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June 13, 2006

BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

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Federal Communications Commission
Office of Secretary

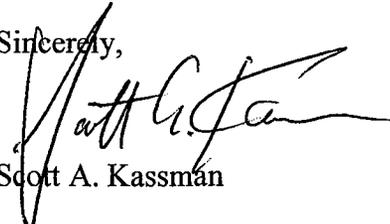
Dear Ms. Dortch:

On behalf of Image Access, Inc. d/b/a NewPhone ("NewPhone"), enclosed please find an original and four copies of NewPhone's Petition for Declaratory Relief, filed pursuant to Sections 1.1 and 1.2 of the Commission's Rules, 47 C.F.R. §§1.1, 1.2.

Also enclosed is a duplicate of this filing. Kindly date-stamp the duplicate and return it to the courier. Please contact the undersigned at (202) 342-8400, if you have any questions about this filing.

Thank you.

Sincerely,


Scott A. Kassman

SAK:koc
Enclosures

**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. _____

PETITION FOR DECLARATORY RULING

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June 13, 2006

SUMMARY

Incumbent local exchange carriers are increasingly employing sophisticated and complicated promotional discounts and bundled offerings that include local telecommunication services. As a result, it is becoming increasingly more difficult to determine the actual retail rate of the service to which the wholesale discount should apply, and disputes between incumbents and resellers are occurring more frequently and taking longer to resolve.

The failure to properly account for promotional discounts the subsequent failure to settle disputes promptly greatly affects the ability of resellers to provide service in competition with incumbents, particularly to residential customers, and thereby harms competition in those markets.

Accordingly, the instant Petition for Declaratory ruling asks the Commission to address issues related to the resale availability, pricing, and timing of incumbents' cash-back, non-cash-back, and mixed bundle promotional offerings.

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PETITION FOR DECLARATORY RULING

Image Access, Inc. d/b/a NewPhone (“NewPhone”), through undersigned counsel, pursuant to Section 1.1 and 1.2 of the Federal Communications Commission’s (“FCC” or “Commission”) rules,¹ hereby requests that the Commission issue a declaratory ruling to ensure that resale remains a viable method of competitive entry into the local exchange market and is not stifled by incumbent local exchange carriers’ (“ILEC”) unreasonable and discriminatory practices and policies. As provided for in further detail below, NewPhone asks the Commission to remove uncertainty surrounding the resale of ILEC services subject to cash-back promotions, gift cards, coupons, checks, or other similar giveaways, and rule as to the wholesale availability and pricing of telecommunications services offered to ILEC retail customers as part of a mixed service bundle, *i.e.*, a bundle consisting of both telecommunications and non-telecommunications services.

¹ 47 C.F.R. §§1.1, 1.2.

I. INTRODUCTION

In enacting the Communications Act of 1934, as amended (“the Act”), Congress expressly recognized the import of resale as a method of competitive entry into the local exchange market. Indeed, Congress wove into the very fabric of the Act the requirement that ILECs make available for resale, at wholesale rates, any telecommunications service that the ILEC provides to its retail end-users, without any unreasonable or discriminatory restrictions or limitations.²

Relying on the ILECs’ Congressionally-mandated obligation to offer retail telecommunications services at wholesale rates, NewPhone, a Louisiana corporation, started providing pre-paid, residential local exchange services in Louisiana in 1998. NewPhone subsequently expanded its business by entering into resale agreements with BellSouth in the remaining eight BellSouth states, and today it serves approximately 12,000 residential customers throughout the region using calls centers located in New Orleans and Baton Rouge, Louisiana.

Despite BellSouth’s federally imposed obligations, NewPhone avers 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 which are designed, in part, to eliminate its resale competition.³ BellSouth has engaged in an extensive campaign throughout its nine-state operating region to win back customers and to retain existing customers through the use of bundling, cash-back, and non-cash-back promotional

² See 47 U.S.C. §251(c)(4).

³ Upon information and belief, AT&T and other ILECs engage in some similar discriminatory conduct.

schemes which disguise promotional price discounts to retail subscribers, or prohibit resale in the first instance.⁴

NewPhone contends that such conduct is unreasonable and discriminatory and asks the Commission to declare the same.

Specifically, NewPhone requests that the Commission declare that:

- (1) ILECs' refusal to make telecommunications services subject to 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;
- (2) for all ILEC promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, ILECs are required to *either*
 - (i) offer to telecommunications carriers the value of all cash-back, check, gift card, coupon, or other similar giveaways or discounts 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*
 - (ii) apply the wholesale discount to the "effective retail rate" of the telecommunications service that is the subject of the ILEC's retail promotion;
- (3) the "effective retail rate" for cash-back, check, gift card, coupon, or other similar giveaway or discounts shall be determined by subtracting the face

⁴ Examples of BellSouth promotions attached hereto as *Exhibit A*.

- value of the promotional discount from the ILEC tariffed rate for the telecommunications service that is the subject of the ILEC promotional offering and the value of such discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months;
- (4) for all ILEC promotions greater than 90 days in duration, ILECs shall make available for resale the telecommunications service component(s) contained within “mixed bundle” promotions, *i.e.*, bundles consisting of both telecommunications service and non-telecommunications service, such as information services, and apply the wholesale avoided cost discount to the “effective retail rate” of the telecommunications services contained within the mixed bundle;
 - (5) the “effective retail rate” of the telecommunications service component(s) of a mixed service bundle shall be determined 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; and
 - (6) telecommunications carriers shall be entitled to resell ILEC promotions of greater than 90 days in duration as of the first day the ILEC offers the promotion to retail subscribers.

II. BACKGROUND

A. PROCEDURAL HISTORY

NewPhone and BellSouth are parties to resale agreements in several states, including the state of North Carolina. Pursuant to the terms and conditions of that agreement, NewPhone is entitled to withhold from BellSouth all disputed charges. Accordingly, NewPhone

has withheld payment from BellSouth as it relates to the wholesale rates that BellSouth has charged NewPhone for reselling promotions lasting more than 90 days in which BellSouth offers its retail subscribers cash-back, check, gift card, coupon, or other such promotional discount.

On June 25, 2004, the Public Staff of the North Carolina Utilities Commission (“NCUC”) filed a Motion with the NCUC seeking guidance on the question of whether local exchange carriers (“LECs”) are required to offer for resale to telecommunications resellers special offerings of telecommunications service that feature gift items as part of the bargain, e.g., gifts such as a check or coupon or gift card, if the special offering is made to retail subscribers for longer than 90 days.⁵ The NCUC sought and received comments from interested parties including the Public Staff and BellSouth. After considering the parties’ comments, the NCUC issued an Order on December 22, 2004, in which it stated:

Despite the ILECs’ argument that gift card type promotions are incentives and/or marketing tools used to distinguish their services in the marketplace, these promotions are in fact promotional offers subject to the FCC’s rules on promotions. While these promotional offerings are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings, they do result in a savings to the customers who subscribe to the regulated service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the ‘real’ retail rate available in the marketplace.⁶

In that same order, the NCUC concluded that

⁵ *In the Matter of Local Exchange and Local Exchange Access Telecommunications Competition, Motion for Order Concerning Eligibility of Promotions for One-Day Notice and ILECs’ Obligations to Offer Promotions to Resellers, North Carolina Utilities Commission Docket No. P-100, Sub. 72b, filed June 25, 2004.*

⁶ *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 Ruling on Motion Regarding Promotions, at 11 (December 22, 2004) (“First Resale Order”), attached hereto as **Exhibit B**.*

[t]he promotion reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway. The tariffed retail rate, would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, *i.e.*, the promotional rate, would become the 'real' retail rate. Thus, the ILEC could use the promotion as a *de facto* rate charge without charging its tariff pricing.⁷

The NCUC also determined that BellSouth's bundled promotional offering consisting of telecommunications service provided at no less than the tariffed retail rate and non-telecommunications service provided free of charge, when offered for more than 90 days, should be treated no differently than gift card promotions, as the value of the free service effectively reduces the retail rate of the other service.⁸ Thus, the NCUC required BellSouth to provide the telecommunications service component at the effective retail rate, which is determined by applying the wholesale discount to the discounted promotional rate.⁹

After the NCUC issued the *First Resale Order*, BellSouth filed a Motion for Reconsideration on February 18, 2005.¹⁰ The NCUC subsequently issued a second order on June 3, 2005 in which it denied BellSouth's Motion for Reconsideration. In that second order, the NCUC once again explained its position on BellSouth's resale obligation with regard to its promotional offerings:

One-time incentive gifts, including gift cards, check coupons and other merchandise, which are offered to induce customers to subscribe to telecommunications services, are promotional

⁷ *Id.*

⁸ *Id.* at 14.

⁹ *Id.* at 15.

¹⁰ *Implementation of Session Law 2003-91, Senate Bill 814 Titled, "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"* BellSouth Motion for Reconsideration or, in the Alternative, for Clarifications, and for a Stay, North Carolina Utilities Commission Docket No. P-100, Sub 72b, filed Feb. 18, 2005.

offerings. Therefore, if such gifts or incentives are offered for more than 90 days, as discussed in greater detail in the *Order*, they have the effect of lowering the actual, 'real' retail rate. The retail rate, and thus the wholesale rate charged to resellers, must be determined on the basis of the 'real' rate charged to subscribers. The Commission's *Order* does not prevent or in any way frown upon the use of such incentives as gift cards and other one-time upfront gifts. However, if the incentives, *i.e.*, promotions, are offered for more than 90 days, on the 91st day, resellers are entitled to have the benefit of the promotion reflected in the wholesale rate, meaning that the wholesale discount must be applied to the promotional rate—not to some other theoretical listed rate which has been undercut by a long-term promotional rate that is generally available to subscribers in the telecommunications marketplace. If an ILEC does not want to offer resellers a wholesale rate based on a retail rate adjusted to reflect the effect of a promotion on the actual retail price, then the ILEC must not offer the promotion for more than 90 days.¹¹

The NCUC's *Second Resale Order* also clarified how the true wholesale rate should be determined for BellSouth's mixed bundle promotions lasting more than 90 days.¹²

On August 2, 2005, BellSouth filed with the U.S. District Court for the Western District of North Carolina a Complaint for Declaratory and Injunctive Relief and Motion for Temporary Restraining Order and Preliminary Injunction seeking to restrain enforcement of certain portions of the NCUC orders on the grounds that they conflict with the Act and federal regulations.¹³ On that same day, the court granted BellSouth an *ex parte* temporary restraining

¹¹ *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*"), attached hereto as *Exhibit C*. NewPhone disagrees with the NCUC's pronouncement that resellers must wait until the 91st day to avail themselves of BellSouth's promotions. NewPhone contends that the benefit of such promotions lasting longer than 90 days should be available to resellers on day one, not day 91.

¹² *Id.* at 7-10.

¹³ BellSouth's Complaint was levied against the individual NCUC commissioners in their official capacity. See *BellSouth Telecommunications, Inc. v. North Carolina Utilities Comm'n et al.*,

order.¹⁴ The court granted BellSouth's Motion for Preliminary Injunction at hearing on August 11, 2005.¹⁵ Notably, the District Court's order only restrained the NCUC from enforcing its conclusion as to gift card promotions and the application of the wholesale discount to the effective retail rate of those promotions.¹⁶

On February 16, 2006, BellSouth and the NCUC filed cross Motions for Summary Judgment, and on May 15, 2006, the Court issued an order granting BellSouth's Motion for Summary Judgment and denying the NCUC's Motion for Summary Judgment.¹⁷ In that order, the court held, in pertinent part:

In its First Report and Order, the FCC stated in unambiguous terms that 'promotions' refers only to 'price discounts from standard offerings that will remain available for at wholesale rates, *i.e.*, temporary price discounts.' First Report and Order, ¶948. 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

W.D.N.C. Case 3:05-cv-00345, Complaint For Declaratory and Injunctive Relief, filed Aug. 2, 2005. *See also*, BellSouth's Motion for Temporary Restraining Order and Preliminary Injunction, filed Aug. 2, 2005. The aforementioned documents are attached hereto as *Exhibit D*.

¹⁴ *See* Temporary Restraining Order attached hereto as *Exhibit E*.

¹⁵ *See* Order Granting Temporary Restraining Order attached hereto as *Exhibit F*.

¹⁶ *Id.* at 7.

¹⁷ *See* Order Granting BellSouth's Motion for Summary Judgment ("*Summary Judgment Order*") attached hereto as *Exhibit G*.

contrary to the plain language of the statute and the FCC implementing regulations.¹⁸

Notably, the District Court's order did not *expressly* address BellSouth's cash-back promotions, which effectively reduce the price paid for a particular service. The court also did not address issues concerning BellSouth's mixed bundle promotional offerings, as BellSouth did not appeal that aspect of the NCUC's orders.¹⁹ Despite that the NCUC's orders remain in effect as to BellSouth's bundled promotional offerings, BellSouth refuses to comply with the terms of those orders.

Emboldened by the district court's decision, BellSouth has filed a complaint against NewPhone with the same court, seeking in excess of \$2 million for what BellSouth alleges *inter alia* is NewPhone's breach of its obligation to pay BellSouth under the parties' 2002 and 2006 interconnection agreements.²⁰

On June 12, the NCUC filed a notice with the District Court, appealing the District Court's May 15, 2006 Summary Judgment Order to the U.S. Court of Appeals for the Fourth Circuit.²¹

B. ACTUAL CONTROVERSY

Section 1.2 of the Commission's rules provides that "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own

¹⁸ *Id.* at 6 (emphasis added).

¹⁹ *Id.*

²⁰ *BellSouth Telecommunications, Inc. v. Image Access d/b/a NewPhone*, W.D.N.C. Case 3:06-cv-00157, Complaint, filed April 4, 2006, attached hereto as *Exhibit H*. NewPhone's Answer is due on June 14, 2006 and it plans to file a Motion to Dismiss at that time.

²¹ *See* NCUC Notice of Appeal attached hereto as *Exhibit I*.

motion issue a declaratory ruling terminating a controversy or removing uncertainty.”²² As the procedural history cited above illustrates, this dispute is not merely academic. NewPhone and BellSouth have been engaged in a series of disputes over these very issues before the NCUC and the U.S. District Court in North Carolina. Accordingly, the instant Petition represents an actual controversy which the Commission should terminate in accordance with Section 1.2 of the Commission’s rules. The Commission is best suited to resolve this matter -- not the courts -- by removing uncertainty surrounding the core resale competition issues presented herein.²³

III. ARGUMENT

A. **RESALE IS AN IMPORTANT METHOD OF LOCAL EXCHANGE COMPETITION AND MUST BE PRESERVED**

Congress expressly recognized that resale is an important method of competitive entry into the local exchange market. The resale obligations are woven into the very fabric of the market opening provisions of the Act by imposing distinct obligations upon different categories of carriers. First, Section 251(b)(1) of the Act, which applies to all local exchange carriers, provides that no local exchange carrier shall “impose unreasonable or discriminatory conditions or limitations on [] the resale of its telecommunications services.”²⁴ By contrast, the resale obligations under Sections 251(c)(4) and 271(c)(2)(B)(xiv), apply only to ILECs and RBOCs, respectively. Section 251(c)(4) requires ILECs:

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) ***not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service***, except that a State commission may, consistent with regulations prescribed by

²² 47 C.F.R. §1.2.

²³ See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 818-19.

²⁴ 47 U.S.C. §251(b)(1).

the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.²⁵

Section 271(c)(2)(B)(xiv) provides that, in order for a Bell Operating Company to provide in-region interLATA services, it must offer telecommunications services for resale in accordance with section 251(c)(4) and the avoided cost pricing standard enunciated in Section 252(d)(3).²⁶

In the *Local Competition Order*, the Commission explained “the strategic importance of resale to the development of competition,” by stating that “[r]esale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term.”²⁷ Indeed, resale allows competitive providers the flexibility to increase their market presence through resale beyond the reach of their existing networks. It also allows competitive providers to increase their market share more quickly than would be possible solely through expansion of their own networks.

The Commission reemphasized the important policy concerns that make restrictions on resale undesirable in granting BellSouth Section 271 authority. In its *South Carolina 271 Order*, the Commission stated, “[r]esale is one of three mechanisms Congress

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

²⁶ 47 U.S.C. §271(c)(2)(B)(xiv). 47 U.S.C. §252(d)(3) provides, in pertinent part, “a State commission shall determine wholesale rates 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.”

²⁷ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶907 (rel. Aug. 8, 1996) (“*Local Competition Order*”).

developed for entry in the BOCs' monopoly market."²⁸ The Commission cited to its *Local Competition Order*, in which it found that

[t]he ability of [I]LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by [I]LECs to preserve their market position. In a competitive market, an individual seller (an [I]LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that [I]LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale.²⁹

The Commission also recently reaffirmed the importance of resale in its *Qwest Omaha Forbearance Order*.³⁰ In that order, the Commission granted, in part, and denied, in part, Qwest's petition for forbearance from numerous statutory and regulatory obligations related to Qwest's provision of service in the Omaha Metropolitan Statistical Area ("MSA"). In denying Qwest's petition for forbearance from the resale obligations of Section 251(c)(4), the Commission stated that "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 customers' interests are protected . . . [W]e conclude that section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible."³¹

Given the Commission's recent series of orders limiting ILEC unbundling obligations, resale is now an even more important method of local exchange competition. Central to this reality, however, is that the barriers to resale entry remain low and that resellers

²⁸ *In the Matter of Application of BellSouth Corp., 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 (rel. Dec. 24, 1997) ("*South Carolina 271 Order*").

²⁹ *Id.*, quoting *Local Competition Order*, 11 FCC Rcd at 15966, ¶939.

³⁰ *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170, rel. Dec. 2, 2005, ¶63 ("*Qwest Omaha Forbearance Order*").

³¹ *Id.*, ¶88.

are able to obtain service upon reasonable rates, terms and conditions in order to compete with the ILECs. In order to ensure that resale remains a viable alternative for competitors and consumers, the Commission must declare *inter alia* that ILECs are required under the Act and the Commission's rules to apply the wholesale avoided cost discount to the "effective" retail rate of the telecommunications service(s) which are the subject of the ILEC's cash-back, non-cash-back, and mixed service bundle promotions.

B. BELLSOUTH'S RESALE PRACTICES ARE UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF THE ACT AND THE COMMISSION'S RULES AND POLICIES

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

The first type of promotional discount used by BellSouth to discriminate against and eliminate its resale competition is a promotion lasting more 90 days which is offered to its end-user subscribers in the form of cash-back or other promotions which effectively reduce the price of the telecommunications service purchased by subscribers by the value of that promotion. Although BellSouth makes the services subject to such promotions available for resale at the applicable state commission avoided cost discount rate, BellSouth does not provide resellers with the value of the promotional discount that it provides to its own end-users, *e.g.*, cash-back, nor does BellSouth apply the state commission approved wholesale avoided cost discount to the "effective retail rate" (the tariffed retail rate minus the value of the promotional discount) of the telecommunications services offered for resale. BellSouth's extensive use of these cash-back and non-cash-back promotions enables it to disguise promotional price discounts to its

subscribers and undercut the price at which resellers are able to offer customers the same service.³²

Section 251(c)(4)(B) of the Act provides that ILECs are “not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service.”³³ Section 271(c)(2)(B)(xiv) of the Act echoes that section, requiring Bell Operating Companies providing in-region, interLATA services to provide telecommunications services for resale in accordance with Section 251(c)(4) in order.³⁴

In the *Local Competition Order*, the Commission concluded that resale restrictions are presumptively unreasonable and that an ILEC can rebut that presumption but only if the restrictions are “narrowly tailored.”³⁵ Similarly, Section 51.605(e) of the Commission’s rules provides that, “[e]xcept as provided in Sec[ti]on 51.613, an [I]LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the [I]LEC.”³⁶ Section 51.613(a), in turn, provides that the only restriction on resale that may be imposed by ILECs are those concerning cross-class selling and short term promotions of 90 days or less.³⁷

Importantly, Section 51.613(b) also states that “[w]ith respect to any restrictions on resale not permitted under paragraph (a), an [I]LEC may impose a restriction *only if it proves*

³² In some cases, BellSouth’s cash-back offers may result in a situation where the effective retail price of the service is below BellSouth’s cost. See *Local Competition Order*, 11 FCC Rcd at 15973, ¶956 (requiring ILECs to apply the wholesale discount on services at below-cost levels).

³³ 47 U.S.C. §251(c)(4)(B).

³⁴ 47 U.S.C. §271(c)(2)(B)(xiv).

³⁵ *Local Competition Order*, 11 FCC Rcd. at 15966, ¶939.

³⁶ 47 C.F.R. §51.605(e).

³⁷ See 47 C.F.R. §51.613(a). Cross-class selling, e.g., offering business customers a residential customer promotion, is only prohibited to the extent that a state commission relieves an ILEC of its resale obligations with respect to cross-class promotions.

to the state commission that the restriction is reasonable and nondiscriminatory.”³⁸

NewPhone is not aware of any state in which BellSouth has proven that its restrictions on resale are either reasonable or nondiscriminatory.³⁹ BellSouth’s refusal to allow NewPhone to resell telecommunications service at the same rates, terms and conditions under which BellSouth offers such services to its own customers is not a “narrowly tailored” restriction. To the contrary, BellSouth’s practices are discriminatory and constitute unreasonable restrictions on resale in violation of Sections 251(c)(4)(B) and 271(c)(2)(B)(xiv) of the Act, as well as Section 51.605(e) of the Commission’s rules.

