sup> *Petition of Image Access Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules* (“Petition”).

packages of services offered by multiple players in the market. Accordingly, the Commission should deny the Petition.

## I. SUMMARY AND INTRODUCTION

This Petition is the latest attempt in NewPhone's continuing efforts to obtain additional resale concessions that are not required by law. In addition to attacking BellSouth's marketing incentive programs before the North Carolina Utilities Commission ("NCUC"), NewPhone also has engaged in unlawful self-help for nearly two years by wrongfully withholding approximately \$2 million owed to BellSouth for purchases made under the resale provisions of its interconnection agreement with BellSouth. Now, on the heels of a complaint filed by BellSouth in federal district court seeking payment for these services,<sup>3</sup> as well as a recent decision by a North Carolina federal district court upholding BellSouth's marketing incentives as lawful and in full compliance with the 1996 Act,<sup>4</sup> NewPhone has turned to the Commission seeking to unlawfully expand ILEC resale requirements far beyond that mandated by Congress. Indeed, as the federal district court recently concluded, interpreting the 1996 Act's resale obligations to require ILECs to offer marketing incentives, such as gift cards, checks, and coupons, to resellers at wholesale rates is "contrary to the plain language of the statute and the FCC implementing regulations."<sup>5</sup>

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<sup>3</sup> See *BellSouth Telecommunications, Inc. v. Image Access, Inc. d/b/a NewPhone*, W.D.N.C. Case No. 3:06-cv-00157, Complaint (filed April 4, 2006) ("Complaint").

<sup>4</sup> *BellSouth Telecommunications, Inc. v. Jo Anne Sanford, et al.*, No. 3:05-cv-00345-MU (copy attached as Exhibit G to Petition), 2006 U.S. Dist. LEXIS 34265 (W.D.N.C. May 15, 2006) ("*BellSouth v. Sanford*"). On June 12, 2006, the NCUC filed a Notice of Appeal of *BellSouth v. Sanford* with the Fourth Circuit.

<sup>5</sup> *BellSouth v. Sanford* at 6, 2006 U.S. Dist LEXIS 34265, at \*10.

As demonstrated more fully herein, NewPhone not only misinterprets the law regarding ILEC resale obligations, but it also makes a number of unsupported – and in some cases, false – allegations against BellSouth. For example, NewPhone asserts that “BellSouth has severely restricted, and in some cases altogether prohibited, the resale of certain telecommunications services at wholesale rates through its use of various promotional discounts.”<sup>6</sup> NewPhone is wrong. BellSouth is in full compliance with the 1996 Act’s resale obligations and has not refused to make telecommunications services available to NewPhone or any other reseller as required by law. NewPhone expressly acknowledges this fact, for example, when it states that “BellSouth makes the services subject to promotions available for resale at the applicable state commission avoided cost discount rate.”<sup>7</sup>

It is clear that NewPhone’s complaint is nothing more than a dispute about pricing. NewPhone wants to obtain additional resale discounts that are plainly not mandated by the 1996 Act. As BellSouth demonstrates more fully below, cash-back promotions, gift cards, checks, coupons and similar marketing incentives are neither “telecommunications services” nor “promotional discounts” subject to the resale requirements of the 1996 Act.

Moreover, expanding the ILEC resale obligations as proposed by NewPhone would be bad public policy. The 1996 Act’s resale requirement was designed to foster competition by enabling new entrants to either eliminate or minimize the financial costs associated with constructing a physical communications network.<sup>8</sup> The 1996 Act, however, was not meant to

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<sup>6</sup> Petition at 2.

<sup>7</sup> *Id.* at 13.

<sup>8</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Act*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 15954, ¶ 907 (1996) (“*First Local Competition Order*”).

force ILECs to subsidize the marketing efforts of its competitors. Resellers such as NewPhone are free to offer the same type of marketing incentives provided by BellSouth, and, in fact, many do so today. In addition, the Commission has already made clear that ILEC efforts to win new and former customers through promotions and other incentives are pro-competitive. As the Commission has explained, for example:

Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to “out bid” each other for a customer’s business, enabling the customer to select the carrier that best suits the customer’s needs. . . . Because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.<sup>9</sup>

To avoid depriving consumers of the concrete benefits derived from ILEC marketing incentives and bundled offerings, the Commission should deny the requested Petition for declaratory ruling.

