

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF QWEST CORPORATION

Image Access, Inc. d/b/a NewPhone (“NewPhone”) and its supporters ask the Federal Communications Commission (“Commission”) to disregard the Telecommunications Act of 1996, and its own long-standing rules to rewrite the regulatory regime for resale under Section 251(c)(4). This rewrite is supposedly necessary in order to ensure that resale remains a viable alternative in the face of the Commission’s decision to limit incumbent local exchange carrier (“ILEC”) unbundling obligations.¹ Qwest’s experience is that competitive local exchange carriers (“CLECs”) are not turning to resale in the face of the new unbundling regime. Rather, they have moved from the unbundled network element platform (“UNE-P”) to Qwest’s commercial Qwest Platform Plus offering. In any event, a petition for a declaratory ruling is not the correct vehicle for rewriting the Commission’s rules.² The Commission should deny NewPhone’s request in its entirety.

¹ NewPhone Petition at 12.

² *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

I. SECTION 251(c)(4)'S RESALE REQUIREMENT IS LIMITED TO TELECOMMUNICATIONS SERVICES OFFERED BY AN ILEC

NewPhone and three of its supporters, COMPTEL, Joint Commenters and SouthEast Telephone, Inc. (“SouthEast”), ask the Commission to require ILECs to resell various services that are not subject to Section 251(c)(4). Section 251(c) imposes upon “each incumbent local exchange carrier” the duty “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”³ The statute clearly does not require that an ILEC’s affiliate resell telecommunications services (such as long distance). Nor does it require an ILEC to resell non-telecommunications services (such as high speed Internet access). Nonetheless, Joint Commenters ask the Commission to require resale of long distance.⁴ COMPTEL and SouthEast also ask the Commission to require resale of mixed bundles, *i.e.*, bundles that contain non-telecommunications services such as high-speed Internet and satellite TV.⁵ These requests find no support in the 1996 Act.

NewPhone’s three supporters take different approaches to finding legal authority in support of this request. COMPTEL relies upon the *Arkansas Preemption Order*,⁶ in support of its request for resale of mixed bundles. In doing so COMPTEL ignores that the *Arkansas Preemption Order* did not address non-telecommunications services, much less require ILECs to offer non-telecommunications services. The *Arkansas Preemption Order* did not address non-ILEC services either. Accordingly, the *Arkansas Preemption Order* does not support

³ 47 U.S.C. § 251(c)(4).

⁴ Joint Commenters at 11-12.

⁵ COMPTEL at 8; SouthEast at 8.

⁶ *In the Matter of 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*, Memorandum Opinion and Order, 14 FCC Rcd 21579 (1999) (“*Arkansas Preemption Order*”).

COMPTEL. Joint Commenters rely upon the North Carolina Utilities Commission's *Second Resale Order*.⁷ The state commission's order does not provide authority for this Commission to order resale of non-Section 251(c)(4) services. Rather, the state commission acknowledged that "an ILEC is not required to resell either non-telecommunications services that it provides or any services that are provided by an entity other than the ILEC."⁸ Accordingly, Joint Commenters misplace their reliance upon the state commission. Finally, the third supporter, SouthEast makes no attempt to find any statutory authority for the request.

In sum, there is no support in the 1996 Act for ordering resale of non-ILEC services. Nor is there any basis for ordering resale of non-telecommunications services.⁹

II. ILECS ARE NOT REQUIRED TO PROVIDE MARKETING INCENTIVES OR THEIR VALUE TO REQUESTING CARRIERS, AND ESPECIALLY NOT AT AN AVOIDED COST DISCOUNT

Two of NewPhone's supporters, COMPTEL and SouthEast, argue that use of marketing incentives such as gift cards "discriminates against resale competitors."¹⁰ They concur in NewPhone's proposal that the ILEC either resell the marketing incentive to the CLEC at a discount or resell the telecommunications service at a discount from the "effective retail rate" which is found by deducting the face value of the marketing incentive from the actual retail rate. As shown above, marketing incentives such as gift cards are not telecommunications services.

⁷ Joint Commenters at 12 (*citing* the North Carolina Utilities Commission *Second Resale Order* at 8). *See 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, Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, June 3, 2005 ("Second Resale Order")*.

⁸ *Second Resale Order* at 8.