NewPhone’s contentions regarding the application of the wholesale discount to the “effective retail rate” are further supported by the Commission’s *Arkansas Preemption Order*. In that order, the Commission preempted an Arkansas statute that was contrary to the Commission’s implementation of section 251(c)(4)(B), stating:

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 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.*⁴⁰

Moreover, NewPhone maintains that the North Carolina district court erroneously created a distinction between those promotions that *directly* reduce the retail rate of a

³⁸ 47 C.F.R. §51.613(b).

³⁹ To the contrary, as demonstrated herein, the NCUC found that BellSouth’s promotions such as its cash-back offers have the effect of lowering the “real” retail rate and that BellSouth must determine that wholesale rate charged to resellers on the basis of the “real” retail rate charged to BellSouth subscribers.

⁴⁰ *In the Matter of 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, ¶47 (rel. Dec. 23, 1999) (“*Arkansas Preemption Order*”) (footnotes omitted) (emphasis added).

telecommunications service and certain promotions that *indirectly* reduce the retail rate.⁴¹ There is simply no basis for such a distinction under the Act or the Commission's rules. Indeed, in the *Local Competition Order* the Commission expressly recognizing that ILECs could use promotions like BellSouth's to manipulate their retail rates and effectively avoid their resale obligations. As such, the Commission found that the resale requirement of Section 251(c)(4) of the Act

*makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. 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.*⁴²

Explaining that promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to Section 251(c)(4)(A), the Commission also stated,

To preclude the potential for abuse of promotional discounts, any benefit of the promotion must be realized within the time period of the promotion, *e.g.*, no benefit can be realized more than ninety days after the promotional offering is taken by the customer if the promotional offering was for ninety days. In addition, an incumbent LEC may not use promotional offerings to evade the wholesale obligation, for example by consecutively offering a series of 90-day promotions.⁴³

As should be evident from the above-referenced language, the Commission does not distinguish between promotions which directly reduce the retail rate of a telecommunications service and those that indirectly do so. The rules which the Commission adopted in the *Local Competition Order* plainly state that *all* promotional offerings must be made available for resale,

⁴¹ *Summary Judgment Order* at 6.

⁴² *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted) (emphasis added).

⁴³ *Id.*, ¶ 950.

other than those expressly provided for in Section 51.613 (cross-class and short term promotions), and that ILECs are prohibited from restricting, limiting or refusing in the first instance to make telecommunications service available for resale. Even assuming *arguendo* that the court decided the matter correctly with regard to indirect, non-cash discounts such as BellSouth's Walmart gift card promotions, that analysis does *not* apply to cash-back promotions which effectively reduce the price of the retail telecommunications service.

As demonstrated above, BellSouth is obligated to provide resellers with the benefit of cash-back promotions, gift cards, coupons, checks, or other similar giveaways in association with making the telecommunications service available for resale, pursuant to the Act and the Commission's rules. BellSouth's refusal to do so constitutes an unreasonable restriction on resale in violation of the Commission's rules and Sections 251(c)(4)(B) and 271(c)(2)(B)(xiv) of the Act. In light of the foregoing, the Commission should declare that for all promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, BellSouth shall *either* (i) in addition to offering the telecommunications service that is the subject of the promotion at the wholesale avoided cost service discount, offer to telecommunications carriers the value of all cash-back, check, gift card, coupon, or other similar giveaways or discounts that BellSouth provide to retail end-users; *or* (ii) apply the wholesale avoided cost service discount to the "effective retail rate" of the telecommunications service that is the subject of the AT&T or BellSouth promotion. 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 any minimum monthly commitment up to a maximum of three months, and that telecommunications carriers

shall be entitled to resell ILEC cash-back and non-cash-back promotions of greater than 90 days on the first day the ILEC offers the promotion to retail subscribers.

2. Mixed Bundles

The second type of promotion used by BellSouth to discriminate against and attempt to eliminate its resale competition are promotions lasting more than 90 days in which BellSouth offers a mixed service bundle, *i.e.*, a bundle consisting of both telecommunications and non-telecommunications services, such as information services. By bundling a telecommunications service together with a non-telecommunications service, an ILEC is able, among other things, to disguise the true retail price of the telecommunications service and thereby discriminate against its resale competitors by applying the wholesale avoided cost discount to the tariffed retail rate rather than to the real rate at which BellSouth offers the bundled telecommunications service to its own subscribers (the “effective retail rate”). BellSouth, however, does not even concede that the telecommunications service incorporated within a mixed service bundle is available for resale in the first instance.

As explained above, Section 251(c)(4)(B) of the Act and Section 51.605(e) of the Commission’s rules prohibit ILECs from imposing unreasonable or discriminatory conditions or limitations on telecommunications available for resale, or refusing in the first instance to provide telecommunication services for resale. BellSouth’s practices concerning the resale of mixed bundle promotions violates both the Act and the Commission’s rules. In the *Local Competition Order*, the Commission concluded “that the plain language of the 1996 Act requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, *i.e.*, bundled service offerings.”⁴⁴ Although the Commission also explained

⁴⁴ *Local Competition Order*, 11 FCC Rcd at 15936, ¶877.

that “[s]ection 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail services,”⁴⁵ those pronouncements were only as to bundles of “pure” telecommunications services, not mixed bundles. Indeed, the Commission recognized that by allowing ILECs to refuse to disaggregate pure telecommunications service bundles where the necessary telecommunications service component is not available as a stand-alone service, a reseller could still gain access to the necessary telecommunications component(s) by obtaining the entire bundle at wholesale rates. By contrast, if mixed bundles were not required to be disaggregated, it lawfully would allow ILECs to refuse to offer the entire mixed bundle for resale, effectively “locking up” the telecommunications components of such bundles. Surely the Commission could not have intended such a result. At a minimum, either the entire mixed service bundle must be available for resale at wholesale rates, or the telecommunications services component(s) must be made available for resale at wholesale rates. Anything less is discriminatory and is an unreasonable restriction on resale in violation of the Act and the Commission’s rules. As such, the Commission should declare that, for all ILEC promotions greater than 90 days in duration, the ILEC shall make available for resale the telecommunications services component(s) of ILEC mixed bundle promotions. The Commission should also declare that telecommunications carriers are entitled to resell bundled promotions lasting longer than 90 days as of the first day the ILEC offers the promotion to retail subscribers.

Equally as important as the availability of the telecommunications service component(s) of ILEC mixed bundle promotions, however, are the prices at which telecommunication services may be obtained for resale. In order for resellers to effectively compete against ILECs, the ILECs must make apply the wholesale avoided cost discount to the

⁴⁵ *Id.*

“effective retail rate” of the telecommunications services contained within the mixed bundle. To do otherwise would be discriminatory and would allow the ILECs to undercut their resale competitors and offer services to their customers that resellers could not offer, let alone match the price.

Accordingly, NewPhone contends that the Commission must require ILECs to offer resellers the telecommunications service component(s) of a mixed service bundle promotion at the “effective retail rate” of the telecommunications component, which should be determined 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. For example, if the individual components comprising a mixed service bundle have a combined retail price of \$150 if purchased on a stand-alone basis, and the telecommunication service component has a stand-alone retail price of \$30, the telecommunications service component would have an “effective retail rate” of 20% of the total mixed service bundled price.⁴⁶

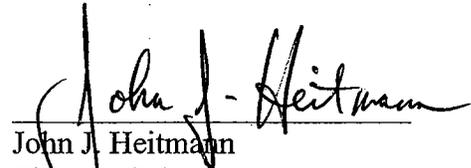
IV. CONCLUSION

Consistent with the foregoing, the Commission should act to preserve resale as a viable method of local exchange competition by granting the instant Petition for Declaratory Ruling.

⁴⁶ This calculation is generally consistent with the way taxing authorities apply a variety of taxes and policies to various components of bundled offerings.

Respectfully submitted,

By:



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NewPhone*

June 13, 2006

* Not admitted in D.C. Practice limited to matters and proceedings before federal courts and agencies.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Declaratory Ruling of Image Access, Inc. d/b/a NewPhone were delivered by messenger on this 13th day of June, 2006 to the parties listed below.



Kathleen Culbertson
Kathleen Culbertson

Best Copy and Printing, Inc.
Portals II
445 12th Street, SW, Room CY-B402
Washington, DC 20554

Tamara Preiss
Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Don Stockdale, Jr.
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

EXHIBIT A

*For less than **\$15.00** a month¹, you get...*

- **Local Service with your choice of 2 calling features** such as Caller ID Deluxe, Call Waiting Deluxe, Call Return (*69), Three-Way Calling and more — at no additional charge for 12 months!²
- **BellSouth® Long Distance Service** for only **5¢ a minute** — WITH NO MONTHLY FEE for 12 months!³
- **BellSouth® Voice Mail Service** — for 12 months — so you never miss a call!⁴ (Available upon request.)
- **Local service connection fee waived** — a savings of up to \$41.00!

*Plus, we'll give you **\$50 CASH BACK**⁵ to spend any way you want!*

Only BellSouth delivers the quality, service and reliability you deserve.

To sign up for this offer today, call us toll free at **1.877.359.3602**,
Monday through Friday, 8 a.m. – 7 p.m. EST and Saturday, 8 a.m. – 5 p.m. EST.
Or visit us online any time at **bellsouth.com/welcome**.



Para español por favor llame al **1.888.698.8674**.

0205-3/1FR
020706-A

(see back for more details)

H602AE-5/19

>> Don't panic.

Even if your dog ate your mail,
he didn't chew up your last chance to
tear into this great new offer!

For less than **\$1500***
a month, you get ...

- Local Service with your choice of 2 calling features such as Caller ID Deluxe, Call Waiting Deluxe, Call Return (*69), Three-Way Calling and more — at no additional charge for 12 months!¹
- BellSouth® Long Distance Service for only 5¢ A MINUTE — WITH NO MONTHLY FEE for 12 months!²
- Voice Mail—for 12 months—so you never miss a call!³ (Available upon request.)

PLUS, we'll waive your local service connection fee — a savings of up to \$41.00!

And give you
\$50 CASH BACK
to spend any way you want!⁴

It all adds up to one sweet deal! Plus, the more services you add, the more you SAVE — high-speed Internet services, DIRECTV® service and Cingular Wireless®. Only BellSouth delivers the quality, service and reliability you deserve. There's no need to go anywhere else!

To sign up for this offer today, call us toll free at 1.877.761.7240,
Monday through Friday, 8 a.m. – 7 p.m. EST
and Saturday, 8 a.m. – 5 p.m. EST.
Or visit us online at bellsouth.com/welcome.

Para español por favor llame al 1.866.211.0240.

AS AN ADDED BONUS,
order DIRECTV service from
BellSouth and receive a 4-room
DIRECTV® System — FREE
with your annual commitment
to any TOTAL CHOICE®
programming package.⁵

Includes satellite dish,
up to 4 standard receivers,
and standard installation.
(Offer available on approved credit.)

Ask about DIRECTV's great offer
for premium channels.

 **BELLSOUTH**
Listening. Answering.®

*Discounted rate excludes taxes, fees & other charges for new qualifying residential customers for 12 months. Rate will vary depending on geographic location. Normal non-discounted rate applies thereafter. **Cash Back coupon to customers who switch local telephone service to BellSouth and subscribe to local service, 2 calling features and a BellSouth long distance plan. Check will be sent within 4-5 weeks after receipt of coupon to customers who retain qualifying service. Valid for one service line at the intended local service address. Offer ends 12/31/05. Customer must not have had local service with BellSouth 10 days prior to new service connection date. One \$50 Cash Back (reacquisition promotion) per customer per 12-month period. 1) Features must be compatible & are subject to availability. Some features require additional equipment. Long distance or expanded local calling rates may apply for Call Return, Call Forwarding and Three-Way Calling. Free calling features & optional voice mail available to customers who switch their local service to BellSouth from another provider and purchase local service and choose 2 calling features from BellSouth. At the end of 12 months, customer will be billed at regular rates for local service and calling features. 2) Nickel Value Promotion: Offer ends 6/30/06. Customers must not have subscribed to any BellSouth Long Distance service within five (5) days prior to their enrollment in this promotion. A \$3.95 monthly recurring charge applies after 12 billing invoices. International calls extra. A Carrier Cost Recovery fee of \$0.99 will be charged monthly. This fee is not a tax or charge imposed or required by any government. Taxes, fees and other charges, including Universal Service Fund, apply. 3) DIRECTV Free Equipment & Installation requires subscription to 12 consecutive months of any DIRECTV® TOTAL CHOICE® programming package (\$41.99/mo. or above), DIRECTV PARA TODOS programming package (\$29.99/mo. or above) or qualifying international services bundle within 30 days of equipment purchase. Offer available on approved credit. \$19.95 handling and delivery fee applies. \$4.99/mo. for separate programming on second and each additional TV. Offer ends 7/31/05. In certain markets, programming and pricing may vary. FAILURE TO ACTIVATE THE DIRECTV SYSTEM WITHIN 30 DAYS OF PURCHASE MAY RESULT IN A CHARGE OF \$150 PER DIRECTV RECEIVER NOT ACTIVATED. IF YOU FAIL TO MAINTAIN AN ANNUAL PROGRAMMING COMMITMENT, DIRECTV MAY CHARGE A PRO-RATED FEE OF UP TO \$150. IN LIEU OF PAYMENT, YOU HAVE AN OPTION TO SEND YOUR DIRECTV SYSTEM TO DIRECTV. VISIT DIRECTV.COM OR CALL 1-800-DIRECTV FOR DETAILS. Programming, pricing, terms and conditions subject to change. Taxes not included. Equipment specifications and programming options may vary in AK or HI. DIRECTV services not provided outside the U.S. Receipt of DIRECTV programming is subject to the terms and conditions of the DIRECTV Customer Agreement; copy provided at DIRECTV.com and in your first bill.

BellSouth Promotion Restrictions: Valid for one service line at the intended local service address. Customers must not have had local service with BellSouth 10 days prior to new service connection date. BellSouth employees not eligible. Promotion ends 12/31/05.

Advised services & features not available in all areas. All offers may be modified or discontinued at any time without notice. Long distance provided by BellSouth Long Distance, Inc. ©2005 BellSouth Corporation. All BellSouth marks contained herein are owned by BellSouth Intellectual Property Corporation. DIRECTV and the Cyclone design logo, TOTAL CHOICE and DIRECTV PARA TODOS are registered trademarks of DIRECTV, Inc.

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Express

06/16-0230332

Hurry! Act Now!

P.O. Box 530590
Birmingham, AL 35253-0590

Dear Gene Dry,

Simple is good, and here's an offer that's simply perfect for you.

For only **\$22.95** a month,¹ you'll get...

- Unlimited local calls with the BellSouth® PreferredPack® Bundle²
- Our most popular calling features, such as Caller ID Deluxe, Call Waiting Deluxe, Call Return (*69), and Three-Way Calling, for much less than you would pay for each feature separately.²
- BellSouth® Long Distance Service for only 5¢ a minute — **WITH NO MONTHLY FEE** for 12 months!⁴
- No connection charge to come back to BellSouth!

Plus, we'll give you
\$100 CASH BACK⁵
to spend any way you want!

Order additional services and save! Get an extra \$100 CASH BACK⁶ when you order BellSouth® FastAccess® DSL Ultra plus either Cingular Wireless® OR DIRECTV® service from BellSouth! That's a total of \$200 CASH BACK! Ask our sales associate for details.

BellSouth is the one company that offers it all — high-speed Internet services, local and long distance, Cingular Wireless and DIRECTV service.

To sign up for this offer today, call us toll free at **1.877.876.6762**, Monday through Friday, 8 a.m. – 7 p.m. EST and Saturday, 8 a.m. – 5 p.m. EST and be sure to mention promo code **AG05B**. Or visit us online any time at bellsouth.com/welcome.

Sincerely,



Carlos A. Salinas
Senior Director
Consumer Marketing

Para español por favor llame al 1.888.734.9222.

1) Quoted rate excludes taxes, fees & other charges for new qualifying residential customers. Rate will vary depending on state and geographic location and is subject to change. 2) BellSouth® PreferredPack® Plan features must be compatible & are subject to availability. Some features require additional equipment. Long distance or expanded local calling rates may apply for Call Return, Call Forwarding and Three-Way Calling. 3) Calling features must be compatible & are subject to availability. Some features require additional equipment. Long distance or expanded local calling rates may apply for Call Return, Call Forwarding and Three-Way Calling. 4) Nickel Savings Value Promotion: Offer ends 12/31/05. Customers must not have subscribed to any BellSouth® Long Distance service within five (5) days prior to their enrollment in this promotion. A \$3.95 monthly recurring charge applies after 12 billing invoices. International calls extra. A Carrier Cost Recovery Fee of \$0.99 will be charged monthly. This fee is not a tax or charge imposed or required by any government. Taxes, fees and other charges, including Universal Service Fund, apply. 5) Cash Back coupon to customers who switch local telephone service to BellSouth and purchase the BellSouth® Complete Choice® plan or the BellSouth® PreferredPack® plan. See coupon for redemption details. Check will be sent within 4-6 weeks after receipt of coupon to customers who retain qualifying service. Offer ends 12/31/05. Other conditions apply. 6) Cash Back: Customers can get \$100 cash-back coupon with new purchases of both BellSouth® FastAccess® DSL plan and qualifying DIRECTV® plan, or both BellSouth® FastAccess® DSL plan and Cingular Wireless® plan (\$39.99 or higher) from BellSouth. BellSouth® FastAccess® DSL. Not eligible. Qualifying service that is disconnected and re-established during promotional period not eligible for cash back. Check to be sent 4-6 weeks after receipt of coupon to customers who retain qualifying service. See coupon for redemption details. Other restrictions apply. Offer ends 8/31/06.

BellSouth Offers: Valid for one service line at the intended local service address. Customers must not have had local service with BellSouth 10 days prior to new service connection date. Advertised services and features not available in all areas. All offers may be modified or discontinued at any time without notice. Applicable taxes and fees based on the full price of all products and services, and no taxes, fees or shipping and handling charges will be added to any reward or rebate. Long distance provided by BellSouth® Long Distance, Inc. DIRECTV service provided by DIRECTV, Inc. and is subject to credit approval. ©2005 BellSouth Corporation. All trademarks and service marks contained herein are the property of their respective owners.

NOT IMPRESSED WITH THE HEROICS OF YOUR PHONE COMPANY? SWITCH TO BELLSOUTH.
WE PROMISE TO WORK AS HARD AS WE CAN TO MAKE SURE ALL OF YOUR NEEDS ARE MET.
AND THE BEST PART IS, WE WON'T HAVE TO WEAR TIGHTS TO DO IT.

BellSouth is the one company that offers it all with local, long distance, Internet services, satellite TV and Cingular Wireless.[®] Simply put, this is a package you can't afford to pass up.

For less than \$35.00 a month,¹ you get...

- Local Service with your choice of 2 calling features such as Caller ID Deluxe, Call Waiting Deluxe, Call Return (*69), Three-Way Calling and more — at no additional charge for 12 months!²
- BellSouth[®] Unlimited plan for long distance...24 hours a day, 7 days a week.³
- Voice Mail — for 12 months — so you never miss a call!⁴ (Available upon request)

PLUS, we'll waive your local service connection fee — a savings of up to \$41.00!

And give you \$75 CASH BACK⁵ to spend any way you want!

As an added bonus, order DIRECTV[®] service from BellSouth, and you'll get a DIRECTV[®] system and standard professional installation for up to four rooms — FREE⁶

Only BellSouth delivers the quality, service and reliability you deserve.

To sign up, call us today toll free at 1.877.315.8253,
Monday through Friday, 8 a.m. – 7 p.m. EST and Saturday, 8 a.m. – 5 p.m. EST.
Or visit us online any time at bellsouth.com/welcome.

Para español por favor llame al 1.888.688.7784.