## **II. ILEC RESALE OBLIGATIONS UNDER THE 1996 ACT AND COMMISSION RULES**

In order to foster competition in the telecommunications marketplace, the 1996 Act imposes specific requirements on BellSouth and other ILECs to make their retail telecommunications services available to competing carriers at significantly discounted wholesale rates. These competitive carriers, in turn, can resell those telecommunications services to their customers. Specifically, Section 251(c)(4)(A) requires an ILEC “to offer for resale at wholesale rates any telecommunications service that [it] provides at retail to subscribers who are not telecommunications carriers.”<sup>10</sup> Wholesale rates are determined by state

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<sup>9</sup> *Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket Nos. 96-115 & 96-149, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, 14446-47, ¶¶ 69, 71 (1999).

<sup>10</sup> 47 U.S.C. § 251(c)(4)(A).

commissions “on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”<sup>11</sup>

The Commission determined that ILEC statutory resale obligations extend to promotional price discounts offered on retail telecommunications services. The Commission has defined “promotions” to include “price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.”<sup>12</sup> The Commission also concluded that “short term promotional prices,” which are defined as “promotions of up to 90 days,” “do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.”<sup>13</sup> Consequently, promotional prices offered for a period of 90 days or less need not be offered to resellers at a wholesale discount, whereas promotional prices offered for periods greater than 90 days must be offered for resale at the wholesale rate.

There are two categories of marketing incentives that NewPhone alleges are unreasonable and discriminatory. The first is when an ILEC runs a marketing campaign for more than 90 days that involves giving customers cash-back, gift cards, checks, coupons or similar giveaways for purchasing a telecommunications service.<sup>14</sup> The second category involves mixed service bundles, *i.e.*, bundles consisting of both telecommunications and non-telecommunications services.<sup>15</sup> As demonstrated more fully below, BellSouth offers each of these marketing

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<sup>11</sup> *Id.* § 252(d)(3).

<sup>12</sup> *First Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948.

<sup>13</sup> *Id.*

<sup>14</sup> Petition at 13.

<sup>15</sup> *Id.* at 18. NewPhone asks the Commission to declare that resellers must be allowed to avail themselves of ILEC promotions lasting longer than 90 days as of the first day that the ILEC offers the promotion, instead of the 91<sup>st</sup> day. *Id.* at 4, 7, n.11. As NewPhone notes, the NCUC

incentives consistent with the 1996 Act, and there are no legal or policy justifications for requiring BellSouth to make these incentives (or the value thereof) available to resellers through wholesale discounts.

**III. BELLSOUTH’S CASH-BACK PROMOTIONS, GIFT CARDS, CHECKS, COUPONS AND SIMILAR MARKETING INCENTIVES ARE NOT SUBJECT TO THE RESALE REQUIREMENTS OF SECTION 251(c)(4).**

Contrary to the claims of NewPhone, the cash-back promotions, gift cards, checks, coupons and similar marketing incentives offered by BellSouth are not subject to the resale requirements of Section 251(c)(4). Therefore, the Commission must deny NewPhone’s request to require ILECs offering promotions lasting longer than 90 days to either: (1) offer to resellers the value of the cash-back, gift card, check, coupon, or similar giveaway *in addition to the wholesale discount*<sup>16</sup> or (2) apply the wholesale discount to the “effective retail rate”<sup>17</sup> of the telecommunications service that is the subject of the ILEC promotion.<sup>18</sup> As discussed more fully below, cash-back promotions, gift cards, checks, coupons and similar marketing incentives are neither “telecommunications services” nor “promotional price discounts” that are subject to the resale requirements of Section 251(c)(4). Therefore, ILECs are neither required to provide the value of these marketing incentives to resellers nor provide an additional or super discount to the already discounted wholesale rate for the “telecommunications service” at issue.

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established this condition regarding resale in the order that was rejected by the North Carolina federal district court, and BellSouth takes no position on NewPhone’s request at this time.

<sup>16</sup> *Id.* at 3 (emphasis added).

<sup>17</sup> NewPhone defines the “effective retail rate” as the tariffed retail rate minus the value of the promotional discount.” *Id.* at 13.