⁹ Neither non-cash marketing incentives, nor the value of those marketing incentives are telecommunications services either. Accordingly, the Commission cannot order ILECs to resell such marketing incentives, or their value, and certainly not at a discount.

¹⁰ COMPTEL at 4; SouthEast at 6.

Thus, the Commission cannot order ILECs to resell them at an avoided cost discount.

Accordingly, an ILEC's refusal to resell marketing incentives is not a violation of Section 251(c)(4).

The second alternative, *i.e.*, creating an "effective retail rate" ignores the Commission's prior rulemaking and the language of the 1996 Act. In the *Local Competition Order* the Commission decided that "promotion" in connection with the regulations pertaining to the resale provisions in the 1996 Act means price discounts off the standard retail rate.¹¹ It does not include non-cash marketing incentives. Moreover, creating an "effective retail rate" is contrary to the 1996 Act's constraint that the state commission must calculate the discount based on the "retail rates charge[d] to subscribers."¹²

In addition, creating an "effective retail rate" ignores the basic economics that non-cash incentives such as gift cards and toasters are less valuable to consumers than cash.¹³ Requiring ILECs to discount their telecommunications service offerings by the face value of such promotions would give resellers an unwarranted competitive advantage.¹⁴ A \$50 cash discount to the reseller is economically superior to a \$50 gift card to a particular store or a \$50 tangible good, such as a toaster. In fact, the ILEC may not have spent \$50 to acquire a marketing incentive with a \$50 face value.

¹¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15970 ¶ 948 (1996) ("*Local Competition Order*") (subsequent history omitted; *see also Arkansas Preemption Order*, 14 FCC Rcd at 21600 ¶ 41(explaining that the *Local Competition Order* "holds that incumbent LECs must apply the wholesale discount rate to promotional offerings, *i.e.*, temporarily reduced prices")).

¹² 47 U.S.C. § 252(d)(3).

¹³ Verizon at 9-12.

¹⁴ *Id.* at 11.

Nonetheless, COMPTEL argues that the marketing incentives “effectively reduce the price of the telecommunications service purchased by the subscribers by the value of the promotion.”¹⁵ Even so, determining the value to the subscriber of any promotional offering is not as simple as deducting the face value of the promotion from the retail cost of the telecommunications service. Rather, as Verizon demonstrates, determining the value would require identifying the percentage of consumers taking advantage of the promotion, the costs the consumers incurred to obtain the benefits of the promotion, and the cash value equivalent experienced by the consumers.¹⁶ Accordingly, if resellers were given a discount on the price of a telecommunications service equivalent to the face value of any non-cash marketing incentive, resellers would be given an unwarranted subsidy.¹⁷

As COMPTEL concedes the avoided cost discount serves only to ensure “that competitors are not paying costs that are avoided when ILEC services are resold by other carriers.”¹⁸ Calculating an effective retail rate by subtracting the face value of the marketing incentive from the actual retail rate would require the ILEC to offer a discount that is greater than its avoided cost. This is because to the extent that the marketing incentive has a cost, those types of marketing costs have already been considered when the state commission determined

¹⁵ COMPTEL at 4.

¹⁶ Verizon at 10-11.

¹⁷ One of NewPhone’s supporters, BLC Management, LLC, d/b/a Angles Communications Solutions (“Angles”) wants an even larger subsidy. They want to calculate the avoided costs by looking at the dollar value of the avoided cost discount, *i.e.*, \$16 in the case of a 16 percent discount on a \$100 product. Then, if the ILEC is offering a \$90 promotional rate, Angles wants to get a \$16 discount off of \$90 (an almost 18% discount), rather than a \$14.40 discount (or 16% discount off of \$90). Angles at 7. While this solution might be beneficial for Angles, it would be totally unworkable for a state commission, which would be called upon to continually recalculate the exact level of marketing, billing, collection, and other costs attributable to each product offered at retail.

¹⁸ COMPTEL at 4.

the avoided cost discount percentage. Reducing the actual retail rate charged to subscribers by the incentive's face value in order to calculate an effective retail price would for all practical purposes include that amount twice.

COMPTEL calls use of marketing incentives a "restriction and condition on resale" which is "presumptively a violation of section 251(c)(4)."¹⁹ This is a misreading of the 1996 Act's prohibition on "discriminatory conditions or limitations on" the resale of telecommunications service.²⁰ That is, the 1996 Act only bars an ILEC from limiting what a reseller may do with the retail telecommunications services that it obtains at wholesale. Here, no one has alleged that any ILEC has prevented resellers from creating their own promotions once they obtain telecommunications services at wholesale. Thus, there is no allegation of any restriction or condition on resale, as those terms are used in the 1996 Act.