 **BELLSOUTH**
Listening. Answering.[®]

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¹) Discounted rate (excluding taxes, fees & other charges) for new qualifying residential customers. Normal non-discounted rate applies for subscribed services after 12 months. Rate will vary depending on state and geographic location. Includes \$2.00/mo. companion services package for optional Voice Mail Service. BellSouth employees are not eligible for this offer. ²) Free calling features & optional voice mail: Available to customers who switch their local service from another provider and subscribe to two calling features and a domestic BellSouth Long Distance plan. Other restrictions may apply. ³) BellSouth[®] Unlimited plan for long distance is for domestic residential voice usage only. Callers under this plan must dial 1 + area code + domestic number. International calls extra. Usage in excess of typical residential usage, which is presumed to be 5000 minutes per month, will be subject to an additional fee of \$50. Other terms, conditions & restrictions apply. Taxes, fees & other charges, including Universal Service Fund, apply. ⁴) Cash Back: \$50 cash back to customers who switch local telephone service to BellSouth and purchase local service plus 2 calling features and a BellSouth Long Distance plan by December 31, 2005. \$25 cash back to residential customers with new purchase of a domestic BellSouth Unlimited Long Distance Plan by August 31, 2005. Offers exclude customers moving existing qualifying services to a new service address and customers moving from one BellSouth Unlimited Long Distance Plan to another such plan. Coupon redemption required. See coupon for redemption details. Checks will be sent within 4-6 weeks after receipt of coupons to customers who retain qualifying services. Other conditions apply. One (re)acquisition reward per customer per 12-month period. ⁵) DIRECTV free Equipment & Installation requires subscription to 12 consecutive months of any DIRECTV[®] TOTAL CHOICE[™] programming package (\$41.99/mo. or above), DIRECTV PARA TODOS programming package (\$29.99/mo. or above) or qualifying international services bundle within 30 days of equipment purchase. Offer available on approved credit. \$19.95 handling and delivery fee applies. \$4.99/mo. for separate programming on second and each additional TV. Offer ends 7/31/05. In certain markets, programming and pricing may vary. FAILURE TO ACTIVATE THE DIRECTV SYSTEM WITHIN 30 DAYS OF PURCHASE MAY RESULT IN A CHARGE OF \$150 PER DIRECTV RECEIVER NOT ACTIVATED. IF YOU FAIL TO MAINTAIN AN ANNUAL PROGRAMMING COMMITMENT, DIRECTV MAY CHARGE A PRORATED FEE OF UP TO \$150 IN LIEU OF PAYMENT, YOU HAVE AN OPTION TO SEND YOUR DIRECTV SYSTEM TO DIRECTV. VISIT DIRECTV.COM OR CALL 1-800-DIRECTV FOR DETAILS. Programming, pricing, terms and conditions subject to change. Taxes not included. Equipment specifications and programming options may vary in AK or HI. DIRECTV services not provided outside the U.S. Receipt of DIRECTV programming is subject to the terms and conditions of the DIRECTV Customer Agreement; copy provided at DIRECTV.com and in your first bill.

BellSouth Offers: Valid for one service line at the intended local service address. Customers must not have had local service with BellSouth 10 days prior to new service connection date. Advertised services and features not available in all areas. All offers may be modified or discontinued at any time without notice. Applicable taxes and fees based on the full price of all products and services, and no taxes, fees or shipping and handling charges will be added to any reward or rebate. Long distance provided by BellSouth[®] Long Distance, Inc. DIRECTV service is provided by DIRECTV. ©2005 BellSouth Corporation. All trademarks and service marks contained herein are the property of their respective owners.

08-0275594

>> How can you enjoy \$249 in savings? "Bundling" is the answer.

Dear Samuel Adams:

Simplifying your life. Giving you more for less money. That's what the BellSouth® Value Answers™ bundle is all about. This special bundle offers more features than comparable plans from other companies—with extra annual savings too.

Become a BellSouth® Complete Choice® plan¹ customer and you'll enjoy unlimited local calling and special features that let you manage your calls. You'll also become eligible for \$5 monthly savings on other services, including high-speed Internet, Cingular Wireless® and DIRECTV® Service. Add the BellSouth® Unlimited Plan for long distance and you can double your savings up to \$10 a month. The two bundle options below include Complete Choice and highlight how you can start saving today.

BellSouth Value Answers bundle

>> with the Nickel Value Plan

- BellSouth Complete Choice plan, including unlimited local calling and multiple calling features such as Caller ID Deluxe, Call Waiting, Call Block, Call Forwarding and more.
- BellSouth Nickel Value plan for long distance calls to anywhere in the U.S., anytime, for only 5 cents per minute. *As a bonus, you'll receive 100 free minutes each month for three months!*

\$36.95/month¹

Save up to \$165 for the first year**

BellSouth Value Answers bundle

>> with the Unlimited Plan for long distance

- BellSouth Complete Choice plan
- BellSouth Unlimited Plan for long distance calling anywhere in the U.S., anytime, for one low monthly rate. *Get \$25 cash back!*

\$54.99/month¹

Save up to \$249 for the first year**

\$25 Cash Back*

BellSouth also gives you extra benefits no other company can offer:

- Get all these services from BellSouth—local, long distance, International, Internet, Cingular Wireless, and DIRECTV service
- Award-winning customer service
- Customized bundles that fit your lifestyle with extra savings

Sign up before it's too late.

These offers are only available for a limited time, so sign up today. To get all the services you need, cash back, special savings, and our award-winning customer service, call 1.877.294.2105 today.

Sincerely,

Kim S. Whitehead
Vice President, Consumer Segment Marketing

Get up to \$25 cash back with BellSouth Answers.*
Hurry, offer ends soon.
Call 1.877.294.2105 or visit bellsouth.com/cashback.

 **BELLSOUTH**
Listening. Answering.™

BELLSOUTH®

PAY TO THE ORDER OF

221 285 *****AUTO**3-DIGIT 701

Samuel Adams

8232 Pritchard Pl.

New Orleans LA 70118-3156



Hurry, offer ends soon.

up to \$25.00

up to twenty-five dollars ^{00/100}

Kim S. Whitehead

Vice President, Consumer Segment Marketing



P.O. Box 530590
Birmingham, AL 35253-0590

UV13LAE-0297007-07/14

Gene Dry
1328 Octavia St.
New Orleans, LA 70115-4225



Dear Gene Dry,

Simple is good, and here's an offer that's simply perfect for you.

**For just \$44.99 a month for 12 months,¹
you'll get the BellSouth® Unlimited AnswersSM Bundle, which includes:**

- BellSouth® Unlimited Plan for long distance...24 hours a day, 7 days a week.²
- Unlimited local service
- BellSouth® Voice Mail service...so you never miss a call. (Available upon request.)
- Caller ID Deluxe, Call Waiting Deluxe, Call Return (*69), Three-Way Calling, Call Forwarding, Call Block and more.³
- Local service connection fee waived — a savings of up to \$41.00!

This plan is normally \$49.99 a month. But, with this special offer, you'll get a \$5.00 a month discount for the first twelve months — a savings of \$60.00!

**We'll give you a \$100 Visa® Reward Card plus
\$25 CASH BACK for the Unlimited Plan!⁴**

BellSouth is the one company that offers it all — high-speed Internet services, local and long distance, Cingular Wireless® and DIRECTV® service.

Ask us how to get a free DIRECTV® DVR, plus a standard DIRECTV® System for up to 3 additional rooms, including standard installation.⁵ (After \$100 mail-in rebate from DIRECTV on approved credit. Programming commitment required.) Plus, ask about great exclusive sports packages from DIRECTV!

To sign up for this offer today, call us toll free at 1.888.247.4184,
Monday through Friday, 8 a.m. – 7 p.m. EST and Saturday, 8 a.m. – 5 p.m. EST
and be sure to mention promo code AR05.
Or visit us online any time at bellsouth.com/welcome.

Sincerely,

Carlos A. Salinas
Senior Director, Consumer Marketing

Para español por favor llame al 1.877.572.2139.

1) Discounted rate for new qualifying residential customers for 12 months. Rate will vary depending on state and geographic location. Normal non-discounted rate applies thereafter. Rate excludes taxes, fees & other charges. BellSouth employees are not eligible for this offer. Offer ends 12/31/05. 2) BellSouth® Unlimited Plan is for domestic residential voice usage only. Callers under this plan must dial 1 + area code + domestic number. International calls extra. Usage in excess of typical residential usage, which is presumed to be 5000 minutes per month, will be subject to an additional fee of \$50. Other terms, conditions & restrictions apply. Taxes, fees & other charges, including Universal Service Fund, apply. 3) Calling features must be compatible & are subject to availability. Some features require additional equipment. Long distance or expanded local calling rates may apply for Call Return, Call Forwarding and Three-Way Calling. 4) \$100 Visa® Reward Card coupon available to customers who switch local telephone service to BellSouth and purchase the BellSouth® Complete Choice® plan or the BellSouth® PreferredPack® plan by 12/31/05. Coupon redemption required. See coupon for redemption details. Visa Reward Cards are provided, not sold, by BellSouth as a promotional reward. Cards are issued by a participating bank and are subject to the bank's terms and conditions provided with the Visa Reward Card. Under those terms, certain fees may be assessed against beginning in the 7th month after date of issuance. The Visa Reward Card will be sent 4 to 6 weeks after BellSouth's receipt of coupon to customers who retain qualifying services. One \$100 Visa Reward per customer per 12-month period. Cards issued by JPMorgan Chase Bank, N.A. pursuant to a license by Visa® and managed by Ecount®, a member service provider of JPMorgan Chase Bank. \$25 cash back to residential customers with new purchase of a domestic BellSouth® Unlimited Long Distance plan by 9/30/05. Offer excludes customers moving existing qualifying services to a new service address and customers moving from one BellSouth® Unlimited Long Distance plan to another such plan. Coupon redemption required. See coupon for redemption details. Check will be sent within 4-6 weeks after receipt of coupon to customers who retain qualifying service. Other conditions apply. 5) DIRECTV: DIRECTV service provided by DIRECTV and subject to credit approval. Land-based phone line connection required. Offer available starting 8/1/05. In certain markets, programming and pricing may vary. Programming, pricing, terms and conditions subject to change. Taxes not included. Receipt of DIRECTV programming is subject to the terms of the DIRECTV Customer Agreement, copy provided at DIRECTV.com and in your first bill. ©2005 DIRECTV, Inc. DIRECTV and the Cyclone Design logo are registered trademarks of DIRECTV, Inc.

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- \$100 VISA Reward Card
- FREE BellSouth® Voice Mail Service

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EXHIBIT B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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") ORDER RULING ON MOTION
REGARDING PROMOTIONS

BY THE COMMISSION: On June 25, 2004, the Public Staff filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. On July 7, 2004, the Commission issued an *Order Seeking Comments on the Public Staff's Motion Regarding Promotions* with initial comments due no later than August 6, 2004 and reply comments August 24, 2004. The following parties or groups of parties filed timely initial comments: the Public Staff; BellSouth Telecommunications, Inc. (BellSouth); Time Warner Telecom of North Carolina, L.P., US LEC of North Carolina, Inc., and Southeastern Competitive Carriers Association (collectively, the "Joint Commenters"); and ALLTEL Carolina, Inc., Carolina Telephone and Telegraph Company, Central Telephone Company, and Verizon South Inc. (collectively, the "ILECs").

By *Supplemental Order* issued on August 24, 2004, the Commission granted the Public Staff's Motion for an extension of time until August 31, 2004, for all parties to file reply comments. The following parties filed timely reply comments: the Public Staff, BellSouth, Verizon South Inc. (Verizon), and Carolina Telephone and Telegraph Company (Carolina) and Central Telephone Company (Central) (collectively, "Sprint").

PUBLIC STAFF'S MOTION

The Public Staff's Motion sought the Commission's further guidance on the proper construction of the provision in G.S. 62-133.5(f) authorizing the filing on one day's notice and without Commission approval of

any promotion or bundled service offering for residence or business customers involving both regulated and nonregulated services that feature price discounts that apply exclusively to services not regulated by the Commission.

G.S. 62-133.5(f). Specifically, the Public Staff sought guidance on construction of the statutory language as it relates to matters regarding promotional discounts/nonregulated

service as set forth below. In addition, the Public Staff sought guidance, also as set forth below, on the application of the resale obligation created by TA96.

A. Promotional Discounts/Nonregulated Service

1) *Are gift cards, checks, coupons for checks or similar types of benefits promotional discounts or nonregulated services, as Carolina/Central have contended?*

The **Public Staff** argued that bill credits, gift cards, checks or coupons offered to customers by a company's regulated business as a promotion to encourage subscription to a regulated service are promotions featuring price discounts. When inducements such as gift cards are given in exchange for subscription to both regulated and nonregulated services, the customer effectively receives a price discount even though the company's tariffed price for the regulated service remains unchanged. It is irrelevant whether the cost of the telecommunications service is directly affected or the customer reduces his expenses elsewhere through use of a gift card, check or coupon. The Public Staff further stated that gift card type promotions are not telecommunications services.

The **Joint Commenters** noted that, while not "services" according to the definition in G.S. 62-3(27), gift cards, checks, coupons and similar incentives are discounts offered to induce customers to purchase certain specified services. In order to invoke the one-day notice provision of Section 62-133.5(f) applicable when a discount applies solely to nonregulated services, the company offering the promotional discount has the burden of establishing that such discount applies only to the nonregulated portion of a mixed or bundled regulated/nonregulated service offering.

BellSouth contended that gift cards, checks, coupons for checks and similar types of benefits are marketing incentives. According to BellSouth, such incentives are not telecommunications services, nor are they promotional discounts, since customers are not provided a reduction, i.e., a discount, from the retail price of the service(s) offered in conjunction with the incentive(s).

According to the **ILECs**, gift cards, checks, coupons for checks and similar types of benefits are themselves nonregulated services. Sprint maintained in its reply comments that any services, such as gift cards, checks or check coupons, not contained in Carolina's and Central's General Subscriber Services or Intrastate Access Tariffs are not regulated by the Commission and are, therefore, nonregulated services. Verizon noted in its reply comments that gift cards, checks and coupons are marketing incentives, not regulated services. Verizon further stated that gift card type incentives cannot be considered promotional discounts because they cannot be used to reduce the retail price a customer pays for regulated services.

DISCUSSION OF QUESTION A-1

The Commission agrees with the Joint Commenters and the Public Staff inasmuch as they argued (1) that gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunication services are not themselves services (regulated or nonregulated) offered by a public utility, and (2) that such inducements are promotional discounts nonetheless. The Commission is persuaded that anything of economic value paid, given, or offered to a customer to promote or induce purchase of a bundled service offering of both regulated and nonregulated telecommunications services is a promotional discount. Gift cards and similar benefits or incentives are not services offered by a public utility and they are not being offered by local exchange carriers as either regulated or nonregulated services. However, when such benefits are offered to induce the purchase of regulated and/or nonregulated services these benefits are promotional discounts. While the retail price to the customer of neither the regulated or nonregulated portions of the bundle is necessarily lowered as part of gift card type promotions, the customer nevertheless receives the offered bundle for a savings because the gift card, check, coupon for check, or other thing of value provided returns value to the customer for the purchase of a bundle. The customer does not receive this savings or value unless he purchases the specified bundle associated with the promotion. Thus, because the savings or benefit is received only in exchange for the purchase of the bundle, the bundle is in effect discounted to the customer by the amount of the monetary benefit or thing of value provided in return.¹

2) *If such benefits are promotional discounts rather than nonregulated services, in what cases are the promotional discounts considered "price discounts that apply exclusively to services not regulated by the Commission"?*

The **Public Staff** argued that, only when the benefit of promotional discounts is funded solely from nonregulated operations of the local exchange carrier, are such discounts price discounts that apply exclusively to services not regulated by the Commission. The Public Staff stated that since the statute restricts the one-day notice provision to cases in which price discounts apply exclusively to services not regulated by the Commission, the burden rests on the company offering the promotional discount to establish that the promotional discount applies exclusively to nonregulated services, i.e., is funded from nonregulated operations. The Public Staff commented that a bundle typically has one price for two or more services, making it impossible to discern, without further information, which services in the bundle have been discounted.

The **Joint Commenters** implicitly agreed that a price discount applies exclusively to nonregulated services when a promotion is funded solely from nonregulated service offerings and the revenue from the regulated portion of a mixed offering is "booked" at the full retail rate or value. The Joint Commenters stated that to

¹ Also, as discussed below in Part B of this Order, the real price of the service eventually becomes the retail price minus the value received for purchasing the service, i.e., the price is discounted by the value received. After a promotion is offered for a long enough period of time, the tariffed retail price is then no longer the real price.

the extent a LEC seeks to invoke the one-day notice provision of G.S. 62-133.5(f) with respect to gift card type incentives, the burden should be on the LEC to demonstrate that the promotional discount generated by the incentive is solely applied to (charged against) the nonregulated portion of any mixed bundle of regulated and nonregulated services. According to the Joint Commenters, if the regulated portions of a bundled offering are accounted for or "booked" at less than the retail value of the regulated services, then the discount does not apply exclusively to nonregulated services and the one-day notice provision of G.S. 62-133.5 is not applicable to the LEC's promotion.

BellSouth stated that since these benefits are not promotional discounts, Question A-2 is not applicable.

The **ILECs** also found Question A-2 inapplicable since they argued that gift card type benefits are not promotional discounts, but are nonregulated marketing incentives. However, the ILECs, Verizon and Sprint suggest that if a promotion is found to feature a price discount for subscription to a bundled service offering of regulated and nonregulated services, and the offering company does not lower or in any way alter the price for the regulated service portion of the bundle, it is fairly simple to determine that the discount for the promotional offering was applied exclusively to the nonregulated service. Therefore the one-day notice of Section 133.5(f) would apply to the promotion.

DISCUSSION OF QUESTION A-2

Promotional discounts are considered "price discounts that apply exclusively to services not regulated by the Commission" when the benefit of the discount is funded solely from or charged against the nonregulated operations of the local exchange carrier. The LEC² is entitled to invoke the one-day notice provision of G.S. 62-133.5(f) when the promotional discount is not used to lower retail revenues of any regulated service offered as part of a mixed bundle, but is instead applied to or accounted for against revenues for nonregulated services contained in the bundle.

3) *Does the source of the discount offered in a promotion, i.e., from regulated or nonregulated operations or both, determine whether a one- or five-day notice is required if the promotion otherwise qualifies as a one business-day promotion?*

The **Public Staff** stated that, if the price of the regulated and nonregulated services in the bundle is lower than the sum of the individual prices, it is reasonable to conclude that the price of one or more of the services in the bundle has been discounted. The Public Staff argued that additional information is needed to confirm that such a discount was applied only to the nonregulated service(s) in the bundle. In some cases, the nonregulated services are not available individually, so it is not always possible to determine the price of the individual services. The Public Staff believes that the regulated company has an obligation to specify whether the marketing incentive or price discount is provided by or charged against regulated or nonregulated operations. If

² The Commission uses the term "LEC" to refer to local exchange carriers, including competing local providers, unless otherwise stated.

the regulated operations of the company will record the tariffed price of the regulated service as revenue (or, conversely, if the cost of the promotion is not recorded as a regulated expense), it is reasonable to conclude that the price discount has been taken only on the nonregulated service(s) in the bundle, qualifying the promotional offer for the one business day notice provision. Otherwise, an ILEC bundle or promotion must be made under the five business-day provision of the ILEC tariffs. Specification of the source of the price discount is a reliable, determinative factor for ensuring that notice of the promotion or bundle has been properly filed.

The **Joint Commenters** stated that in order to use the one-day notice provision, the company offering the promotional discount has the burden of showing that the exclusive source of funding for any promotional discount offered as an incentive to purchase a mixed bundle is nonregulated service operations. The Joint Commenters believe the source should be identified through accounting records that will show whether any discount was applied to or accounted for against regulated service operations or nonregulated service operations.

BellSouth emphasized that it is not the accounting treatment of the benefit or marketing incentive that determines the proper notice period, but whether a price discount is being offered. BellSouth maintained that gift card type promotions are mere incentives and do not provide price discounts against the services offered, since such promotions do not impact or reduce the retail price of the bundled service package purchased by the customer.

The **ILECs** again stated that the only necessary test for determining whether there is a discount applicable exclusively to the nonregulated services in a mixed bundle is to determine whether the price for any regulated services in the bundle has been lowered. If the price for a regulated service has been lowered, a five-day notice filing is required. If a price discount is present without any lowering of the regulated price, the Commission must determine that the discount was applied exclusively to the nonregulated service in the bundled offering and that one-day notice to the Commission of the promotion is all that is required. The ILECs maintained that if services in a bundle or promotion offered by a company operating under price regulation include any nonregulated service, there should be no consideration of the source of the funds for the promotion or discount.

DISCUSSION OF QUESTION A-3

Whether a new promotion featuring a price discount applies exclusively to services not regulated by the Commission is what determines whether a LEC is entitled to invoke the one-day notice provision of G.S. 62-133.5(f). Accordingly, the real question raised by the Public Staff's Motion is whether the source of funding for a promotional discount must come from nonregulated service operations in order for a LEC to establish that the featured promotional price discount applies exclusively to services not regulated by the Commission. The Commission believes, as argued by the Public Staff and the Joint Commenters, that the source of funding for any promotional

discount is determinative of whether the discount “applies exclusively to services not regulated by the Commission.” If the discount is funded in whole or in part by charging it to a regulated service or the regulated service operations, then it would not apply exclusively to nonregulated services or operations and the LEC offering the promotion would not be entitled to avail itself of the one-day notice provision.

4) *If the source of the discount determines whether a one- or five-day notice is required, should the Commission require that [a LEC] specify in its filing whether the benefit offered in conjunction with a promotion is funded by nonregulated operations, regulated operations, or both so that the Public Staff can determine whether the promotion is properly filed?*

The **Public Staff** in effect argued that if the source of funding is determinative of whether a promotion “appl[ies] exclusively to services not regulated by the Commission” and therefore the Commission need only receive one day’s notice prior to the effective date of the promotion, then the Commission’s *Order* dated January 2, 2004 must be expanded to include a specification of the source of the funding for the promotional discount. The Public Staff claimed that without further information from companies regarding the source of a promotional discount, the Public Staff and Commission are unable to monitor promotions and to ensure that the proper amount of notice has been given.