<sup>18</sup> *Id.* at 3.

**A. Cash-Back Promotions, Gift Cards, Checks, Coupons and Similar Marketing Incentives Are Not “Telecommunications Services” Subject to The Resale Requirements of Section 251(c)(4).**

Cash-back promotions, gift cards, checks, coupons and similar benefits certainly do not meet the definition of a “telecommunications service” and therefore are not subject to the resale obligations of Section 251(c)(4). A “telecommunications service” is defined in the 1996 Act as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”<sup>19</sup>

“Telecommunications,” in turn, is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form of content of the information as sent and received.”<sup>20</sup>

The issue of whether these types of marketing incentives are subject to the resale obligations of Section 251(c)(4) was squarely before North Carolina federal district court, and the court appropriately concluded that “[t]here can be no argument that gift cards, checks, coupons for checks, and similar types of marketing incentives are ‘telecommunications services.’”<sup>21</sup> Even the NCUC, which rendered the initial ruling that is the genesis of the instant Petition, made clear that these marketing incentives are not “telecommunications services.” The

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<sup>19</sup> 47 U.S.C. § 153(46).

<sup>20</sup> *Id.* § 153(43).

<sup>21</sup> *BellSouth v. Sanford* at 5, 2006 U.S. Dist LEXIS 34265, at \*9. NewPhone narrowly interprets the North Carolina federal district court’s ruling by asserting that the “District Court’s order did not expressly address BellSouth’s cash-back promotions, which effectively reduce the price paid for a particular service.” Petition at 9. The court clearly stated that “[t]he marketing incentives at issue here do not give the customer a reduction or discount on the price of the telecommunications service provided by BellSouth.” *BellSouth v. Sanford* at 6, 2006 U.S. Dist. LEXIS 34265, at \*9-10. It is clear from the court order, the proceedings before the NCUC, and the various pleadings filed by the parties that the marketing incentives at issue extend beyond gift cards to include checks, which can be equivalent to cash-back. As the court points out, the key issue is whether there is a reduction in the retail price of the telecommunications service offered by BellSouth, and cash-back does not result in a discount in the retail price billed to and paid by end users.

NCUC specifically stated that its ruling “does not require that *non-telecommunications services, such as gift cards, check coupons, or merchandise*, be resold.”<sup>22</sup> Thus, cash-back promotions, gift cards, checks, coupons and similar marketing incentives clearly are not “telecommunications services” subject to the resale obligations of Section 251(c)(4).

**B. Cash-Back Promotions, Gift Cards, Checks, Coupons and Similar Marketing Incentives Are Not “Promotional Discounts” Subject to The Resale Requirements of Section 251(c)(4).**

Not only are cash-back promotions, gift cards, checks, coupons and similar marketing tools used by carriers to induce customers to purchase their services not “telecommunications services” subject to resale (as demonstrated above), but they also are not “promotional discounts” subject to resale. The Commission has defined “promotions” to include “*price discounts* from standard offerings that will remain available for wholesale rates, i.e., temporary price discounts.”<sup>23</sup> Thus, the Commission’s focus is appropriately on the price paid by the customer for the telecommunications service. When a customer receives cash, a coupon, a gift card, or a check in exchange for signing up to receive certain services, that customer will pay the same full tariff price for the service each month as do customers who sign up for the service without the benefit of the marketing incentive. Therefore, these marketing incentives do not qualify as “promotional discounts” subject to resale.

Despite clear direction from the Commission that promotions subject to resale are those resulting in a reduction or discount in the price paid by the customer for the telecommunications

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<sup>22</sup> *Implementation of Session Law 2003-91 Senate Bill 814 Titled “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* Docket No. P-100, Sub 72b, *Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay*, at 6 (June 3, 2005) (“*Second Resale Order*”) (emphasis added).