In sum, granting NewPhone's request would force ILECs to subsidize CLECs' marketing programs. This would be contrary to the pro-competitive policies underlying the 1996 Act. As Verizon points out, offering marketing incentives is an important way in which incumbent and competitive carriers compete for consumers. ILECs are constrained from competing based on price because resellers receive the benefit of any decrease in retail rate. ILECs are constrained from competing based upon new or innovative services, because resellers must receive those too. ILECs will lose any incentive to offer promotions that last longer than 90 days if the Commission grants NewPhone's petition.

¹⁹ *Id.* at 5.

²⁰ 47 U.S.C. §§ 251(b)(1), (c)(4)(B).

III. ILECS ARE NOT REQUIRED TO PROVIDE A DISCOUNT ON THE TELECOMMUNICATIONS SERVICE COMPONENT OF MIXED BUNDLES

NewPhone and its supporters want ILECs to either resell mixed bundles in their entirety or offer the ILEC's telecommunications service components of the mixed bundles at a discount off of the hypothetical "effective retail rate." As shown in Section I., the Commission does not have the authority to mandate the first option. That is, the Commission cannot mandate the resale of non-ILEC services. Nor can it mandate the resale of an ILEC's non-telecommunications services.

The Commission should also reject the second option, mandating a discount off of the hypothetical "effective retail rate." Again, the request to calculate the avoided cost discount off the "effective retail rate" ignores the Commission's prior rulemaking and the language of the 1996 Act. In the *Local Competition Order* the Commission decided that "promotion" in connection with the regulations pertaining to the resale provisions in the 1996 Act means price discounts off the standard retail rate.²¹ Moreover, creating an "effective retail rate" is contrary to the 1996 Act's constraint that the state commission must calculate the discount based on the "retail rates charge[d] to subscribers."²²

As Verizon demonstrates, the lower price of any bundle reflects the efficiencies that result from packaging services together.²³ Forcing ILECs to pick apart the bundle to offer an internal discount when the telecommunications service is sold alone would be illogical and

²¹ *Local Competition Order*, 11 FCC Rcd at 15970 ¶ 948.

²² 47 U.S.C. § 252(d)(3).

²³ Verizon at 14, *see also* Qwest at n.25. Joint Commenters concede that when BellSouth offers a package made entirely of its retail telecommunications services the reseller does not have to buy the services individually. Rather, the reseller gets an avoided cost discount off the package rate. Joint Commenters at 6.

contrary to the 1996 Act and the *Local Competition Order*.²⁴ When the ILEC sells the reseller the telecommunications services separately, the ILEC is not gaining any of the efficiencies produced by bundling. Thus, the proper starting point for calculating the discount is the price that the ILEC charges its retail customers when they buy the telecommunications service separately. In addition, the discount that NewPhone seeks is not based upon avoiding marketing, billing, collection and other costs. Discounts based upon those avoided costs are the only discounts mandated by the 1996 Act and the *Local Competition Order*.

SouthEast claims that BellSouth utilizes mixed bundles “to discriminate in an attempt to eliminate” resale competition.²⁵ As Verizon shows, ILECs do not offer mixed bundles to eliminate resale competition. Rather, ILECs offer such bundles because customers demand them. ILECs must meet that demand in order to compete against other providers, such as cable companies, that offer similar bundles. Resale carriers are free to create their own bundles, and sell those bundles to subscribers at lower prices.

²⁴ *Local Competition Order*, 11 FCC Rcd at 15936 ¶ 877. To be clear, there is no allegation that any ILEC’s telecommunications service has been locked up such that it is only offered as part of a mixed bundle.

²⁵ SouthEast at 7.

IV. CONCLUSION

For the foregoing reasons, Qwest asks that the Commission deny NewPhone's petition in its entirety.

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST CORPORATION** to be 1) filed with the Office of the Secretary via the FCC's Electronic Comment Filing System; 2) served via email on the staff person of the FCC identified in the attached service list; 3) served via email on the FCC's duplicating contractor Best Copy and Printing, Inc. identified in the attached service list; and 4) served via First Class United States mail, postage prepaid, on the other parties listed in the attached service list.

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