The **Joint Commenters** requested the Commission to impose upon LECs seeking to invoke the one-day notice provision in G.S. 62-133.5(f) the requirement that their notices contain more specific information in support of their filings made pursuant to the one-day notice provision of the statute. The Joint Commenters proposed a rule that would address the LEC’s internal accounting procedures as they may relate to G.S. 62-133.5(f). The Joint Commenters stated that without the adoption of appropriate and detailed protective mechanisms and guidance concerning LEC bundling and promotions, the one-day notice provision is extremely difficult to administer and could lead to anticompetitive behavior.

BellSouth argued that the source of funding does not determine the proper amount of notice and that it is not required by any statute or rule to give any notice of marketing incentives. BellSouth reiterated that gift card promotions are marketing incentives—not promotional discounts that impact the retail price of any service. Because these types of promotions are not discounts, they do not require any notice whatsoever pursuant to any North Carolina statute or rule. However, BellSouth stated that it “does not object generally to providing information indicating whether marketing incentives [such as gift card promotions] are funded by regulated and/or non-regulated operations.”

The **ILECs** opposed the imposition of any requirement that LECs provide information in addition to that required by the Commission’s *Order* dated January 2, 2004. The ILECs stated that any requirement by the Commission of anything more than a statement from carriers describing the promotional/bundled service offerings, and the

dates during which those offerings would be made available, would suggest that Commission has approval authority not provided for in G.S. 62-133.5(f). Further, the ILECs suggested that the Commission's *Order* dated January 2, 2004 requires more information in notices of promotional offerings than the statute requires. In its reply, Sprint answered that the Commission should not require LECs to provide any additional information regarding the funding source for a promotion. Sprint noted that perhaps the Public Staff's proposal may be justified for those companies which are rate of return regulated. However, examination of a price regulated company's financial accounting by the Public Staff is not required or appropriate.

DISCUSSION OF QUESTION A-4

While, as discussed above, the Commission finds the source of funding for promotional discounts, such as gift cards, relevant to the determination of whether a discount applies exclusively to the nonregulated services in a mixed bundle of services, thereby qualifying the promotion for the one-day notice requirement, the Commission rules that there is no need to expand its *Order* dated January 2, 2004, regarding the content of notices provided under G.S. 62-133.5(f). Pursuant to the statute at issue, a LEC is not entitled to give the Commission one business day's notice *unless* the promotion or bundled service offering (1) involves both regulated and nonregulated services and (2) features a price discount that applies exclusively to the nonregulated services. Therefore, the Commission need not impose a requirement that the LEC specify the funding source for its promotion in its one-day notice filing. When a LEC purports to file a one-day notice pursuant to G.S. 62-133.5(f) for a promotional offering involving both regulated and nonregulated services, it is representing that any discount applies exclusively to nonregulated services, i.e., that it has chosen to fund any discount from its nonregulated operations.

Thus, as argued by the ILECs, if a LEC provides the Commission with one-day notice of a promotion and a price discount is present without any lowering of the regulated price, the Commission will view the one-day notice as the LEC's representation that the discount was applied exclusively to the nonregulated service in the bundled offering in accordance with the reasoning of this *Order*. The Commission's decision does not impose internal accounting procedures on the LECs; rather, by submitting a one-day notice under G.S. 62-133.5(f), a LEC, on its own volition, has elected to fund its promotion from its nonregulated operations. The Commission still believes, as asserted by the Public Staff in earlier comments when the Commission was initially requested to adopt rules related to the notice required under G.S. 62-133.5(f), that imposing unnecessary "rules" or requirements on notices for promotions and bundled service offerings could make it more difficult and more time-consuming for LECs than the Legislature intended when it enacted the one-day notice provision and exempted these types of offerings from the Commission's approval authority.

In sum, the Commission finds that companies who avail themselves of the one-day notice provision of G.S. 62-133.5(f) necessarily represent that any promotional discount applies exclusively to the nonregulated portion of a mixed bundle, and that any

such discount given for the purchase of a mixed bundle will be funded, accounted for or applied against only the nonregulated portion of the bundle. Therefore, for all regulatory purposes and required filings, regulated companies must assign the full tariff rate to sales of (or revenues from) regulated services that were subscribed to as a result of promotional discounts involving bundled offerings of both regulated and nonregulated services.³ LECs who invoke the one-day notice provision should keep records regarding the funding of their promotion and be mindful that they are subject to audit. See G.S. 62-51.

B. Resale Obligation

1) *If a LEC offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?*

The **Public Staff** alleges that BellSouth's 1FR + 2 Cash Back promotion, which provides subscribers with a \$100 check for subscribing to certain services, is implicated by Question B-1. The Public Staff argued that when inducements such as gift cards are offered to promote new or continued subscriptions to regulated telecommunications services, the regulated services are discounted. The resulting discount, brought about by the inducing promotion, should be available to resellers at the discounted resale rate whenever the promotion is offered for more than 90 days. The FCC's Local Competition Order makes no distinction between charging a reduced price for service, and charging the standard tariff rate while awarding the customer with a check or a coupon for a check.

The **Joint Commenters** declined to take a position with respect to resale obligations related to gift card type promotions offered for the purchase of bundles of both regulated and nonregulated services.

BellSouth stated that gift cards, coupons, etc. are not telecommunications services and therefore are not subject to the resale obligation of TA96. Gift card type promotions are marketing tools that do not provide end-user customers with a reduction of the price of the ILEC's services.

The **ILECs** argued that marketing incentives, gift cards, checks, coupons for checks, and similar incentives are not telecommunications services and are not subject to the resale requirements of the Act. Sprint reiterated that the obligation to resell

³ The Commission notes that it is not concerned with the rate of return of price regulated companies such as the ILECs who filed comments. However, inquiring into the source of funding for purposes of applying G.S. 133.5(f) is not the same as inquiring into a company's rate of return. The Commission's interest is not in a company's margins or profits or in any particular amount of reduction of revenues; the Commission's interest is in whether the costs (no matter the amount) of a given promotion were applied to nonregulated services.

services does not extend to nonregulated services (i.e., incentives, gift cards, checks etc.) offered with regulated services.

DISCUSSION OF QUESTION B-1

At the outset, the Commission notes that Question B-1 does not address mixed bundles of regulated and nonregulated services. Instead, Question B-1 is directed to promotions that offer a gift such as a gift card or a check for cash in exchange for subscribing to regulated services.

Section 251(c)(4) of TA96 addresses the extent to which an ILEC may restrict resale of its retail telecommunications services. Section 251(c)(4) requires an ILEC "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." This Section further requires ILECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of . . . telecommunications service" provided at retail to end-user subscribers. Section 252(d)(3) provides that wholesale rates are to be determined on the basis of rates charged to subscribers.

While gift cards, check coupons and other similar promotions or incentives offered for the purchase of a regulated telecommunications service are not themselves services that ILECs offer at retail from their tariffs, they are promotional offerings for telecommunications services. Promotional offerings are subject to the limitations and conditions set forth by the FCC. In ¶ 948 of its Local Competition Order⁴, the FCC stated that Section 251(c)(4)'s requirement that ILECs resell retail telecommunications services

makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for *all promotional or discount service offerings* made by incumbent LECs. [Emphasis added.] 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. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts.

The Commission interprets ¶ 948 of the FCC's Local Competition Order to mean that an ILEC's duty to resell telecommunications services it offers at retail does not exclude an ILEC's promotional offerings. The FCC clearly stated that any other conclusion would allow ILECs routinely to create promotions or nonstandard offerings just to avoid their resale obligation. The FCC was concerned that ILEC promotions could become *de facto* standard offerings that would not be made available to resellers

⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, (CC Docket 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order").

and would therefore undercut the duty to resell retail services to resellers at wholesale rates. The FCC's statement that the subject of its discussion on promotions referred to "price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.*, temporary price discounts," does not define or limit the term "promotion," as used by the FCC in its Order, to a reduction from the retail price of a tariffed service. Rather, the FCC was speaking to the temporary nature of a promotion. The term "promotion" in the context of a sale or advertising campaign usually refers to an opportunity or offer that is temporary or short-term, rather than one that is more permanent or long-lasting.⁵ The FCC distinguished a promotional price discount from a "standard offering" that would remain available for sale at retail and therefore available for resale at the wholesale rate. Contrasted with a promotional offering, a standard offering is one that is of a more permanent, long-lasting nature. When the reference to a promotion as a price discount is read in context, the Commission believes it is clear that the FCC was not stating that a promotion exists only when there is a reduction or discount of the retail price of a telecommunications service.⁶

The Commission's interpretation of ¶ 948 of the FCC's Order is supported by the Order's next paragraph. In ¶ 949, the FCC immediately began a discussion of whether "short-term promotional prices" are "retail rates." Since resale wholesale rates are based on retail rates, state commissions setting wholesale rates must know if the rates for promotions, *i.e.*, short-term prices, are "retail rates" that are to be discounted to the wholesale rates that ILECs must offer to resellers. Because TA96 does not define "retail rates," the FCC interpreted the meaning of the term as follows:

In view of this ambiguity, we conclude that "retail rate" should be interpreted in the light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effect. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.⁷

Thus, short-term promotional prices or nonstandard offerings are not the "retail rate" for purposes of establishing the wholesale rate. If a promotion is offered for an indefinite extended period of time, at some point it starts to become or look more like a standard

⁵ The Commission's interpretation is supported by the FCC's opinion and order in *In the Matter of American Communications Services, Inc.*, (CC Docket 97-100); FCC No. 99-386, 14 FCC Rcd 21579 (rel. December 23, 1999), ¶¶ 41, 51 (noting that phrases such as "service packages" and "trial offerings" connote an element of a temporary price discount).

⁶ The FCC's use of the phrase "all promotional or discount service offerings" in ¶ 948 of the Local Competition Order implies a distinction between a promotional service offering and a discount service offering. That is to say, the FCC appears to have contemplated that an ILEC could offer a promotion that would not necessarily result in a reduced service price per se.

⁷ Local Competition Order, ¶ 949.

retail offering that should be subject to the duty to resell at the wholesale rate. Cognizant of this situation, the FCC made a determination as to when a promotional price ceases to be short-term and must be treated as the retail rate to be used in calculating the wholesale rate.

We believe that promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to 251(c)(4)(A).⁸

Despite the ILECs' argument that gift card type promotions are incentives and/or marketing tools used to distinguish their services in the marketplace, these promotions are in fact promotional offers subject to the FCC's rules on promotions.⁹ While these promotional offerings are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings, they do result in a savings to the customers who subscribe to the regulated service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the "real" retail rate available in the marketplace. The promotion reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the "real" retail rate. Thus, the ILEC could use the promotion as a *de facto* rate change without changing its tariff pricing. The FCC hoped to avoid this situation, where the promotional rate competes with the tariffed price for a long or indefinite period of time, by defining the point at which the promotional rate would become a retail rate to be discounted for resale as the 91st day the promotion is available to end-users purchasing a particular telecommunications service. In other words, the FCC decided that after 90 days, resellers are entitled to the promotional rate (the "real" retail rate) minus the wholesale discount.

Therefore, pursuant to TA96, in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the

⁸ Local Competition Order, ¶ 950.

⁹ See *In re AT&T Communications of the Southern States, Inc.*, Docket No. 960833-TP, PSC-96-1579-FOF-TP (Fla. P.S.C. 1996); *In re AT&T Communications of the Southern States, Inc.*, Docket No. 6801-U (Ga. P.S.C. 1996); *In re Sprint Communications Company, L.P.*, Case No. TO-97-124 (Mo. P.S.C. 1997); *In re US West Communications, Inc.*, Docket No. 70000-TT-98-379, Record No. 3992, (Wyo. P.S.C. 1999) (rejecting similar "marketing tool"/"marketing expense" arguments offered by ILECs to avoid resale obligation with regard to promotions).

promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation.¹⁰

Does the record before the Commission sufficiently establish that it is reasonable and nondiscriminatory for ILECs not to apply the wholesale discount to the promotional rate for gift card type promotions? The Commission finds it extremely noteworthy that while its *Order* seeking comments on the questions raised by the Public Staff's Motion was served on companies authorized to resell local service in North Carolina, no resellers filed comments addressing the ILECs' resale obligation with respect to promotional offerings. This absence of comment would appear to suggest that the reseller community believes competition will not be stifled or unduly harmed by gift card type promotions such as the one presently being offered by BellSouth since June 29, 2004 and scheduled to run until March 31, 2005. Although the resellers offered no comments, ILECs such as BellSouth commented that they offer these type promotions precisely because there is robust competition they are trying to meet by distinguishing their services with gift card type promotions. While these promotions do provide a savings and therefore a type of discount to subscribers, they do not in fact lower the charge to the subscribers for the regulated services purchased. Therefore, the Commission believes these promotions do not have the same degree of anticompetitive effect that a direct discounting of the retail price would have on the reseller market. Some customers will likely subscribe to the regulated service offering at the retail rate, although the gift received (particularly a gift card) may have little value to them.¹¹ Furthermore, the ILECs continue to resell the regulated services offered in their promotions to resellers, reducing the retail rate for these services by the amount of the applicable wholesale discount. Hence, the ILECs argue they are meeting their statutory obligation to resell their retail telecommunication services; resellers are not being prevented from reselling these services. Moreover, after purchasing services from the ILECs at the wholesale discount rate (a rate made possible by excluding ILEC marketing costs from the resale price), resellers may resell these services to end-users and may offer promotional inducements at their own expense whether or not the ILECs offer such promotions. In fact, ILECs have argued that their promotions are in response to promotions (fee waivers and the like) offered by resellers. Finally, to the extent that these gift card promotions are for a reasonably limited duration and are not offered consecutively, their procompetitive effects in a market that is more competitive than it was in 1996 when the Local Competition Order was issued will likely outweigh the anticompetitive effects.

Given that there has been no opposition to gift card type promotions from the reseller community, the Commission is reluctant to establish a rule that the benefit of these promotions must be offered to resellers in addition to the reseller discount. To the contrary, given the absence of opposition, the Commission is persuaded by the arguments put forth by the ILECs. Although the Commission believes that restrictions on resale obligations must be considered on a promotion-by-promotion basis, some

¹⁰ 47 C.F.R. § 51.613(b).

¹¹ For example, BellSouth commented that some customers accepting gift card type promotions never use the gift card or coupon for check, etc.

restrictions on resale of some gift card type promotions that run for more than 90 days may be proven to be reasonable and nondiscriminatory. While promotions must be analyzed individually for their anticompetitive effects, the Commission finds that, upon proof that it is reasonable and nondiscriminatory not to offer the benefit of a promotion offered for more than 90 days to resellers, ILECs will not be required to provide such benefit to resellers in addition to the established reseller wholesale discount. However, ILECs should be mindful that resale restrictions on unreasonably long, unlimited or permanent promotions that compete with and undercut the tariffed retail price for services would gut the resale obligation of TA96 and will be held unreasonable.¹²

With regard to BellSouth's 1FR + 2 Cash Back promotion, based on the Commission's current knowledge, the Commission would be inclined to find that a restriction on resale is reasonable and non-discriminatory. Resellers have not complained or asked the Commission to find the restriction unreasonable or harmful to competition. Resellers have not been precluded from reselling the regulated service and are able to purchase the service at the tariffed rate minus the wholesale discount. The wholesale discount was, in part, set by deducting ILEC marketing expenses from the ILECs' costs for the regulated service—at least in part a recognition that resellers would have their own marketing expenses. Resellers remain free to offer, at their own expense, promotional inducements to customers who purchase the tariffed service(s) from them. Although the Commission would ordinarily be concerned about a promotion in competition with the tariffed offering for a nine-month period (from June to March), BellSouth's promotion will be offered for a limited time, and the resellers' apparent disinterest or indifference would tend to persuade the Commission that, at least with respect to 1FR + 2 Cash Back, the anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the procompetitive effects.

2) *Is an ILEC offering a bundle of regulated and nonregulated services for more than ninety days obligated to offer the bundle, the regulated portion of the bundle, or both to resellers during the term of the promotion or, as BellSouth has contended, is no part of such a bundle subject to the resale obligations?*

The **Public Staff** argued that the regulated portion of a mixed bundle containing regulated services is subject to resale. Companies should not be allowed to evade their resale obligations by placing regulated services in bundles, discounting these services, and refusing to offer the regulated portion of the bundle to resellers. Bundling regulated services does not suddenly make those services immune from regulation. Bundles certainly can be in the public interest by allowing customers to buy services they desire at a lower rate. However, they are not immune from regulation.

¹² The Commission notes that to the extent a gift card type promotion may be associated with a mixed bundle offering of regulated and nonregulated services with respect to which an ILEC invokes the one-day notice in G.S. 62-133.5(f), case-by-case determinations for the purpose of determining resale obligations will not run afoul of the ILECs' right to offer the promotion without obtaining the Commission's approval. The Commission's case-by-case determination would not be for approval purposes but would be to determine whether, under TA96 and the FCC's rules, the benefit of a promotion offered for more than 90 days must be accounted for in determining the retail rate that must be discounted by the wholesale discount.

The **Joint Commenters** did not address this issue.

BellSouth maintained that a company is not required to resell mixed bundles containing non-telecommunications services or services provided by other entities. There is no obligation to make the separate parts of a bundled offering available to resellers at a "hypothetical" discounted price which would be the equivalent of providing resellers a service at a price that does not relate to the prices for which those services are sold at retail to non-carrier subscribers. However, a company must offer for resale each regulated service contained in a bundle at the retail rate minus the wholesale discount.

The **ILECs** commented that if a bundle consists of regulated and nonregulated services, resellers should not be allowed to sell the bundle at the promotional discount rate. Requiring the resale of bundled offerings containing regulated and nonregulated services would be contrary to the TA96.

DISCUSSION OF QUESTION B-2

As has been discussed hereinabove, Section 251(c)(4)(A) of TA96 requires ILECs to offer for resale at wholesale discounts any telecommunications service that it provides at retail to non-telecommunications end-user subscribers. The FCC has held that promotions offered for more than 90 days must be made available to resellers at the promotional rate minus the wholesale rate, because any promotion exceeding 90 days would be in competition with the retail rate and would allow the ILEC to undercut the reseller by shifting customers to the promotional offerings and denying the benefits of those offerings to the resellers. An ILEC's obligation to make the benefit of a promotional offering available to resellers is, therefore, directly related to whether the promotional rate is available to the end-user retail customer in such a way as to be in competition with the tariffed retail rate. Service bundles, such as those implicated by Question B-2, are not categorically exempt from the resale obligation.¹³

In the context of analyzing the obligation of ILECs to resell services, there are at least two different types of mixed bundle offerings. The first type is similar to the gift card type promotion and must be made available to resellers if offered for more than 90 days, unless a restriction on reselling the promotion is reasonable and nondiscriminatory. The second type of mixed bundle offering requires the customer to subscribe to a bundle of services, the total cost of which exceeds the cost of the consideration of the regulated service(s) on a stand-alone basis if purchased from the tariff. ILECs should not be obligated to resell this second type of promotion.

The first type of mixed bundle promotion consists of regulated telecommunications services, provided at no less than the tariffed retail rate, and nonregulated services, provided free of charge. For resale purposes, this type of promotion should be treated no differently than gift card type promotions. Promotions that allow the customer to receive something of value as a giveaway for the purchase of

¹³ *In the Matter of American Communications Services, Inc.*, ¶¶ 41, 51, 52.

a regulated telecommunications service would provide the customer with a discount off the price of the regulated service, i.e., a discount equal to the value of the giveaway, whether it be a gift card, cash back or free nonregulated services. These promotions permit the customer to purchase the regulated service for the same price listed in the tariff but gives the customer more for the same amount of money by providing the customer a giveaway of some value. These promotions, therefore, compete head-to-head with the retail price. The customer's choice is between paying the retail price of, for example, \$20, and receiving only the tariffed regulated service, or paying the same \$20 retail price for the same service but receiving an additional value or giveaway for making the exact same dollar cost purchase. Thus, the promotion reduces or discounts the retail price by the value of the giveaway. When such a discount of the regulated service is offered for more than 90 days, the discounted price (the tariffed rate minus the value of the giveaway) becomes the "real" retail rate and competes directly with the tariffed rate for the regulated service. Therefore, in order for the reseller to receive the true wholesale rate, the wholesale discount must be from the discounted promotional rate. The ILEC must allow the reseller's purchase price to be determined by applying the wholesale discount to the promotional rate that is, in effect, available at retail to end-user subscribers. To further clarify the ILEC's resale obligation as to this first type of mixed bundle promotion, the Commission notes that the ILEC does not have to allow the reseller to purchase the bundle of services offered in the ILEC's promotion as long as it offers for resale each telecommunications service component of the bundle at the promotional rate minus the wholesale discount. Of course, if the promotional rate is not available to end-user subscribers for more than 90 days, the ILEC is not obligated to permit resellers to take advantage of the promotional rate.