<sup>23</sup> *First Local Competition Order*, 11 FCC Rcd at 15970, ¶ 948 (emphasis added).

service, NewPhone requests that the Commission expand its interpretation of “promotional discounts.” The Commission should refuse to do so, consistent with the North Carolina federal district court’s recent decision rejecting the NCUC’s finding that BellSouth’s marketing incentive programs were subject to resale. The NCUC erroneously concluded that the “economic value” of gift cards, checks, coupons or similar gifts functions to lower the retail price of the services, and that ILECs must give “resellers the benefit of the change in rate brought about by offering one-time incentives for more than 90 days.”<sup>24</sup> Rejecting this conclusion, the court explained:

As noted above, the FCC has determined that the Act’s resale obligations extend to *promotional price discounts* offered on retail communications services. . . . Had the FCC wished to include marketing incentives such as Walmart gift cards in the definition of “promotions,” it could have easily done so. The marketing incentives at issue here do not give the customer a reduction or discount on the price of the telecommunications service provided by BellSouth. A customer receiving a Walmart gift card in exchange for signing up to receive certain services, for example, will pay the same full tariff price for the service each month as customers who subscribed to the service without the benefit of the gift card. . . . If the marketing incentive came in the form of a bill credit or other direct reduction in the price paid for a particular service, then the incentive would certainly be considered a promotional discount that would trigger BellSouth’s resale obligations.

The NCUC’s Orders purport to extend the definition of promotional discounts to include anything of economic value. The court believes that this interpretation is contrary to the plain language of the statute and the FCC implementing regulations.<sup>25</sup>

Under NewPhone’s theory, anything of value offered to the customer by an ILEC as an incentive to subscribe to a service constitutes a price discount on the service, even though the

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<sup>24</sup> *Second Resale Order* at 6.

<sup>25</sup> *BellSouth v. Sanford* at 6-7, 2006 U.S. Dist. LEXIS 34265, at \*9-10 (emphasis added).

tariff price itself has not been altered. This argument is not tenable. Indeed, as the court concluded, “[i]f the marketing incentive came in the form of a bill credit or other direct reduction in the price paid for particular service, then the incentive would certainly be considered a promotional discount that would trigger BellSouth’s resale obligations.”<sup>26</sup> However, that is not the situation here. For the marketing incentives at issue, the customer is billed the full tariff price and must pay the full price for the carrier’s services regardless of whether the customer uses the cash-back, gift card, check, or coupon. Therefore, the Commission should find that cash-back promotions, gift cards, checks, coupons and similar marketing incentives are not “promotional discounts,” and therefore are not subject to resale requirements of the 1996 Act.

Even if the Commission were to conclude otherwise, it should reject NewPhone’s request to require ILECs to provide resellers with the face value of the incentive 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.<sup>27</sup> There is no statutory basis for such a requirement.

Section 252(d)(3) states that wholesale rates charged to resellers shall be set “*on the basis of the retail rates charged to subscribers* for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collections, and other costs that will be avoided by the local exchange carrier.”<sup>28</sup> In other words, the wholesale discount necessarily functions to remove BellSouth’s marketing expenses from the retail rate so that the reseller pays a lower rate that does not include these expenses. The incentives at issue here

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<sup>26</sup> *Id.* at 7, 2006 U.S. Dist. LEXIS 34265, at \*10.

<sup>27</sup> Petition at 3, 17-18. Even if the Commission were to conclude that cash-back promotions, gift cards, checks, coupons and similar marketing incentives are subject to the 1996 Act’s resale requirements, an ILEC may not be obligated to offer resellers the wholesale discount on the telecommunications service that is the subject of the particular promotion, if it can prove that the restriction is reasonable and nondiscriminatory. *See* 47 C.F.R. § 51.613(b).

<sup>28</sup> 47 U.S.C. § 252(d)(3) (emphasis added).

represent marketing expenditures that BellSouth makes to compete for the customers' business. Consequently, requiring ILECs to provide the face value of marketing incentives to resellers would not only force ILECs to subsidize the resellers' marketing efforts but also would allow resellers to avoid the very costs that the 1996 Act requires *each* carrier to bear for itself. The Commission should not and cannot lawfully sanction such an outcome.

Moreover, NewPhone's reliance on the Commission's decision preempting an Arkansas statute governing resale is misplaced.<sup>29</sup> Contrary to NewPhone's assertion, that decision does not support the argument that ILECs must provide resellers the value of marketing incentives such as cash-back, gift cards, checks or coupons through an additional or super discount beyond the state-mandated wholesale discount. The Commission's statement that its rules "require the incumbent LEC to apply the wholesale discount to the special reduced rate"<sup>30</sup> refers to ***promotional price discounts*** offered beyond 90 days. Under these circumstances, the wholesale discount is applied to the reduced promotional price. Again, marketing incentives such as cash-back promotions, gift cards, checks and coupons do not reduce the retail price billed to and paid by end users. As such, they do not constitute "promotional discounts" subject to the 1996 Act's resale requirements.

