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EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *AT&T, Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74

Dear Ms. Dortch:

BellSouth submits this response to the recent letter from the Resale Coalition complaining that BellSouth's refusal to offer for resale cash-back and bundled promotions is discriminatory and an "attempt to eliminate its resale competition"¹ In addition to being completely unrelated to the merger, the Resale Coalition's complaints are unfounded, and its proposed conditions are legally flawed.

First, while the Resale Coalition seeks an order requiring the combined company to offer for resale "the value of all cash-back, gift card, coupon, or other similar giveaways or incentives," such a requirement would violate the plain language of the 1996 Act, the Commission's rules and orders, and at least one federal court decision. Section 251(c)(4) of the 1996 Act requires BellSouth to offer for resale "any telecommunications service" it provides at retail to subscribers who are not telecommunications carriers. On its face, this statutory provision does not compel an ILEC to resell marketing incentives such as a gift card or a toaster, since the value of such items is no more a retail telecommunications service than the gift card or toaster itself.

¹ See Letter from John J. Heitmann, Counsel for Image Access, Inc. d/b/a NewPhone, ABC Telecome d/b/a Home Phone, Alternative Phone, Inc., AmeriMex Communications Corp., CGM, Inc., Connect Paging, Inc. d/b/a Get a Phone, dPi Teleconnect, Express Phone Service, Inc., FLATEL, Inc., Ganoco, Inc. d/b/a American Dialtone, Lost Key Telecom, Quality Telephone, Seven Bridges Communications, Smart Telecom Concepts, LLC, and the National Alternative Local Exchange Carrier Association/Prepaid Communications Association (collectively, the "Resale Coalition") to Marlene Dortch, Secretary, FCC (Nov. 27, 2006).

In determining ILEC resale obligations, the Commission has expressly limited the scope of the term “promotions” as “only referring to *price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.*”² The Commission did not define “promotions” expansively to include “anything of value” provided in connection with a retail offering of telecommunications services but rather limited the term to temporary reductions in the price of standard telecommunications service offerings. As the federal District Court for the Western District of North Carolina recently held, gift cards or other similar one-time marketing incentives do not constitute a discount off of the standard retail price for a regulated telecommunications service and thus are not available for resale.³

Second, the Resale Coalition’s request that the combined company be required to resell “mixed bundle promotions, *i.e., bundles consisting of both telecommunication and information service*” is similarly misguided. The 1996 Act 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.”⁴ As the statute makes clear, the resale obligation does not extend to information services or any other non-telecommunications services that the ILEC provides, or to any services provided by an entity other than the ILEC. Thus, no obligation exists for an ILEC to resell bundles consisting of telecommunications and non-telecommunications services, although an ILEC must offer for resale each component of a bundle that constitutes a telecommunications service being provided by the ILEC at the tariffed rate for that service minus the wholesale discount, which the combined company will do.⁵

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15970 ¶ 948 (“*Interconnection Order*”) (emphasis added). The Commission further 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.” *Id.*, see also 47 C.F.R. § 51.613(a)(2). The Commission’s conclusion that only promotional pricing lasting for periods greater than 90 days must be offered for resale at the wholesale discount is fatal to the Resale Coalition’s demand that the combined company be required to resell gift cards or other one-time marketing incentives.

³ *BellSouth Telecommunications, Inc. v. Sanford et al.*, No. 3:05CV345-MU, slip op. (W.D. N.C. May 15, 2006), *appeal pending* Civil Action 3:05-CV-345-MU (4th Cir.). The Resale Coalition also demands that the combined company be required to apply the wholesale discount to the “effective retail rate” of the telecommunications services that are the subject of the promotion, which the Resale Coalition proposes be calculated by subtracting the face value of the promotional incentive from the tariffed rate for the services. This demand fares no better because neither the 1996 Act nor the Commission’s rules defines “promotion” in terms of “effective rates” or hypothetical retail rates.

⁴ 47 U.S.C. § 251(c)(4)(A).

⁵ This result also is consistent with the Commission’s order regarding bundling in which the Commission authorized ILECs to sell bundles including local and enhanced services, subject to existing safeguards. See *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418 (2001).

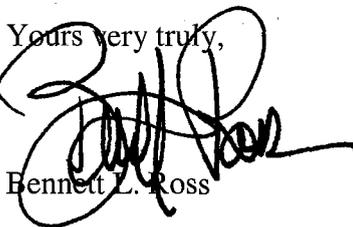
Ms. Marlene H. Dortch

December 4, 2006

Page 3

The resale conditions proposed by the Resale Coalition are not necessary to “protect consumers,” as the Resale Coalition falsely claims, but rather would simply result in a subsidy to resellers at the expense of the combined company. In setting wholesale prices, the state public service commissions have already deducted the avoided retail costs that BellSouth presumably would not have to incur in the wholesale market, including the marketing expenses associated with gift cards and similar incentives.⁶ By demanding an additional discount based on the supposed value of these marketing incentives, the Resale Coalition would effectively double count a significant amount of BellSouth’s marketing expenses against the wholesale discount already offered to resellers. Such “double dipping” would be patently improper and be inconsistent with the 1996 Act, which is designed to foster competition in the telecommunications marketplace, not force ILECs to subsidize their local competitors.⁷

Please include a copy of this letter in the record in the above-referenced proceeding. Thank you for your attention to this matter.

Yours very truly,

Bennett L. Ross

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Such safeguards include the obligation to offer “local exchange service separately on an unbundled tariff basis if they bundle the service....” *Id.* at 7425 ¶ 12 (emphasis added).

⁶ 47 U.S.C. § 252(d)(3); 47 C.F.R. §§ 51.607, 51.609(b) & 51.609(c)(1).

⁷ *See, e.g.*, 141 Cong. Rec. S8364 (June 14, 1995) (statement of Sen. Inouye) (“Make no mistake – we want to be sure that the Bell 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.”).