The second type of mixed bundle promotion also consists of both regulated telecommunications services and nonregulated services, but the entire bundle is offered to the customer for more consideration than the customer would pay if purchasing from the tariffed offering.¹⁴ For resale purposes, the ILEC should not be required to provide these bundled offerings or the benefit of these promotions to resellers. Such promotions do not compete directly with tariffed offerings. With these promotions, end-user subscribers cannot purchase the bundle (or the regulated portion of the bundle) for a price less than or equal to the tariffed retail rate for the regulated service(s) in the bundle. The subscriber to such a promotional offering must accept the complete bundle and pay not only for the regulated service(s), but also for the additional services in the bundle at a total cost that exceeds the price of the regulated service(s) when purchased on a stand-alone basis under the tariff. Some or all of the services (regulated and/or nonregulated) may be discounted, but the customer cannot purchase the regulated portion of the bundle, discounted or not, without purchasing the entire bundle for consideration that exceeds the tariffed price for just the regulated retail services. Any discount that may apply to a regulated service in such a promotional bundle is not available to end-users because they cannot receive the discounted service

¹⁴ For purposes of this discussion on the second type of mixed bundle, more consideration includes all additional consideration (beyond the tariffed price) from the customer, such as the price paid for service, the signing of a contract binding the consumer to purchase a service for a set or extended period of time, or the subscription to a certain increased level of service at a specified premium price.

unless they purchase the entire bundle of services for consideration that exceeds the retail price for the regulated service. Therefore, with these promotions, neither the promotional bundle nor the regulated services in the bundle competes directly with or undercuts the equivalent regulated tariffed offerings. The customer's choice is between the regulated service(s) at the tariffed price on the one hand, or the regulated service(s) plus additional services for a total price exceeding the cost of the stand-alone regulated service(s) under the tariff on the other hand. The promotional bundle, which costs the customer more, is not a lower cost means of obtaining the regulated services in the bundle; instead, it is a higher cost means of purchasing the service because the customer can only receive the regulated service in the bundle by paying additional money or consideration for additional services.¹⁵

However, ILECs are advised that if promotional mixed bundles should be offered for a total price that is less than or equal to the price of the regulated services offered on a stand-alone basis under their tariffs, the promotions would cause head-to-head competition with the tariffed retail rates. Accordingly, with regard to the regulated services in such a bundle, the benefit of such promotions offered for more than 90 days would have to be offered to the resellers, as discussed in the section above on the first type of mixed bundle offerings. In any event, as with the first type of promotions, ILECs are not required to make the bundles themselves available to resellers and would only have to make the promotional rate of the regulated services available for resale if the entire bundle was offered for less than the price of the tariffed regulated services.

3) *If the ILEC is required to offer the bundle or the regulated portion of the bundle to resellers, does the reseller discount apply in addition to any promotional discount offered in the bundle to the ILEC's end users during the term of the promotion?*

The **Public Staff** argued that the regulated portion of a bundle is subject to resale, and both the promotion discount and the reseller discount should apply. The Public Staff opined that, since the promotion discount has lowered the retail rate of the regulated service, the wholesale discount should be applied to the reduced retail rate.

The **Joint Commenters** did not address this question.

BellSouth stated that, as set forth in its initial comments, a service is required to be offered for resale at the wholesale discount only if it is made available to end-users at the retail rate. Retail customers do not have the ability to pick and choose selected portions of bundles. They can purchase a component of a bundle alone if that service is available on a stand-alone basis, and when they do so they pay the tariffed rate for the individual service, not some percentage of the price for a bundle that includes that service (and others). In those cases, BellSouth makes the retail service available for resale at the retail price minus the wholesale discount. There is no further requirement

¹⁵ While the bundle costs more than just the regulated service(s), a customer who wants the additional services *and* the regulated services saves money by choosing the promotional bundle because it is priced lower than the total cost of the services purchased individually.

in any jurisdiction that BellSouth break apart and resell parts of bundles piece-meal, and there is no valid basis for the Commission to create one.

Again, the ILECs commented that if a bundle consists of regulated and nonregulated services, resellers should not be allowed to sell the bundle at the promotional discount rate. Requiring the resale of bundled offerings containing regulated and nonregulated services would be contrary to the TA96.

DISCUSSION OF QUESTION B-3

This question has been answered by the discussion hereinabove. Whenever an ILEC is required to make the benefit of a promotion available to resellers because it is being offered for more than 90 days and is therefore in competition with the tariffed retail rates, the reseller discount applies to the promotional rate. That is to say, the reseller discount applies in addition to the promotional discount.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

- 1) That gift cards, checks, coupons for checks or similar types of benefits are promotional discounts for the purposes of G.S. 62-133.5(f);
- 2) That promotional discounts are considered "price discounts that apply exclusively to services not regulated by the Commission" pursuant to G.S. 62-133.5(f) when the benefit of the discounts is funded solely from or charged against the nonregulated operations of the local exchange carrier;
- 3) That the source of funding for any promotional discount is determinative of whether the discount "applies exclusively to services not regulated by the Commission." A discount funded in whole or in part by charging it to a regulated service or to regulated service operations is not one that "appl[ies] exclusively to services not regulated by the Commission;"
- 4) That LECs who avail themselves of the one-day notice provision of G.S. 62-133.5(f) necessarily represent that any promotional discount appl[ies] exclusively to the nonregulated portion of a mixed bundle, and that any discount given for the purchase of a mixed bundle will be funded, accounted for or applied against only the nonregulated portion of the bundle. The Commission declines to expand its *Order of January 2, 2004* to require a LEC to specify the funding source of its promotions;
- 5) That the benefit of a gift card type promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the regulated service(s) associated with the promotion at the promotional rate minus the wholesale discount, unless the ILEC proves to the Commission (per 47 C.F.R.

§ 51.613(b)) that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation;

- 6) That the benefit of a mixed bundle offering that results in a regulated service in the bundle being in direct competition with the tariffed retail rate for the regulated service must be made available to resellers if the bundled promotion is offered for more than 90 days, but the benefit of a mixed bundle offering that does not result in such direct competition with the tariff offering (as discussed above in this *Order*) need not be made available to resellers; and,
- 7) That whenever an ILEC is required to make the benefit of a promotion available to resellers because it is being offered for more than 90 days and is therefore in competition with the tariffed retail rates, the reseller discount applies to the promotional rate instead of the tariffed retail rate.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of December, 2004.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

EXHIBIT C

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 72b

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Implementation of Session Law 2003-91,) ORDER CLARIFYING RULING
Senate Bill 814 Titled "An Act to Clarify the) ON PROMOTIONS AND
Law Regarding Competitive and Deregulated) DENYING MOTIONS FOR
Offerings of Telecommunications Services") RECONSIDERATION AND STAY

BY THE COMMISSION: On December 22, 2004, the Commission issued *Order Ruling on Motion Regarding Promotions*. On February 18, 2005, BellSouth Telecommunications, Inc. ("BellSouth") filed a Motion for Reconsideration or, in the Alternative, for Clarification, and for Stay. Also on February 18, 2005, Image Access, Inc. d/b/a New Phone ("New Phone") filed a Petition to Intervene and Comment Out of Time. The Commission granted New Phone's Petition to Intervene on March 3, 2005, and accepted New Phone's Comments for the record, but did not otherwise address them. This Order addresses both New Phone's comments and BellSouth's motion.

New Phone's Comments

A. The Commission's forecast and 47 C.F.R. 51.613(a)(2)

In its comments, New Phone complains that the Commission considered a specific promotion, which BellSouth offered in excess of 90 days, and forecasted that the Commission would be inclined to find that a restriction on the resale of the promotion was reasonable and nondiscriminatory. New Phone notes that the Commission's forecast was *dictum*, based in part on the Commission's perception that Competing Local Providers ("CLPs") did not object to BellSouth's refusal to offer the promotion for resale since no CLP filed comments or objections. New Phone explains that it and other CLPs were not indifferent on this issue, but failed to file comments or objections because the Commission's July 7, 2004 *Order* seeking comments did not indicate that specific BellSouth promotions of more than 90 days' duration would be considered or approved. According to New Phone, without regard to whether a CLP files an objection, Federal Communications Commission ("FCC") Rule 47 C.F.R. 51.613(a)(2) establishes that it is unreasonable and discriminatory for an ILEC to refuse to resell telecommunications services at the promotional rate minus the percentage wholesale discount when the promotional rate is offered to retail customers for more than 90 days.

DISCUSSION

First, the Commission does not agree that its July 7, 2004 *Order* failed to provide CLPs with notice that BellSouth's 1FR + 2 Cash Back promotion could be under consideration. The Public Staff's motion for a ruling on promotions made express mention of the 1FR + 2 Cash Back promotion, the dispute with BellSouth regarding the availability of the promotion for resale, and the start and end dates for the nine-month promotion. In addition, the Public Staff's motion was an attachment to the Commission's *Order*, and the Public Staff again specifically identified and discussed the 1FR + 2 Cash Back promotion in the comments it filed on August 6, 2004 pursuant to the Commission's *Order*. Thus, the Commission believes that New Phone and other CLPs had adequate notice that the Commission could address the 1FR + 2 Cash Back promotion in examining and clarifying BellSouth's resale obligations. Nevertheless, the Commission granted New Phone's Petition to Intervene and accepted New Phone's comments for the record. Because New Phone's comments were not filed in time to be considered prior to issuance of the December 22nd *Order*, the Commission will consider them now and will treat them as a motion for reconsideration or, in the alternative, for clarification of the Commission's *Order Ruling on Motion Regarding Promotions*.

Second, the Commission generally agrees with New Phone's interpretation of 47 C.F.R. 51.613(a)(2): if a promotion involves rates that will be in effect for more than 90 days, an ILEC shall apply the wholesale discount to the special promotional rate for retail service rather than to the ordinary rate. The FCC has stated in express terms that short-term promotional prices do not constitute retail rates that are subject to the wholesale percentage discount and has defined short-term promotions to be those offered for no more than 90 days. The FCC reasoned that a promotion offered for 90 days or less has procompetitive effects that outweigh the anticompetitive effects of restricting the resale of such a promotion.¹ The clear implication of the FCC's rule and related opinions is a presumption that it is unreasonable and discriminatory for an ILEC not to resell telecommunications services at the promotional rate minus the percentage wholesale discount when the promotional rate is offered to retail customers for more than 90 days.

However, in its December 22nd *Order*, the Commission recognized that the FCC clearly intended that an ILEC may rebut this presumption as to promotions offered in excess of 90 days by proving that a restriction on resale of such promotions is reasonable and nondiscriminatory. "With respect to any restrictions on resale not permitted under paragraph (a) [e.g., a restriction on the resale of a long-term promotion that is offered for more than 90 days], an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."² That is to say, not all promotions offered for more than 90 days

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, (CC Docket 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order"), ¶¶ 949-50.

² 47 C.F.R. 51.613(b).

necessarily have anticompetitive effects that outweigh procompetitive effects. It may not always be unreasonable and discriminatory for an ILEC not to apply the wholesale discount to the 90-day-plus special promotional rate.

By its *dicta*, the Commission did not intend to suggest a change of law or to disregard existing FCC rules and orders. Instead, the Commission's discussion of the dispute implicated by BellSouth's 1FR + 2 Cash Back promotion recognized that FCC rules do permit an ILEC to restrict resale of a promotion offered at retail for more than 90 days, upon *proving* that the restriction is reasonable and nondiscriminatory. The Commission's discussion of factors an ILEC may present to establish that a restriction is reasonable and nondiscriminatory was not intended to be exhaustive nor meant to suggest that the presence of any one or all of the factors would be sufficient to prove that a given restriction is permissible under the FCC's rules. Rather, the Commission's opinion stressed that each 90-day-plus promotion, including the 1FR + 2 Cash Back promotion, would have to be examined on a promotion-by-promotion basis, and that, in the absence of an objection by a reseller, the stated factors could be considered and could have some persuasive value to the Commission in determining whether a particular restriction on resale is reasonable and nondiscriminatory.

CONCLUSIONS

To clarify, the Commission's December 22, 2004 *Order* should not be read as a change of law or policy. If the Commission is called upon to determine whether a promotion offered for more than 90 days must be offered to resellers at the promotional rate minus the wholesale discount, the Commission will follow the law as stated in 47 U.S. C. 251(c)(4) and 47 C. F. R. 51.613 (a)(2) and (b). In order to withhold the benefit of a long-term (90-day-plus) promotional rate from resellers, an ILEC is first required to "[prove] to the [Commission] that the restriction is reasonable and nondiscriminatory." The Commission's discussion of the 1FR + 2 Cash Back promotion was intended only to offer a modicum of guidance as to some of the kinds of factors the Commission might find probative, in the absence of objection, should an ILEC seek to prove that a restriction on resale is reasonable and nondiscriminatory. The burden of proving any restriction reasonable and nondiscriminatory remains with the ILEC. The factors acknowledged by the Commission were not intended to be exhaustive or necessarily sufficient to meet the ILEC's burden of proof. The Commission will consider all arguments and admissible evidence presented and decide on a promotion-by-promotion basis (with regard to promotions offered in excess of 90 days) whether an ILEC has proved that a restriction on resale is permissible pursuant to 47 C.F.R. 51.613(b). The Commission cannot authorize a restriction on resale of a long-term promotion in the absence of such proof

B. The Commission's forecast and the parties' interconnection agreement

New Phone states in its comments that it is concerned that BellSouth may rely on the Commission's forecast with respect to the 1FR + 2 Cash Back promotion to avoid its obligation to resell promotions as provided by the terms of BellSouth's interconnection

agreement with New Phone ("Agreement"). According to New Phone, the Agreement provides that BellSouth must resell all telecommunications services at the wholesale discount rate subject to a list of restrictions set forth in the Agreement. New Phone states that the Agreement provides that all promotions must be available for resale at the wholesale discount rate except those promotions, as identified in the list of restrictions, which are offered for less than 90 days. New Phone further notes that the Agreement contains Parity provisions that may be violated if BellSouth fails to resell promotions in accordance with the terms of the Agreement.

DISCUSSION AND CONCLUSION

The Commission's December 22, 2004 *Order* does not relieve any party of obligations it might have under an existing interconnection agreement. The Commission does not, based on the present record, express any opinion about the extent of any party's obligation under New Phone's interconnection agreement with BellSouth. Moreover, the Commission has no evidence before it suggesting that BellSouth has any intent to avoid the obligations established by its interconnection agreement with New Phone. Accordingly, the Commission clarifies that its December 22, 2004 *Order* relieves no party of any resale obligations it might have under an existing interconnection agreement.

BellSouth's Motion

A. Resale Obligations and One-time Gift Promotions

In its motion for reconsideration or clarification, BellSouth argues that the Commission created a novel resale obligation for one-time incentive gifts that ILECs provide to their customers. According to BellSouth, the Commission's *Order* requires one-time upfront gifts "that are funded in whole or in part by the ILEC's regulated service operations" and offered as incentives to customers subscribing to retail services to be "made available to resellers, unless the ILEC proves to the Commission that not making [such gifts] available for resale is reasonable and nondiscriminatory." BellSouth suggests that the Commission's ruling on resale obligations is based on language in the *Order* stating that "anything of economic value paid, given, or offered to a customer to promote or induce purchase of a bundled service offering of both regulated and nonregulated telecommunications services is a promotional discount." BellSouth calls the result of the Commission *Order* "patently silly" and "bizarre" because, according to BellSouth, the *Order* would require BellSouth "to give a CLP . . . a toaster for each customer to whom the CLP resells [a given] service," if BellSouth offers a toaster to any customer subscribing to that same service. BellSouth re-asserts its initial argument that because one-time gifts offered as incentives are not themselves "telecommunications services," they are not subject to the resale obligations of the Telecommunications Act of 1996 ("TA 96"). BellSouth further complains that CLPs are not required to pass the benefit of the promotional rate on to their customers and that it will often be difficult, if not impossible, to determine the value of one-time incentive gifts, since ILECs generally do not pay face value for such gifts.

DISCUSSION

First, the Commission notes that BellSouth appears to cite language from Part A of the Commission's *Order*, which pertains to the interpretation of a state statute concerning when notice of a promotion or a bundled service offering must be filed, to complain about the Commission's holding in Part B of the *Order*, which pertains to federal resale obligations under TA 96. To clarify, the Commission's holdings with respect to resale obligations are not based on the ILEC's funding source for incentive gifts or marketing tools. The Commission's discussion of the source of funding for a promotion applies only to the interpretation of the state statute at issue in Part A of the *Order*.

Second, notwithstanding BellSouth's characterizations, the Commission's *Order* creates no new resale obligations. Section 251(c)(4) of TA 96 requires an ILEC "to offer for resale at wholesale rates any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers." Section 252(d)(3) provides that the wholesale rates are to be determined on the basis of rates charged to subscribers. The Commission's *Order* merely recognizes what the FCC found in its 1996 Local Competition Order, *i.e.*, that long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied. The FCC stated that there is to be no general exemption of promotional offerings from the wholesale requirement. However, in the same order, the FCC held that promotional offerings are exempt from the wholesale requirement if they are offered for 90 days or less because such short-term promotional offerings do not constitute the actual retail rate. The wholesale requirement, therefore, would not apply to such short-term promotions because they have been determined by the FCC not to change the actual retail rate. This bright line test was the FCC's compromise between allowing and not allowing ILECs to offer promotions that could undercut reseller pricing, so that short-term promotions, deemed procompetitive and beneficial to customers, would not have to be unnecessarily restricted.

One-time incentive gifts, including gift cards, check coupons and other merchandise, which are offered to induce customers to subscribe to telecommunications services, are promotional offerings. Therefore, if such gifts or incentives are offered for more than 90 days, as discussed in greater detail in the *Order*, they have the effect of lowering the actual, "real" retail rate. The retail rate, and thus the wholesale rate charged to resellers, must be determined on the basis of the "real" rate charged to subscribers. The Commission's *Order* does not prevent or in any way frown upon the use of such incentives as gift cards and other one-time upfront gifts. However, if the incentives, *i.e.*, promotions, are offered for more than 90 days, on the 91st day, resellers are entitled to have the benefit of the promotion reflected in the wholesale rate, meaning that the wholesale discount must be applied to the promotional rate—not to some other theoretical listed rate which has been undercut by a long-term promotional rate that is generally available to subscribers in the telecommunications marketplace. If an ILEC does not want to offer resellers a wholesale rate based on a retail rate adjusted

to reflect the effect of a promotion on the actual retail price, then the ILEC must not offer the promotion for more than 90 days.

Third, the Commission did not create a novel approach or new law when it held that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate . . . such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering [rate] is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." As discussed above with respect to New Phone's comments, FCC Rule 51.613(b), read in tandem with Rule 51.613(a)(2), has long provided for the possibility that an ILEC could avoid applying the wholesale discount to the special promotional rate if the ILEC is able to prove that withholding the availability of the promotional rate from the reseller is reasonable and nondiscriminatory.

Fourth, the Commission is not persuaded by BellSouth's argument that one-time incentive gifts such as gift cards and toasters are not "telecommunications services" required to be resold pursuant to TA 96. The *Order* does not require that non-telecommunications services, such as gift cards, check coupons, or merchandise, be resold. Such items do, however, have economic value. In recognition of this fact, the *Order* requires that telecommunications services subject to the resale obligation of Section 251(c)(4) be resold at rates that give resellers the benefit of the change in rate brought about by offering one-time incentives for more than 90 days. The *Order* does not require ILECs to provide CLPs with toasters, phones, knife sets, hotel accommodations, gift cards, etc. that they might provide to their customers as an incentive to purchase services. The *Order* does require that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers by applying the wholesale discount to the lower actual retail price.

Fifth, BellSouth complains that the Commission did not determine the value of various gift incentives or provide guidance on making such determinations, given that the ILECs' costs to acquire incentive gifts are likely not the same as the face value or actual value of the gifts to the customers. The Commission did not address determining the value of the benefit of an incentive gift promotion nor did it attempt to set strict guidelines for determining the actual rate for a service based on the value of any particular type of incentive gift. The Commission intentionally left this matter open so that the parties would be free to negotiate and arrive at a mutually agreed upon real retail rate. Irresolvable disputes in this area may be brought to the Commission for decision. However, to the extent that it is impossible either to reach a fair accommodation or agreed upon rate based on the promotional offer, or to provide the benefit of the promotional rate to resellers because it is too difficult to calculate such a

rate, then, in the absence of contrary proof, such 90-day-plus promotions would be unreasonable and discriminatory and could not be approved.³

Finally, BellSouth complains that CLPs will not be required to pass on the benefit of the promotional rate to their customers. According to BellSouth, a CLP would have every incentive to keep the benefit for itself as a windfall over and above the wholesale discount it already receives. The resale obligation of TA 96 permits a CLP to use the wholesale discount in a way that is beneficial to it without requiring the benefit to be passed directly to end users, so it is possible that a reseller could choose not to pass the promotional rate on to its customers. However, the Commission believes such an outcome is unlikely because the reseller's success is based on being able to sell services at prices that are competitive with the ILEC's prices in the marketplace. If the ILEC offers a long-term promotion and that promotional rate continues to be generally available in the market after the 90th day of a promotion, the reseller will need to offer its services at a competitive price and will likely want to maintain the price differential it usually maintains between the ILEC's retail rates and the rates it charges customers. Moreover, BellSouth's argument seems to contemplate that the gift would be provided directly to the CLP, e.g., if a \$100 coupon was offered to BellSouth's customers, BellSouth would have to provide resellers with a \$100 cash payment for each of its customers. However, as discussed above, the *benefit* (not the gift itself) would be delivered to the reseller through the wholesale price charged to the reseller, thus, further reducing the likelihood of undue windfall as described by BellSouth.