Assuming *arguendo* that ILECs were under an obligation to offer discounted rates for telecommunications services based on the value of marketing incentives, the face value of such

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<sup>29</sup> See Petition at 15 (citing *American Communications Services, Inc.; MCI Telecommunications Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, CC Docket No. 97-100, *Memorandum Opinion and Order*, 14 FCC Rcd 21579, 21602, ¶ 47 (1999)).

<sup>30</sup> *American Communications Services, Inc.; MCI Telecommunications Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as*

incentives is not an appropriate basis for determining the wholesale discount. In most instances, the face value of the incentive does not reflect the costs incurred by the carrier to obtain or offer the incentive. For example, carriers that purchase gift cards to use as marketing incentives often do not pay full face value for the gift card. Therefore, requiring ILECs to provide the face value of such incentives either directly or through further reduced wholesale rates is not only contrary to the 1996 Act but also would provide resellers with financial windfalls at the expense of the ILECs.

**IV. BELLSOUTH FULLY COMPLIES WITH ITS STATUTORY OBLIGATION TO MAKE THE ILEC-PROVIDED TELECOMMUNICATIONS SERVICE COMPONENT OF A MIXED BUNDLE AVAILABLE AT WHOLESALE RATES.**

The Commission should not grant NewPhone's request to require ILECs to: (1) offer mixed bundles for resale at wholesale rates; or (2) offer the telecommunications component in a mixed bundle at a super-discounted rate.<sup>31</sup> Both of these proposals are contrary to the 1996 Act and the Commission's rules.

As an initial matter, NewPhone mischaracterizes BellSouth's position on the resale of mixed service bundles by stating: "BellSouth, however, does not even concede that the telecommunications service incorporated within a mixed service bundle is available for resale in the first instance."<sup>32</sup> This statement is wrong. BellSouth's position has always been that the ILEC-provided telecommunications service component of a mixed bundle is available for resale

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*amended*, CC Docket No. 97-100, *Memorandum Opinion and Order*, 14 FCC Rcd at 21602, ¶ 47 (1999).

<sup>31</sup> Petition at 19.

<sup>32</sup> *Id.* at 18.

on an unbundled standalone basis at the tariffed price for that service minus the wholesale discount as required by the 1996 Act.

As stated earlier, Section 251(c)(4)(A) requires that ILECs offer for resale at wholesale discounts “*any telecommunications service that the [ILEC] provides* at retail to subscribers who are not telecommunications carriers.”<sup>33</sup> As the statute makes clear, the resale obligation does not extend to non-telecommunications services or to any services provided by an entity other than the ILEC, regardless of whether such services are offered on a standalone basis or as part of a mixed bundle. In the absence of such a statutory obligation, the Commission must deny NewPhone’s request to mandate that ILECs resell complete bundles of telecommunications and non-telecommunications services at wholesale rates.

Similarly, the Commission should deny NewPhone’s request to require ILECs to offer the ILEC-provided telecommunications component of a mixed bundle at a super-discounted rate. Specifically, NewPhone proposes that the Commission require ILECs to offer the telecommunications service component of a mixed bundle at what it terms the “effective retail rate,” which NewPhone would calculate by “prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their retail unbundled component prices.”<sup>34</sup>

This approach is contrary to the 1996 Act as it does not reflect the retail rate available in the market to end users. Section 251(c)(4) requires an ILEC “to offer for resale at wholesale rates any telecommunications service that [it] *provides at retail to subscribers* who are not

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<sup>33</sup> 47 U.S.C. § 251(c)(4)(A) (emphasis added).