CONCLUSION

The Commission's *Order* regarding resale obligations applicable to one-time gift promotions, pursuant to TA 96, is clarified in accordance with the foregoing discussion.

B. Resale obligations with respect to mixed bundles

BellSouth complains that, with respect to mixed bundles of telecommunications services and non-telecommunications services, the Commission's *Order* requires ILECs to make the regulated services in the bundle available for resale at a "super discount." According to BellSouth, this super discount results because the *Order* requires the wholesale discount to be applied to the difference between the tariff rate for the telecommunications services in the mixed bundle and the entire price of the bundle, whenever the bundle is offered for a total price that is less than or equal to the stand-alone tariff price for the regulated telecommunications service. Thus, BellSouth believes the *Order* requires ILECs to resell piece-meal portions of mixed bundles at a "super discount." BellSouth argues that it should not be made to break apart such bundles. An ILEC has no obligation to resell either non-telecommunications services

³ Prior approval is not required under N.C.G.S. 62-133.5(f), but starting on the 91st day of a promotional offering, "an incumbent LEC may impose a restriction [on the resale obligation] only if it [has proved] to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. 51.613(b).

that it provides, or any services (telecommunications or non-telecommunications services) that are provided by entities other than the ILEC.

DISCUSSION

At the outset, the Commission notes that its *Order* addressed the Public Staff's specific questions, which focused on resale obligations with respect to *regulated* telecommunications services that were part of a gift card promotion or that were part of a bundle of regulated and nonregulated services. Therefore, the *Order* generally discussed resale obligations regarding component services in a mixed bundle in terms of regulated and nonregulated services. However, pursuant to Section 251(c)(4), an ILEC is required "to offer for resale at wholesale rates any telecommunications service that [the ILEC] provides at retail to subscribers who are not telecommunications carriers." It follows from Section 251(c)(4) that an ILEC must resell all telecommunications services, whether regulated or nonregulated, at the true retail price minus the wholesale discount. Thus, an ILEC must offer the reseller any regulated telecommunications services it provides at retail (the tariff list price) for the wholesale rate, and it must also offer the reseller any nonregulated telecommunications services it provides at retail (the retail list price) for the wholesale rate. Accordingly, hereinafter, the Commission will discuss the resale obligation in terms of telecommunications services and non-telecommunications services, not in terms of regulated and nonregulated services.

BellSouth correctly states 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. The Commission's *Order* imposed no resale obligation in conflict with this stated principle. The *Order* does not require an ILEC to resell a mixed bundle that contains inside wire maintenance (a non-telecommunications service) nor a mixed bundle that contains long distance service (a telecommunications service) supplied by a non-ILEC such as BellSouth Long Distance, Inc. However, the Commission's *Order* does require that an ILEC make any telecommunications services provided by it and offered as a component of a mixed bundle available for resale on a stand-alone basis for the wholesale rate, which must be determined by applying the wholesale discount rate to the actual, retail, marketplace rate. Accordingly, with respect to mixed bundles of telecommunications services and non-telecommunications services or telecommunications services and services offered by non-ILECs, determining the actual retail rate of any ILEC-provided telecommunications services that are in the bundle is crucial to calculating the wholesale rate a reseller must pay to resell such telecommunications services. As discussed in the *Order*, short-term promotional rates offered for 90 days or less do not constitute retail rates for telecommunications services, but long-term promotional rates offered for 91 days or more do constitute the retail rates that must be used to determine the reseller's wholesale rate.

In its discussion of a "super discount" resale obligation, BellSouth has misunderstood the Commission's *Order*, which the Commission finds should be clarified with respect to resale obligations relating to telecommunications services offered as part

of a mixed bundle. When a package or bundle of a telecommunications service and a non-telecommunications service is offered in excess of 90 days for a total price that equals the price of the telecommunications service, *i.e.*, the price of the telecommunications service is not lowered but the customer receives added value for the price of the telecommunications service alone, the real retail rate in the market for the ILEC-provided telecommunications service must be determined by accounting for the value of the services in the bundle that are not telecommunications services provided by the ILEC. In this situation, the price for the telecommunications service provided by the ILEC is reduced by the value received in the form of additional non-telecommunications services and/or non-ILEC provided services. Thus, if Telecommunications Service 1 ("TS1") retails for \$50 and a mixed bundle consisting of TS1, a Non-Telecommunications Service, and Satellite Television provided by a non-ILEC entity retails for \$50, then TS1 is being discounted by the value of the other services in the bundle (which may appear to be provided as a free gift). If this mixed bundle is offered for 91 days or more, then the wholesale rate that the reseller must pay for TS1 is determined by applying the wholesale discount (to be determined in accordance with the discussion on Pages 6-7 above) to the promotional rate for TS1, which is determined by subtracting the value (benefit) of the giveaways (the Non-Telecommunications Service and the non-ILEC provided Satellite Television Service) from the tariff or retail list price for TS1.

When a package or bundle of a telecommunications services and a non-telecommunications service is offered in excess of 90 days for a total price that is less than the price of the telecommunications service, the real retail rate for the telecommunications service is the total price of the bundle. That is to say, when the total bundle price is less than the telecommunications service in the bundle, the ILEC has determined the value of the discount from the tariff or retail list price and has thereby determined that the actual retail rate for the telecommunications service is the price of the total mixed bundle. (There is no requirement that discounts applicable to individual components sold together in a bundle be determined or passed on to resellers.) For example, if TS1 retails for \$50 and Telecommunications Service 2 ("TS2") retails for \$75, while a mixed bundle consisting of TS1, TS2, a Non-Telecommunications Service, and Satellite Television is offered for \$60, then TS2 is actually available in the marketplace for a real retail rate of \$60. A customer whose goal is to acquire TS2 for the best price in the market can do so by paying \$60 for the bundle rather than the retail list price of \$75, although he must also accept additional services in order to acquire TS2 at the lower rate. Therefore, the wholesale rate that the reseller must pay for TS2 is determined by applying the wholesale discount to \$60, the promotional rate for TS2. In this example, the mixed bundle sells for more than the retail price for TS1, so TS1 is not available in the marketplace for less than the tariff or retail list price of \$50. The customer whose goal is to purchase TS1 for the best price in the market would not purchase the \$60 mixed bundle just to acquire TS1, because he can purchase TS1 for less at the retail list price. Accordingly, an ILEC is only obligated to resell TS1 at the retail list price minus the wholesale discount.

In another example, if TS2 again retails on a stand-alone basis for \$75 and a Non-Telecommunications Service retails for \$10, while a mixed bundle of TS2 and the Non-Telecommunications Service is offered for more than 90 days for \$25, then TS2 would be available in the market for a real retail rate of \$25 even though a subscriber would have to accept the entire bundle to obtain TS2 for that price. Thus, TS2 should be offered to the reseller at the wholesale rate, which would be determined by applying the wholesale discount to the TS2 promotional rate of \$25.

Looking at BellSouth's example on Page 7 of its Motion for Reconsideration, where telecommunications service A retails for \$30, telecommunications service B retails for \$10, and a bundle of both A and B is priced at \$25 for a period in excess of 90 days, a reseller must pay \$25 minus the wholesale discount for service A, since a customer could purchase service A for less than \$30 by purchasing the bundle for \$25. That is to say, the real retail rate for service A would be \$25. For service B, the reseller must pay \$10 minus the wholesale discount because the real retail rate for service B remains at \$10, *i.e.*, a customer cannot acquire service B for less than \$10 by purchasing the bundle. The reseller would not be entitled to purchase service A alone for \$15 ($\$40 [A + B] \text{ minus } \$25 = \$15$) minus the wholesale discount as BellSouth apparently believed was required by the Commission's *Order*. It should be noted that if service B is changed to a non-telecommunications service or to a non-ILEC provided service, the ILEC would have no obligation to offer service B to a reseller at the wholesale rate.

Finally, to reiterate, as was noted above and in the *Order*, when the entire mixed bundle is offered for a price that is more than an end-user subscriber would pay for a telecommunications service if purchased alone at the retail list price, an ILEC is not required to resell the telecommunications services in the bundle for a price that is lower than the retail list price minus the wholesale discount. Instead, the ILEC is only required to resell such telecommunications services at the listed retail price minus the wholesale discount. For example, TS1 retails for \$50, while a mixed bundle of TS1, a Non-Telecommunications Service and Satellite Television supplied by a non-ILEC is offered at \$80. In this example, the mixed bundle cannot be purchased as a lower cost means of acquiring TS1. Thus, the wholesale rate for TS1 would continue to be determined by applying the wholesale discount to the tariff or retail list price for TS1, not the promotional rate that a customer might receive for TS1 if it is purchased as part of the bundle. To clarify further, the Commission's *Order* does not require an ILEC to calculate internal discount prices of components offered in a bundle and then "pick apart" the bundle to offer those internal discounts applicable to telecommunications services (discounts that are never offered to retail customers on a stand-alone basis) to resellers.

CONCLUSION

The Commission's *Order* regarding federal resale obligations applicable to mixed bundles is clarified in accordance with the foregoing discussion.

DISPOSITION OF MOTIONS

WHEREUPON, the Commission disposes of the parties' motions as follows:

1. New Phone's Motion to Reconsider IS DENIED.
2. New Phone's alternative Motion for Clarification IS GRANTED in accordance with the foregoing discussion and conclusions stated hereinabove in the section captioned "New Phone's Comments."
3. BellSouth's Motion to Reconsider and its Motion for Stay ARE DENIED.
4. BellSouth's alternative Motion for Clarification IS GRANTED in accordance with the foregoing discussion and conclusions stated hereinabove in the section captioned "BellSouth's Motion."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of June, 2005.

NORTH CAROLINA UTILITIES COMMISSION



Patricia Swenson, Deputy Clerk

tb052305.01

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

OFFICIAL COPY

FILED

Civil Action No.

AUG 02 2005

BELLSOUTH TELECOMMUNICATIONS,)
INC.,)

Plaintiff,)

v.)

NORTH CAROLINA UTILITIES)
COMMISSION; JO ANNE SANFORD,)
Chairman; ROBERT K. KOGER,)
Commissioner; ROBERT V. OWENS, JR.,)
Commissioner; SAM J. ERVIN, IV,)
Commissioner; LORINZO L. JOYNER,)
Commissioner; JAMES Y. KERR, II,)
Commissioner; and HOWARD N. LEE,)
Commissioner (in their official capacities as)
Commissioners of the North Carolina)
Utilities Commission),)

Defendants.)

Clerk's Office
N.C. Utilities Commission

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

P-100 Sub 72 B

Nature of the Action

1. This is an action seeking declaratory and injunctive relief with respect to portions of two Orders (attached hereto as Exhibits 1 and 2) of the North Carolina Utilities Commission (the "Commission") that violate the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Act").

2. The dispute in this matter arises from a disagreement regarding plaintiff BellSouth Telecommunications, Inc.'s ("BellSouth") resale obligations under 47 U.S.C. §§ 251(c)(4)(A) and 252(d)(3), and more specifically, whether BellSouth or other incumbent local exchange carriers ("ILECs") must provide competing local providers ("CLPs") an additional

discount, on top of the wholesale discount CLPs already receive when purchasing telecommunications services for resale to consumers, for the value of any marketing incentives that BellSouth offers to retail customers for more than ninety (90) days.

3. No CLP has ever argued or complained that BellSouth or other ILECs have an obligation to offer CLPs marketing incentives, or the value of those incentives, in addition to the wholesale discount resellers receive on an ILEC's retail telecommunications services. Nevertheless, following a motion by the Commission's Public Staff and the submission of comments by the Public Staff, BellSouth, and others, on December 22, 2004, the Commission issued an order holding, in pertinent part, that marketing incentives "are in fact promotional offers subject to the FCC's rules on promotion," and that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." Exhibit 1, pp. 11-12.

Parties, Jurisdiction and Venue

4. BellSouth Telecommunications, Inc. is a Georgia corporation with its principal place of business in Atlanta, Georgia. BellSouth is an ILEC under the Act.

5. Defendants Jo Anne Sanford, Robert K. Koger, Robert V. Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Howard N. Lee are Commissioners of the North Carolina Utilities Commission, and are sued in their official capacities for declaratory and injunctive relief only.

6. This Court has subject matter jurisdiction over this action pursuant to the judicial review provision of the Act, 47 U.S.C. § 252(e)(6), and pursuant to 28 U.S.C. § 1331. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 643 (2002) (reviewing a decision of the Fourth Circuit Court of Appeals and finding that federal courts have the authority under 28 U.S.C. § 1331 to review state commission decisions for compliance with federal law).

7. Venue is proper in this district under 28 U.S.C. § 1391(b) because one or more of the defendants resides in this district, and because a substantial part of the events giving rise to this action occurred in this district.

Statutory and Regulatory Background

8. To foster competition, the Act imposes specific requirements on BellSouth and other ILECs to make their retail telecommunications services available to CLPs at a significantly discounted wholesale rate. Specifically, section 251(c)(4)(A) of the Act requires ILECs “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” Section 251(c)(4)(B) of the Act further requires ILECs “not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of . . . telecommunications service.”

9. The Federal Communications Commission (“FCC”) has concluded that this statutory resale obligation includes promotional price discounts offered on retail telecommunications services. The FCC has defined “promotions” to include “price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.” *In the Matter of Implementation of the Local Competition Provisions in the*

Telecommunications Act of 1996 (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499, (rel. Aug. 8, 1996) ("First Report and Order"), para. 948.

10. The FCC has 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." First Report and Order, paras. 949 & 950. Thus, 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 discount.

11. The Commission has established that CLPs may purchase BellSouth's retail telecommunications services in North Carolina at a 21.5% wholesale discount less than the retail price for business services and for 17.6% less than the retail price for residential services.

12. Section 252(d)(3) of the Act directs state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier." Thus, Congress acknowledged that ILECs and CLPs are responsible for the costs of their own marketing initiatives.

13. The competitive environment envisioned by Congress when it passed the Act has become a reality. There is robust competition in North Carolina between ILECs and CLPs, and as a result consumers benefit greatly so long as there is a level playing field that forces ILECs and CLPs to compete fairly.

Factual Allegations

14. On June 25, 2004, the Public Staff of the North Carolina Utilities Commission ("Public Staff") filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. *See* Exhibit 3, attached hereto. Among the issues for which the Public Staff sought guidance was the following: "If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?"

15. On July 7, 2004, the Commission issued an order seeking comments on the Public Staff's Motion. On August 6, 2004, the Public Staff filed comments advocating, in pertinent part, that ILECs such as BellSouth be required to offer non-regulated marketing incentives such as gift cards to resellers in addition to the wholesale discount on regulated telecommunications services. *See* Exhibit 4, attached hereto.

16. Also on August 6, 2004, BellSouth, ALLTEL Carolina, Inc., Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, "Sprint"), and Verizon South, Inc. ("Verizon") filed comments with the Commission advocating, in pertinent part, that ILECs are required to sell to CLPs at wholesale rates any "telecommunications service" that the ILEC offers to retail customers so that the CLP can resell the service to end users. Furthermore, marketing incentives are not telecommunications services and do not reduce the retail rates customers pay for telecommunications services, and thus as a matter of law are not subject to the resale requirements of the Act. *See* Exhibits 5 and 6, attached hereto.

17. On August 31, 2004, the Public Staff filed its Reply Comments, which argued that even if marketing incentives are not telecommunications services and are not subject to resale, they “effectively” constitute a discount on such services, and “[i]t is irrelevant whether the cost of the telecommunications service is directly affected or the customer reduces his expenses elsewhere.” See Exhibit 7, attached hereto.

18. On August 31, 2004, BellSouth, Sprint and Verizon filed their respective reply comments, which emphasized that the Public Staff’s position regarding ILECs’ resale obligations with regard to marketing incentives was wholly unsupported by law, basic principles of statutory interpretation, and common sense. See Exhibit 8, 9, and 10, attached hereto.

19. On December 22, 2004, the Commission issued its Order Ruling on Motion Regarding Promotions (Exhibit 1, attached hereto) (the “First Resale Order”). The Commission erroneously ruled that marketing incentives such as gift cards “are in fact promotional offers subject to the FCC’s rules on promotions.” First Resale Order, p. 11.

20. The Commission expressly acknowledged that marketing incentives “are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings.” First Resale Order, p. 11. However, it then erred in finding that a marketing incentive “reduces the subscriber’s cost for the service by the value received in the form of a gift card or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the ‘real’ retail rate.” First Resale Order, p. 11.

21. The Commission's inquiry should have ended once it found that marketing incentives are not discount service offerings because they do not result in a reduction of the tariffed retail price charged for the regulated telecommunications service offerings. Instead, it decided to modify, if not rewrite, section 251(c)(4)(A) of the Act by expanding the scope of an ILEC's resale obligation to include unregulated marketing incentives.

22. In so finding, the Commission ignored the facts that (1) marketing incentives such as gift cards cannot be used to pay for (i.e., reduce the retail rate of) telecommunications services; (2) consumers may choose not to use a gift card or other marketing incentive, or to give it away, and thus might not derive any actual value from it; (3) CLPs use marketing incentives as well, so they are fundamentally different from and unrelated to price discounts offered on retail telecommunications services by ILECs; and (4) the Act mandates that wholesale rates be calculated "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). The Act does not authorize state commissions to set wholesale rates based on hypothetical "real retail rates."

23. As a result of its unwarranted expansion of the scope of the Act and its erroneous findings, the Commission held that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." First Resale Order, pp. 11-12.

24. On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, For Clarification, and for a Stay of the Commission's December 22, 2004 Order. See Exhibit 11, attached hereto. In this Motion, BellSouth argued that the Commission's First Resale Order created a novel resale obligation that is contrary to the resale requirements of the Act and is unprecedented in the nine states in which BellSouth operates. BellSouth also argued that this unprecedented interpretation of the Act would require BellSouth to incur significant expenses creating North Carolina-specific exceptions in its marketing operations, which could compel BellSouth to offer North Carolina consumers fewer and/or less attractive marketing incentives than it offers to consumers in other states.

25. BellSouth noted in its Motion for Reconsideration that pursuant to the Act and the FCC's rules, the Commission already had deducted costs attributable to marketing expenses in calculating the wholesale discount CLPs receive when they purchase BellSouth's retail telecommunications services for resale. Thus, requiring ILECs to resell marketing incentives (or the value thereof) at a wholesale discount forces the ILECs to subsidize the CLPs marketing efforts and allows the CLPs to avoid the very costs that the resale provisions of the Act require each carrier to bear. The manifest unfairness of such a result is demonstrated by the fact that many marketing incentives offered by BellSouth are *in response to* marketing incentives initiated by a CLP. This pro-consumer competition in the retail marketplace will be thwarted if one side (the ILECs) is forced to subsidize the other (the CLPs).

26. On June 3, 2005, the Commission issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay ("Second Resale Order") (Exhibit 2, attached hereto). Though the Commission acknowledged that section 252(d)(3) of

the Act provides that the wholesale rates to be charged to resellers are to be determined on the basis of rates charged to subscribers, it ignored this unambiguous statutory language and effectively rewrote section 252(d)(3) of the Act by holding that marketing incentives have the effect of lowering “the actual, ‘real’ retail rate.” Second Resale Order, p. 5.

27. The Commission further erred by requiring that BellSouth determine “the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price” and pass the benefit of such a reduction on to resellers through a wholesale discount on the “lower actual retail price.” Second Resale Order, p. 6. The Commission provided no guidance on how this hypothetical “real retail price” should be calculated, instead stating that it “intentionally left this matter open so that the parties would be free to negotiate.” *Id.* If a negotiated solution is not possible, the ILECs and CLPs may bring the matter before the Commission, but if it is too difficult to calculate the “real retail price,” the Commission will presume that a marketing incentive “would be unreasonable and discriminatory.” Second Retail Order, pp. 6-7.

28. On June 27, 2005, BellSouth filed a Motion for Extension of Time to Appeal the Second Resale Order. *See* Exhibit 12, attached hereto. On June 28, 2005, the Commission granted this Motion and extended the time for BellSouth to appeal the Second Resale Order to August 2, 2005. *See* Exhibit 13, attached hereto.

FIRST CLAIM FOR RELIEF

Declaratory Judgment Regarding Violation of the Telecommunications Act of 1996

29. BellSouth restates and realleges the allegations in paragraphs 1-28 of this Complaint as if fully set forth herein.

30. The North Carolina Utility Commission's conclusions in the First and Second Resale Orders that BellSouth is required to offer CLPs a wholesale discount on marketing incentives (or the value thereof) in addition to the wholesale discount offered on its retail telecommunications services is contrary to and violates the Telecommunications Act of 1996.

31. By its plain meaning, section 251(c)(4) of the Act mandates the resale of telecommunications services made available to retail subscribers. It does not mention or concern, directly or indirectly, the resale of independent marketing incentives or providing the value of such incentives to CLPs at a discounted wholesale rate.

32. Section 252(d)(3) of the Act provides that the wholesale rates to be charged to resellers are to be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier." Nowhere does the Act mention or sanction the concept of a "real" or "actual" retail rate based on the value of marketing incentives to consumers.

33. By misinterpreting and attempting to substantially rewrite and expand the scope of the Act, the Commission has acted in violation of federal law.

34. For these reasons, BellSouth is entitled to a declaration under 28 U.S.C. § 2201 that the portions of the First and Second Resale Orders concerning BellSouth's resale obligations regarding one-time marketing incentives such as gift cards are unlawful.

SECOND CLAIM FOR RELIEF

Injunctive Relief

35. BellSouth restates and realleges the allegations in paragraphs 1-34 of this Complaint as though fully set forth herein.

36. Unless the Commission is temporarily restrained and preliminarily and permanently enjoined from enforcing the erroneous and unlawful portions of the Resale Orders, BellSouth will suffer immediate, substantial, and irreparable harm, including:

- A. Loss of market share and goodwill as a result of confusion in the marketplace and market dislocation;
- B. Disruption of its uniform marketing plan and lost marketing opportunities in a highly competitive environment;
- C. Substantial administrative, legal and restructuring costs that must be incurred to comply with the Resale Orders; and
- D. Disruption of a carefully regulated and competitive marketplace, as a result of being forced to pay unwarranted subsidies to its competitors and waste valuable management time and resources.

37. BellSouth has no adequate remedy at law and seeks temporary, preliminary and permanent injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

38. For these reasons, BellSouth is entitled to an order enjoining enforcement of those portions of the Resale Orders that are challenged in this action.

PRAYER FOR RELIEF

WHEREFORE, plaintiff BellSouth Telecommunications, Inc. respectfully prays for judgment as follows:

1. That the Court enter a declaratory judgment pursuant to 28 U.S.C. § 2201, that the portions of the December 22, 2004 and June 3, 2005 Orders of the North Carolina Utilities Commission concerning an BellSouth's resale

obligations regarding one-time marketing incentives violate the Telecommunications Act of 1996 and are unlawful;

2. That the Court enter an order enjoining, on a temporary, preliminary, and permanent basis, the North Carolina Utilities Commission and all of its individual Commissioners from seeking to enforce the unlawful portions of the Commission's December 22, 2004 and June 3, 2005 Orders; and
3. That the Court grant BellSouth such additional relief as the Court may deem just and proper.

Respectfully submitted, this 2nd day of August, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

By:



Frank A. Hirsch, Jr.
N.C. State Bar No. 13904
Matthew P. McGuire
N.C. State Bar No. 20048
Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
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matt.mcguire@nelsonmullins.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **Complaint for Declaratory and Injunctive Relief** was served on the persons indicated below by hand delivery and by placing a copy of thereof in the United States Mail, postage prepaid, certified mail, return receipt requested, and addressed as follows:

North Carolina Utilities Commission
c/o Geneva Thigpen, Chief Clerk
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Jo Anne Sanford, Chair
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Dr. Robert K. Koger, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Robert V. Owens, Jr., Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
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Sam J. Ervin, IV, Commissioner
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Lorinzo L. Joyner, Commissioner
North Carolina Utilities Commission
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James Y. Kerr, II, Commissioner
North Carolina Utilities Commission
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430 North Salisbury Street
Raleigh, NC 27603-5918

Howard N. Lee, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

This the 2nd day of August, 2005

A handwritten signature in black ink, appearing to read "James Y. Kerr, II". The signature is written in a cursive style with a horizontal line at the end.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

OFFICIAL COPY

Civil Action No.

P-100 sub 72B

BELLSOUTH TELECOMMUNICATIONS,)
INC.,)

Plaintiff,)

v.)

NORTH CAROLINA UTILITIES)
COMMISSION; JO ANNE SANFORD,)
Chairman; ROBERT K. KOGER,)
Commissioner; ROBERT V. OWENS, JR.,)
Commissioner; SAM J. ERVIN, IV,)
Commissioner; LORINZO L. JOYNER,)
Commissioner; JAMES Y. KERR, II,)
Commissioner; and HOWARD N. LEE,)
Commissioner (in their official capacities as)
Commissioners of the North Carolina)
Utilities Commission),)

Defendants.)

**PLAINTIFF BELLSOUTH
TELECOMMUNICATIONS, INC.'S
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

Plaintiff BellSouth Telecommunications, Inc. ("BellSouth"), by and through its undersigned counsel and pursuant to Rule 65 of the Federal Rules of Civil Procedures, respectfully moves for the entry of a temporary restraining order and preliminary injunction enjoining the enforcement of certain portions of the North Carolina Utilities Commission's (the "Commission") December 22, 2004 Order Ruling on Motion Regarding Promotions and its June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (collectively, the "Resale Orders"), in the action entitled *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,”

Docket No. P-100, Sub 72b. In support of this Motion, BellSouth shows the Court as follows:

1. On June 25, 2004, the Public Staff of the North Carolina Utilities Commission (“Public Staff”) filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs’ Obligations to Offer Promotions to Resellers. Among the issues for which the Public Staff sought guidance was the following: “If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?”

2. On July 7, 2004, the Commission issued an order seeking comments on the Public Staff’s Motion. On August 6, 2004, the Public Staff filed comments advocating, in pertinent part, that incumbent local exchange carriers (“ILECs”) such as BellSouth be required to offer non-regulated marketing incentives such as gift cards to resellers in addition to the wholesale discount on regulated telecommunications services mandated by the Telecommunications Act of 1996 (the “Act”), 47 U.S.C. §251(c)(4)(A). Also on August 6, 2004, BellSouth, ALLTEL Carolina, Inc., Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, “Sprint”), and Verizon South, Inc. (“Verizon”) filed comments with the Commission advocating, in pertinent part, that ILECs are only required to sell to competing local providers (“CLPs”) at wholesale rates any “telecommunications service” that the ILEC offers to retail customers. Furthermore, marketing incentives are not telecommunications services and do not reduce the retail rates customers pay for telecommunications services, and thus as a matter of law are not subject to the resale requirements of the Act.

3. On August 31, 2004, the Public Staff filed its Reply Comments, which argued that even if marketing incentives are not telecommunications services and are not subject to resale, they “effectively” constitute a discount on such services, and “[i]t is irrelevant whether the cost of the telecommunications service is directly affected or the customer reduces his expenses elsewhere.”

4. On August 31, 2004, BellSouth, Sprint and Verizon filed their respective reply comments, which emphasized that the Public Staff’s position regarding ILECs’ resale obligations with regard to marketing incentives was wholly unsupported by law, basic principles of statutory interpretation, and common sense.

5. On December 22, 2004, the Commission, acting through the individual Commissioners, issued its Order Ruling on Motion Regarding Promotions (the “First Resale Order”). The Commission ruled, in pertinent part, that marketing incentives such as gift cards that are in effect for more than 90 days “are in fact promotional offers subject to the FCC’s rules on promotions.” The Commission opined that a marketing incentive “reduces the subscriber’s cost for the service by the value received in the form of a gift card or other giveaway.” The Commission further held that “in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers’ wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC’s resale obligation.”

6. On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, For Clarification, and for a Stay of the Commission’s First Resale Order. In this Motion, BellSouth argued that the Commission’s First Resale Order created a novel resale

obligation that is contrary to the resale requirements of the Act and which would require BellSouth to incur significant expenses creating North Carolina-specific exceptions in its marketing operations. BellSouth noted that pursuant to the Act and the FCC's rules, the Commission already had deducted the costs attributable to marketing expenses in calculating the wholesale discount CLPs receive when they purchase BellSouth's retail telecommunications services for resale. Thus, BellSouth argued, requiring it to resell marketing incentives (or the value thereof) at a wholesale discount would force BellSouth to subsidize the CLPs' marketing efforts and allows the CLPs to avoid the very costs that the resale provisions of the Act require each carrier to bear.

7. On June 3, 2005, the Commission, acting through the individual Commissioners, issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (the "Second Resale Order"). Although the Commission acknowledged that section 252(d)(3) of the Act provides that the wholesale rates to be charged to resellers shall be determined on the basis of retail rates charged to subscribers, it nonetheless effectively rewrote section 252(d)(3) of the Act by holding that marketing incentives have the effect of lowering "the actual, 'real' retail rate." The Commission ordered that BellSouth determine "the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price" and pass the benefit of such a reduction on to resellers through a wholesale discount on the "lower actual retail price." The Commission provided no guidance on how this hypothetical "real retail price" should be calculated; instead, it "intentionally left this matter open so that the parties would be free to negotiate." If a negotiated solution is not possible, BellSouth and the CLPs may bring the matter before the Commission. However, if it

is too difficult to calculate the “real retail price,” the Commission will presume that a marketing incentive “would be unreasonable and discriminatory.”

8. The aforementioned portions of the Resale Orders violate federal law by contravening the plain language of the Telecommunications Act of 1996, 47 U.S.C. §§ 251(c)(4)(A) and 252(d)(3). The Act does not authorize state Commissions to impose novel methods for calculating the wholesale rates for resellers of telecommunications services. To the contrary, the Act expressly provides that “a State commission *shall* determine wholesale rates *on the basis of retail rates charged to subscribers* for the telecommunications service requested, *excluding the portion thereof attributable to marketing . . .* and other costs that will be avoided by the local exchange carrier.” 47 U.S.C. § 252(d)(3)(emphasis added).

9. Absent the entry of a temporary restraining order and preliminary injunction, the Commission’s Resale Orders will become effective and binding on BellSouth on August 2, 2005. Unless the Commission is temporarily restrained and preliminarily and permanently enjoined from enforcing the erroneous and unlawful portions of the Resale Orders, BellSouth will suffer immediate, substantial, and irreparable harm, including:

- A. Loss of market share and goodwill as a result of confusion in the marketplace and market dislocation;
- B. Disruption of its uniform marketing plan and lost marketing opportunities in a highly competitive environment;
- C. Substantial administrative, legal and restructuring costs that must be incurred to comply with the Resale Orders; and

D. Disruption of a carefully regulated and competitive marketplace, as a result of being forced to pay unwarranted subsidies to its competitors and waste valuable management time and resources.

10. Defendants, on the other hand, will not be injured by the entry of a temporary restraining order and preliminary injunction. BellSouth has provided 90-day-plus marketing incentives to North Carolina consumers for several years without challenges from any party. The Commission only recently took issue with this long-standing practice, and no other state commission in BellSouth's operating territory has held similarly. Just as it suffered no injury during the previous years in which BellSouth and other ILECs offered these long-term marketing incentives, the Commission cannot claim that it will suffer any injury from maintaining the status quo during the pendency of this action.

11. In further support of this Motion, BellSouth refers to, and incorporates herein by reference, its Complaint and Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

12. Undersigned counsel certifies to the Court that notice of this motion has been attempted by delivering copies of the Complaint, Motion for Temporary Restraining Order and Preliminary Injunction, and Memorandum of Law in Support thereof to the following persons:

North Carolina Utilities Commission
c/o Geneva Thigpen, Chief Clerk
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

and

Robert H. Bennick, Jr.
Director and General Counsel
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

WHEREFORE, Plaintiff BellSouth Telecommunications, Inc. respectfully requests that the Court enter a temporary restraining order, pursuant to Rule 65 of the Federal Rules of Civil Procedure:

1. Enjoining Defendants from enforcing (a) Conclusion No. 5 of the Commission's December 22, 2004 Order Ruling on Motion Regarding Promotions, and (b) the Commission's Conclusions regarding Resale Obligations and One-Time Gift Promotions in its June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (pp. 5-7, therein);
2. Ordering Defendants to appear within ten days hereof and show cause why a preliminary injunction should not be entered continuing the injunctive relief requested herein pending the trial of this matter; and
3. Granting such other relief as the Court deems just and proper.

Respectfully submitted, this 2nd day of August, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

By:



Frank A. Hirsch, Jr.
N.C. State Bar No. 13904
Matthew P. McGuire
N.C. State Bar No. 20048
Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
4140 Parklake Ave.
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
Email: frank.hirsch@nelsonmullins.com
matt.mcguire@nelsonmullins.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **BellSouth Telecommunications, Inc.'s Motion for Temporary Restraining Order** was served on the persons indicated below by hand delivery and by placing a copy of thereof in the United States Mail, postage prepaid, certified mail, return receipt requested, and addressed as follows:

North Carolina Utilities Commission
c/o Geneva Thigpen, Chief Clerk
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Jo Anne Sanford, Chair
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Dr. Robert K. Koger, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Robert V. Owens, Jr., Commissioner
North Carolina Utilities Commission
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Sam J. Ervin, IV, Commissioner
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Lorinzo L. Joyner, Commissioner
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James Y. Kerr, II, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Howard N. Lee, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

This the 2nd day of August, 2005

A handwritten signature in black ink, appearing to be "Watts" followed by a stylized flourish.

EXHIBIT E

FILED

AUG 03 2005

Clerk's Office
N.C. Utilities Commission

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FILED
CHARLOTTE, N. C.

AUG 2 2005

Civil Action No. 3:05-cr-345

U. S. DISTRICT COURT
W. DIST. OF N. C.

BELLSOUTH TELECOMMUNICATIONS,)
INC.,)

Plaintiff,)

v.)

NORTH CAROLINA UTILITIES)
COMMISSION; JO ANNE SANFORD,)
Chairman; ROBERT K. KOGER,)
Commissioner; ROBERT V. OWENS, JR.,)
Commissioner; SAM J. ERVIN, IV,)
Commissioner; LORINZO L. JOYNER,)
Commissioner; JAMES Y. KERR, II,)
Commissioner; and HOWARD N. LEE,)
Commissioner (in their official capacities as)
Commissioners of the North Carolina)
Utilities Commission),)

Defendants.)

TEMPORARY RESTRAINING ORDER

This matter is before the Court upon the Motion of Plaintiff BellSouth Telecommunications, Inc. (hereinafter "BellSouth") for a Temporary Restraining Order pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. It appearing to the Court that the Complaint, Motion, brief, and material supporting BellSouth's Motion have been duly filed and served upon the Defendants as well as on the General Counsel of the North Carolina Utilities Commission, providing notice of these proceedings and of the intent to seek a temporary restraining order, the Court has reviewed the Complaint, Motion, brief, supporting affidavits, as well as the exhibits attached thereto, and upon good cause shown, finds that unless this temporary restraining order is entered, BellSouth will suffer irreparable harm, including

incalculable costs, competitive disadvantages, damage to goodwill, and marketing potential, constituting irreparable harm, before the matter can be heard on BellSouth's motion for a preliminary injunction. This Temporary Restraining Order sought by BellSouth is otherwise necessary and proper to preserve the *status quo ante* while issues raised by the Complaint for decision by this Court are considered and decided. This Court finds further that this Temporary Restraining Order is proper in light of the balance between the harm that denying injunctive relief will inflict upon BellSouth and the harm that granting the injunction may inflict on any other party, the likelihood of BellSouth's success on the merits, and the public interest in avoiding consumer confusion and potential marketing dislocation.

With regard to the security bond required pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, this Court exercises its discretionary power to waive the bond because the solvency of the movant is undisputed. Given the substantial assets and financial stability of BellSouth, this court finds that no parties are in danger of being unable to collect amounts that BellSouth would be required to pay if this temporary restraining order were denied; accordingly,

IT IS HEREBY ORDERED that Defendants the North Carolina Utilities Commission and, in their official capacities, the following Commissioners: Jo Anne Sanford; Robert K. Koger; Robert V. Owens, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; James Y. Kerr, II; and Howard N. Lee, be, and hereby are temporarily enjoined and restrained from enforcing Conclusion No. 5 of the Commission's December 22, 2004 Order Ruling on Motion Regarding Promotions, *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"*, Docket No. P-100, Sub-72b as well as the Commission's Conclusions regarding Resale Obligations and One-Time Gift Promotions in its June 3, 2005

Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, *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"*, Docket No. P-100, Sub-72b (pp. 5-7, therein).

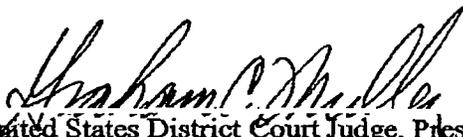
This Temporary Restraining Order shall remain in full force and effect until the 12th day of August, 2005, at 11:00 a.m./p.m. unless extended for a longer time by consent or for good cause shown.

IT IS FURTHER ORDERED that no bond by BellSouth is required as security for this temporary restraining order.

IT IS FURTHER ORDERED that service of a copy of this Order, BellSouth's Complaint, brief, supporting affidavits, and exhibits shall be served upon Defendants.

IT IS FURTHER ORDERED that the hearing on BellSouth's motion for Preliminary Injunction is set for the 11th day of August, 2005, at 2:00 a.m./p.m. to be held in Courtroom 3 at the Federal Courthouse, Charlotte, North Carolina, at which time Defendants shall appear and show cause, if any there be, why the preliminary injunctive relief requested by BellSouth should not be granted.

IT IS SO ORDERED.


United States District Court Judge, Presiding

Date: 2 AUGUST
3:28 PM

EXHIBIT F

OFFICIAL COPY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:05-CV-345-MU

FILED

AUG 29 2005

Claims Office
N.C. Utilities Commission

BELLSOUTH)
TELECOMMUNICATIONS, INC.,)
)
Plaintiff,)
v.)
)
NORTH CAROLINA UTILITIES)
COMMISSION; JO ANNE SANFORD,)
Chairman; ROBERT K. KOGER,)
Commissioner; ROBERT V. OWENS,)
JR., Commissioner; SAM J. ERVIN, IV,)
Commissioner; LORINZO L. JOYNER,)
Commissioner; JAMES Y. KERR, II,)
Commissioner; and HOWARD N. LEE,)
Commissioner (in their official capacities)
as Commissioners of the North Carolina)
Utilities Commission),)
)
Defendants.)

ORDER

P-100, sub 12b

No dist.
per BB

THIS MATTER is before the Court on Plaintiff BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Temporary Restraining Order and Preliminary Injunction, [file doc. 10], and Memorandum in Support, both filed August 2, 2005. Also on August 2, 2005, this Court entered an Order granting BellSouth's Motion for a Temporary Restraining Order and setting a hearing for this matter which was held on August 11, 2005 at 2:00 p.m. While the North Carolina Utilities Commission (the "Commission") and the Commissioners (collectively referred to as "Defendants") named above did not file a written Response to the Motion for Preliminary Injunction, defense counsel for both did attend the hearing, although only in her

3

capacity as counsel to the Commissioners.¹ Having heard and considered the arguments of BellSouth and the Commissioners, this matter is ripe for ruling by the Court. For the reasons stated below, the Court hereby GRANTS BellSouth's Motion for Preliminary Injunction.

I. FACTUAL AND PROCEDURAL HISTORY

This case is centered around the interpretation of several provisions of the Telecommunications Act of 1996 (the "Act"). In the spirit of fostering competition, the Act imposes several requirements on incumbent local exchange carriers ("ILECs"), like BellSouth, to make their retail telecommunications services available to competing local providers ("CLPs") at discounted wholesale rates. See 47 U.S.C. § 251(c)(4)(A). Pursuant to 47 U.S.C. § 252(d)(3), State commissions determine the wholesale rates on the basis of the ILEC's retail rates, excluding any portion attributable to marketing, among other things. In practical terms, it is both the Commission and the market which set the wholesale rates available to CLPs. ILECs propose a wholesale rate bearing in mind what the market will tolerate, but before they can sell these telecommunications services, the Commission must approve the rates.

As explained above, many factors influence the value of the wholesale rates. And, as would be expected, the Federal Communications Commission ("FCC") has weighed in on the issue of what should be considered when valuing wholesale rates. Specifically, and of importance to the outcome of this matter, the FCC has found that promotional offerings that are in effect for more than ninety days essentially become the retail rate from which the wholesale rate is determined. *In the Matter of Implementation of the Local Competition Provisions in the*

¹ Defense counsel stated on the record that she was only appearing in her capacity as counsel to the Commissioners because the North Carolina Utilities Commission seeks to have this action dismissed against it without making an appearance in the matter.

Telecommunications Act of 1996, (CC Docket 96-58): First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499 (rel. August 8, 1996), ¶ 948. This point is further clarified through the negative implication of 47 C.F.R. § 51.613(2)(I), which states that “promotions” lasting less than ninety days are not considered when determining the wholesale rate.

The dispute between BellSouth and the Defendants arose when the Defendants issued a December 22, 2004 Order Ruling on Motion Regarding Promotions and a June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (collectively the “Resale Orders”). The Resale Orders found that incentives, such as gift cards, that are in effect for more than ninety days “are in fact promotional offers subject to the FCC’s rules on promotions.” On the other hand, BellSouth argued in oral argument that gift cards and other such giveaways are not telecommunications services, and as such are not regulated by the Act.