<sup>34</sup> Petition at 4, 20.

telecommunications carriers.”<sup>35</sup> And, wholesale rates are calculated “*on the basis of retail rates charged to subscribers* for the telecommunications service requested.”<sup>36</sup> These provisions of the 1996 Act make clear that the starting point for the wholesale discount is the retail rate charged to end users, not some hypothetical or pretend rate. Consequently, the approach advocated by NewPhone to base the wholesale discount on an “effective retail rate” must necessarily fail, because this hypothetical discounted price is not a price at which the ILEC makes such services available to its own retail end users.<sup>37</sup>

Moreover, as the Commission has concluded, “section 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services.”<sup>38</sup> In other words, the 1996 Act does not mandate that ILECs tear apart bundles and develop hypothetical prices or “effective retail rates” for each service within the bundle in order to calculate the wholesale discount. Making the telecommunications services available for resale at an “effective retail rate” minus the additional wholesale discount, as advocated by NewPhone, would be equivalent to providing resellers a service at a price that does not relate to the prices for which those services are actually offered at retail to the public. Such an outcome would be wholly inconsistent with the statute.

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<sup>35</sup> 47 U.S.C. § 251(c)(4)(A) (emphasis added).

<sup>36</sup> *Id.* § 252(d)(3) (emphasis added).

<sup>37</sup> No state in BellSouth’s region (or elsewhere as far as BellSouth knows) requires ILECs to break apart bundles and to give resellers super discounts off of hypothetical rates that are not available to end users.

<sup>38</sup> *First Local Competition Order*, 11 FCC Rcd at 15936, ¶ 877.

## V. EXPANDING ILEC RESALE OBLIGATIONS WOULD HARM COMPETITION AND CONSUMERS.

In addition to being unsupported by the governing law, expanding the ILEC resale obligations based on the fiction that ILECs are offering services to end users at make-believe prices that those ILECs are not actually offering would be bad public policy. The resale obligations under the 1996 Act were designed to foster competition by enabling new entrants to either eliminate or minimize the financial costs associated with building their own networks,<sup>39</sup> not to subsidize resellers' marketing efforts. Senator Daniel Inouye (D-HI) made this point clear when he stated:

Make no mistake – we want to be sure that the Bell Operating Companies are compensated for the actual cost of providing these facilities, services, and functions to competing carriers. We are not asking them to subsidize their competitors.<sup>40</sup>

Requiring ILECs such as BellSouth to provide resellers the value of marketing incentives directly or through additional discounts would result in the type of subsidization to which Senator Inouye objected. NewPhone is free to offer its own cash-back promotions, gift cards, checks, coupons and similar marketing incentives to consumers, and it should appropriately bear the costs associated with such promotions. If BellSouth is forced to subsidize resellers' marketing through additional discounts, BellSouth would have no business reason to continue to offer such incentives in the market, because its competitors could immediately offer those same incentives at a lower net cost (thanks to the subsidy from BellSouth). Thus, to avoid eliminating ILECs as players in this area and ensure that consumers continue to enjoy innovative, competitively priced offerings, the Commission should deny the Petition.

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<sup>39</sup> *Id.* at 15954, ¶ 907.

<sup>40</sup> 141 Cong. Rec. S8364-01 (June 14, 1995) (statement of Sen. Inouye).

**VI. CONCLUSION**

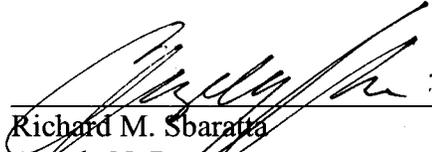
As the foregoing demonstrates, NewPhone's Petition seeks an unlawful expansion of the ILEC resale obligations under the 1996 Act. To comply with the plain language of the statute and to ensure that consumers continue to benefit from increased choices in the marketplace, the Commission should deny the Petition.

Respectfully submitted,

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July 31, 2006

**CERTIFICATE OF SERVICE**

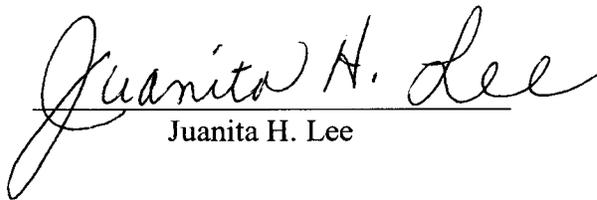
I do hereby certify that I have this 31<sup>st</sup> day of July 2006 served the following parties to this action with a copy of the foregoing **OPPOSITION OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of same in the United States Mail, addressed to the parties listed below.

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