More specifically, BellSouth cites to the FCC’s definition of “promotions” to make the argument that items such as gift cards are in fact *marketing* incentives, which are specifically excluded from the valuation of wholesale rates by 47 U.S.C. § 252(d)(3). (Pl.’s Mem. at 11.) The FCC has defined “promotions” to include “price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.” *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-58): First Report and Order, FCC No. 96-325, 11 FCC RCD 15499, (rel. Aug. 8, 1996), ¶ 948.

Pursuant to 47 U.S.C. § 252(e)(6), BellSouth has brought the matter to this Court to determine whether the Resale Orders are in fact contrary to the statutory provisions of the Act.

At this stage in the proceedings, BellSouth seeks a Preliminary Injunction prohibiting the Defendants from enforcing those provisions of the Resale Orders which would require ILECs to take into consideration the value of gift cards and other giveaways in the same manner that rate discounts which last for longer than ninety days are considered when arriving at the wholesale rate for telecommunications services for CLPs.

II. DISCUSSION

The "balance of hardships" test is used to determine the propriety of preliminary injunctive relief. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977). This test weighs the following four factors: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendants if the requested relief is granted; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *Id.* Further, the plaintiff bears the burden of establishing that each of the four elements supports granting the injunction. *Dirax Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1992).

A. Irreparable Harm to BellSouth in the Absence of a Preliminary Injunction

The question of irreparable harm to the plaintiff is the first factor to be considered in a motion for preliminary injunction. *Id.* If a plaintiff cannot establish that irreparable harm is likely to occur in the absence of a preliminary injunction, that failure alone is sufficient to deny injunctive relief. *Manning v. Hunt*, 119 F.3d 254, 266 (4th Cir. 1997). "Moreover, the required 'irreparable harm' must be 'neither remote nor speculative, but actual and imminent.'" *Dirax*, 952 F.2d at 812 (quoting *Tucker Anthony Realty Corp. v. Schiesinger*, 888 F.2d 969, 975 (2d Cir. 1995)). However, as the balance tips in favor of finding irreparable harm to plaintiff, there is a

lesser need for plaintiff to establish likelihood of success on the merits. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991).

In the instant case, BellSouth has established that it will suffer actual, imminent, and irreparable harm if the Court does not enter the requested preliminary injunction. BellSouth represented to the Court that implementation of the Resale Orders would require them to create significant changes in their marketing structure. The marketing efforts in North Carolina would be carried out in a substantially different manner than efforts in other states where BellSouth does business. Putting aside the large financial burden of this effort, the lasting impact that this two-tiered marketing could have on customer loyalty and BellSouth's goodwill in North Carolina cannot be understated. A North Carolina customer visiting Georgia would understandably become rather disgruntled to learn that the same benefits were not offered to him as were offered to BellSouth customers in Georgia.

Further, there would be the same loss of customer loyalty when North Carolina residents learn that many of the CLPs are able to offer much better incentives than BellSouth. Customer loyalty is not the type of loss that can be made whole with a court order at the end of a lawsuit. Additionally, there is the direct financial loss which will occur if the wholesale rates are suddenly decreased to comply with the Resale Orders. The beneficiaries of this decrease, the CLPs, are not even a party to this action.

In sum, if the Court does not enter a preliminary injunction, Defendants' ruling will result in irreparable harm to BellSouth.

P. Likelihood of Harm to Defendants if Preliminary Injunction is Granted

The Court finds that if the Resale Orders are implemented, the harm to BellSouth

certainly outweighs any harm to Defendants. In fact, the Defendants were unable to name any harm that they would incur as a result of a Preliminary Injunction. Defendants pointed out that the fourth factor, the public interest, should be considered in this step as well due to the fact that Defendants represent the public interest. However, there is no clear argument that the public interest would not be best served by granting this Preliminary Injunction. The Court has not been convinced that the Resale Orders will actually promote competition. At this point in the proceedings, there appears to be a valid argument that the Resale Orders are actually going to hinder competition in North Carolina. It is precisely the intent of the Act to foster competition for the public good.

Therefore, the likelihood of harm to BellSouth if the injunction is not granted significantly outweighs any possible harm to Defendants resulting from the imposition of the injunction.

C. BellSouth's Likelihood of Success on the Merits of its Claims

Since the Court finds that BellSouth would suffer irreparable harm in the absence of a preliminary injunction, the Court will not discuss in detail whether BellSouth has a likelihood of success on the merits of its claims. The Court notes, however, that BellSouth has sufficiently convinced the Court that this novel issue of law merits further review.

D. Public Interest

As discussed above, the Court further finds that the public interest is served by the issuance of the requested injunction. The impact of the Resale Orders would result in North Carolina residents being treated differently than similarly situated residents of other states through the interpretation of a federal law.

In conclusion, the Court finds that the entry of a preliminary injunction is necessary to protect BellSouth from actual, imminent and irreparable harm. Such harm to BellSouth significantly outweighs any harm that Defendants may incur as a result of the entry of the injunction.

E. Rule 65(c) of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure state that "[n]o . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). As noted in Rule 65, the amount of bond is within the discretion of the Court. *Maryland Dept. of Human Resources v. U.S. Dept. of Agriculture*, 576 F.2d 1462, 1483 (4th Cir. 1992). The Court here finds that a bond of \$100 is sufficient to cover Defendant's costs or damages should it later be determined that Defendant was wrongfully enjoined.

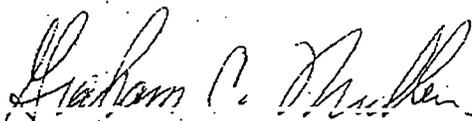
IT IS THEREFORE ORDERED that Plaintiff's Motion for Preliminary Injunction is hereby **GRANTED**. Pending a trial on the merits, Defendants are enjoined and restrained from enforcing Conclusion No. 5 of the Commission's December 22, 2004 Order Ruling on Motion Regarding Promotions, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"* Docket No. P-100, Sub-72b as well as the Commission's Conclusions regarding Resale Obligations and One-Time Gift Promotions in its June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, *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,"

Docket No. P-100, Sub-72b (pp. 5-7, therein).

IT IS FURTHER ORDERED that BellSouth shall post a bond of \$100.00.

Signed: August 12, 2005



Graham C. Mullen
Chief United States District Judge



EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:05CV345-MU

BELLSOUTH TELECOMMUNICATIONS,)
INC.,)
)
Plaintiff,)
)
vs.)
)
JO ANNE SANFORD, Chairman; ROBERT K.)
KOGER, Commissioner; ROBERT V. OWENS,)
JR., Commissioner; SAM J. ERVIN, IV,)
Commissioner; LORINZO L. JOYNER,)
Commissioner; JAMES Y. KERR, II,)
Commissioner; and HOWARD N. LEE,)
Commissioner (in their official capacities as)
Commissioners of the North Carolina Utilities)
Commission),)
)
Defendants.)
)

ORDER

This matter is before the court upon cross-motions for summary judgment filed by Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") and the Defendant Commissioners of the North Carolina Utilities Commission (the "Commissioners"). It appears to the court that there are no genuine issues of material fact, and this matter is now ripe for disposition.

BACKGROUND

BellSouth is an incumbent local exchange carrier ("ILEC"). Under the Telecommunications Act of 1996 (the "Act"), BellSouth, as an ILEC, is required to offer its telecommunications services to competing local providers ("CLPs") for resale at wholesale rates established by the North Carolina Utilities Commission (the "NCUC"). Specifically, the Act

requires ILECs to “offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” 47 U.S.C. § 251(c)(4). Wholesale rates are determined by State 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.”¹ 47 U.S.C. § 252(d)(3).

The Federal Communications Commission (“FCC”) has determined that the Act’s resale obligations extend to promotional price discounts offered on retail communications services. However, the FCC has expressly limited the scope of the term “promotions” to “price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.” *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499, (rel. Aug. 8, 1996), ¶ 948 (“First Report and Order”). The FCC 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 not subject to the wholesale rate obligation.” *Id.* at ¶¶ 949 & 950. Thus, 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.

BellSouth uses certain marketing incentives in all nine states in which it operates. These incentives include gift cards or other one-time giveaways that encourage customers to subscribe

¹The NCUC has established that CLPs may purchase BellSouth’s retail telecommunications services in North Carolina at a 21.5% wholesale discount less the retail price for business services and for 17.6% less than the retail price for residential services.

to BellSouth's telecommunications services. CLPs that compete with BellSouth regularly employ similar marketing practices. These marketing incentives are redeemable only for unaffiliated, that is, non-BellSouth, goods or services. Because these types of marketing incentives originate from unaffiliated companies, BellSouth is unable to track their usage or redemption rates.

In June of 2004, the Public Staff of the NCUC filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. One of the issues on which the Public Staff sought guidance was the following: "If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?" The Public Staff took the position that marketing incentives such as gift cards, checks, etc. "effectively" constitutes a discount on telecommunications services and are subject to resale obligations. On December 22, 2004, the NCUC issued its Order Ruling on Motion Regarding Promotions (the "First Resale Order"), holding that marketing incentives "are in fact promotional offers subject to the FCC's rules on promotion," and that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days." While acknowledging that marketing incentives "are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings," the NCUC nevertheless concluded that a marketing incentive "reduces the subscriber's cost for the service by the value received in the form of a gift card or other

giveaway.” First Resale Order, p. 11. Thus, the NCUC stated, “The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the ‘real’ retail rate.” Id.

On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, for Clarification, and for a Stay of the Commission’s December 22, 2004 Order. On June 3, 2005, the NCUC issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (the “Second Resale Order”). In this Order, the NCUC held that marketing incentives have the effect of lowering “the actual, ‘real’ retail rate.” Second Resale Order, p. 5. The NCUC further required BellSouth to determine “the price lowering impact of any such 90 day plus promotions on the real tariff or retail list price” and pass the benefit of such a reduction on to resellers through a wholesale discount on the “lower actual retail price.” Id. at p. 6.

BellSouth filed this action on August 2, 2005 seeking declaratory and injunctive relief with respect to the two Orders of the NCUC, alleging that the Orders violate the Act. BellSouth also filed a Motion for Preliminary Injunction seeking to enjoin enforcement of those provisions of the Orders requiring ILECs to take into consideration the value of gift cards and other giveaways in the same manner that rate discounts which last longer than ninety days are considered when arriving at the wholesale rate for telecommunications services for CLPs. After a hearing on August 11, 2005, this court granted BellSouth’s Motion for Preliminary Injunction. The parties have now filed their cross-motions for summary judgment.

DISCUSSION

BellSouth alleges that the NCUC's conclusions that BellSouth is required to offer CLPs a wholesale discount on marketing incentives (or the value thereof) in addition to the wholesale discount offered on its retail telecommunications services is in violation of the Telecommunications Act. The court reviews the NCUC's interpretations of the Act *de novo*. GTE South, Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999). However, "[a] 'state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes . . .'" *Id.* (quoting Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997)). The court has carefully reviewed the two Orders of the NCUC, the arguments of counsel, and the pertinent law, and concludes that the Orders of the NCUC are contrary to and in violation of the Act.

The first rule of statutory construction is that a court must look to the language of the statute. When examining the language of a statute, the court "must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The court may look beyond the express language of the statute only when the language of the statute is ambiguous or where a literal interpretation would thwart the purpose of the overall statutory scheme. U.S. v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978).

Looking to the language of the Act, Congress' intent is plain. Section 251 (c)(4) requires an ILEC to offer for resale "any telecommunications service" it provides at retail to subscribers who are not telecommunications carriers. There can be no argument that gift cards, checks, coupons for checks, and similar types of marketing incentives are "telecommunications services." Indeed, in its First Resale Order, the NCUC conceded that marketing incentives "are

not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service . . .” First Resale Order, p. 11.

As noted above, the FCC has determined that the Act’s resale obligations extend to *promotional price discounts* offered on retail communications services. In its First Report and Order, the FCC stated in unambiguous terms that “promotions” refers only to “*price discounts* from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.” First Report and Order, ¶ 948. 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. Moreover, a customer cannot use a Walmart gift card or coupon to pay her phone bill. 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. Accordingly,

IT IS THEREFORE ORDERED that BellSouth's Motion for Summary Judgment is hereby GRANTED, and the Commissioners' Motion for Summary Judgment is hereby DENIED.

Signed: May 15, 2006

A handwritten signature in cursive script, reading "Graham C. Mullen", written over a horizontal line.

Graham C. Mullen
United States District Judge



EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO.: _____

BELLSOUTH TELECOMMUNICATIONS,
INC.,

Plaintiff,

vs.

IMAGE ACCESS, INC. d/b/a NEWPHONE,

Defendant.

COMPLAINT

BellSouth Telecommunications, Inc. ("BellSouth"), complaining of the Defendant, Image Access, Inc. d/b/a NewPhone ("Image Access"), alleges and says that:

PARTIES, JURISDICTION, AND VENUE

1. BellSouth is a Georgia corporation with its principal place of business in Atlanta, Georgia. BellSouth is an Incumbent Local Exchange Carrier ("ILEC") under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "Act").

2. Image Access is a Louisiana corporation with its principal place of business in Metairie, Louisiana. Image Access is a Competitive Local Exchange Carrier under the Act, also known as a Competing Local Provider ("CLP").

3. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1332 in that BellSouth and Image Access are citizens of different states, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

4. Venue is proper in this district under 28 U.S.C. § 1391(a).

**BELLSOUTH'S RESALE OBLIGATIONS UNDER THE ACT AND
THE BELLSOUTH-IMAGE ACCESS INTERCONNECTION AGREEMENTS**

5. To foster CLPs' ability to compete with ILECs in the telecommunications marketplace, the Act imposes specific requirements on BellSouth to make its retail telecommunications services available to CLPs such as Image Access at significantly discounted wholesale rates. Image Access, in turn, can then resell those telecommunications services to its customers. Specifically, section 251(c)(4)(A) of the Act requires BellSouth "to offer for resale at wholesale rates any telecommunications service that [it] provides at retail to subscribers who are not telecommunications carriers."

6. Rather than attempting to impose a uniform set of terms for all ILEC/CLP arrangements, the Act obligates ILECs and CLPs to negotiate Interconnection Agreements to implement the specific details of the parties' relationship.

7. On or about June 19, 2002, the BellSouth and Image Access entered into an Interconnection Agreement (hereinafter, the "2002 ICA") in which BellSouth agreed, among other things, to offer various telecommunications services for resale to Image Access at specified wholesale rates and subject to specified exclusions and limitations. 2002 ICA, Attachment 1, section 3.1. The 2002 ICA covered the resale of telecommunications services to Image Access in all nine states in which BellSouth operates as an ILEC. A copy of the pertinent provisions of the 2002 ICA is attached hereto as Exhibit A.

8. In consideration for BellSouth's agreement to make its retail telecommunications services available for resale, Image Access agreed to make payment to BellSouth for all services billed, in immediately available funds, and that said payments would be due by the next bill date (i.e., the same date in the following month as the bill date). 2002 ICA, Attachment 1, sections 7.2 & 7.5.

9. Image Access further agreed that if any portion of its payment is received by BellSouth after the due date or in funds that are not immediately available to BellSouth, then a late payment penalty shall be due to BellSouth. 2002 ICA, Attachment 1, section 7.9.

10. The 2002 ICA contained no provision allowing Image Access to withhold any amounts due to BellSouth based on the value of any cash back promotions or other marketing incentives that BellSouth employed as part of its marketing strategy.

11. BellSouth and Image Access amended the 2002 ICA in November 2003, July 2004, and November 2004, but the provisions addressing BellSouth's resale obligations and Image Access' corresponding payment obligations remained unchanged.

12. In March, 2006, BellSouth and Image Access entered into a second Interconnection Agreement (hereinafter, the "2006 ICA"; the 2002 ICA and 2006 ICA shall be referred to collectively as the "ICAs"). A copy of the pertinent provisions of the 2006 ICA is attached hereto as Exhibit B. The 2006 ICA similarly provides that BellSouth agrees to offer various telecommunications services for resale to Image Access at specified wholesale rates and subject to specified exclusions and limitations. 2006 ICA, Attachment 1, section 4. The 2006 ICA covers the resale of telecommunications services to Image Access in all nine states in which BellSouth operates as an ILEC.

13. In consideration for BellSouth's agreement to make its retail telecommunications services available for resale, Image Access agreed to make payment to BellSouth for all services billed, in immediately available funds, and that said payments would be due by the next bill date (i.e., the same date in the following month as the bill date). 2006 ICA, Attachment 7, sections 1.4 & 1.4.1.

14. Image Access further agreed that if any portion of its payment is received by BellSouth after the due date or in funds that are not immediately available to BellSouth, then a late payment penalty shall be due to BellSouth. 2006 ICA, Attachment 7, section 1.4.3.

15. The 2006 ICA contained no provision allowing Image Access to withhold any amounts due to BellSouth based on the value of any cash back promotions or other marketing incentives that BellSouth employed as part of its marketing strategy.

RELATED LITIGATION CONCERNING BELL SOUTH'S RESALE OBLIGATIONS

16. The Federal Communications Commission ("FCC") has concluded that ILECs' statutory resale obligation includes promotional price discounts offered on retail telecommunications services. The FCC has defined "promotions" to include "price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499, (rel. Aug. 8, 1996) ("First Report and Order"), para. 948.

17. The FCC has 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." First Report and Order, paras. 949 & 950. Thus, 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 discount.

18. Section 252(d)(3) of the Act directs state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier."

19. On June 25, 2004, the Public Staff of the North Carolina Utilities Commission ("Public Staff") filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. Among the issues for which the Public Staff sought guidance was the following: "If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?"

20. After receiving multiple rounds of comments from ILECs and CLPs alike, on December 22, 2004, the Commission issued its Order Ruling on Motion Regarding Promotions (the "First Resale Order"). A copy of the First Resale Order is attached hereto as Exhibit C. The Commission erroneously ruled that marketing incentives "are in fact promotional offers subject to the FCC's rules on promotions" and held that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." First Resale Order, pp. 11-12.

21. On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, For Clarification, and for a Stay of the Commission's December 22, 2004 Order.

22. On June 3, 2005, the Commission issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay ("Second Resale Order"). A copy of the Second Resale Order is attached hereto as Exhibit D. The Commission effectively rewrote section 252(d)(3) of the Act by holding that marketing incentives have the effect of lowering "the actual, 'real' retail rate." Second Resale Order, p. 5. Having so held, the

Commission required that BellSouth determine “the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price” and pass the benefit of such a reduction on to resellers through a wholesale discount on the “lower actual retail price.” Second Resale Order, p. 6. The Commission provided no guidance on how this hypothetical “real retail price” should be calculated, instead stating that it “intentionally left this matter open so that the parties would be free to negotiate.” *Id.* If a negotiated solution is not possible, the ILECs and CLPs may bring the matter before the Commission, but if it is too difficult to calculate the “real retail price,” the Commission will presume that a marketing incentive “would be unreasonable and discriminatory.” Second Retail Order, pp. 6-7.

23. On June 27, 2005, BellSouth filed a Motion for Extension of Time to Appeal the Second Resale Order. On June 28, 2005, the Commission granted this Motion and extended the time for BellSouth to appeal the Second Resale Order to August 2, 2005.

24. On August 2, 2005, BellSouth filed a Complaint against the North Carolina Utilities Commission and the individual Commissioners in the United States District Court for the Western District of North Carolina (Civil Action No. 3:05-CV-345-MU) (hereinafter, the “NCUC Action”) seeking, among other things, a declaratory judgment that the provisions of the First and Second Resale Orders concerning BellSouth’s resale obligations for marketing incentives violated federal law. A copy of this Complaint is attached hereto as Exhibit E. BellSouth also filed a motion for a temporary restraining order and a preliminary injunction preventing enforcement of portions of the First and Second Resale Orders during the pendency of the action.

25. On August 2, 2005, the Honorable Graham C. Mullen, Chief United States District Court Judge, entered an Order temporarily restraining the Commission and the individual Commissioners from enforcing Conclusion No. 5 of the First Resale Order and the

Commission's Conclusions regarding resale obligations and one-time gift promotions in its Second Resale Order. A copy of this Order is attached hereto as Exhibit F.

26. On August 12, 2005, following a hearing, Judge Mullen entered an Order preliminarily enjoining enforcement of Conclusion No. 5 of the First Resale Order and the Commission's Conclusions in the Second Resale Order regarding resale obligations and one-time gift promotions. A copy of this Preliminary Injunction Order is attached hereto as Exhibit G. In short, the Court preserved the status quo, in which BellSouth was not obligated to provide CLPs with an additional discount based on some value associated with marketing incentives such as gift cards or cash-back coupons.

27. The parties to the NCUC Action have filed cross-motions for summary judgment, and briefing on those motions has not been completed.

IMAGE ACCESS' BREACH OF THE 2002 AND 2006 ICA'S

28. In October 2004, Image Access began withholding payment for amounts billed by BellSouth for telecommunications services sold to Image Access under the resale provisions of the 2002 ICA. Image Access claimed that it was entitled to the value of various cash-back coupon or gift card promotions utilized by BellSouth as marketing incentives. The basis for Image Access' claim was that these marketing incentives were "promotions" as that term was used by the FCC in its First Report and Order, *see* Paragraph 16, *supra*, and that it was entitled to receive credit for those alleged promotions at the discounted wholesale rate, provided that they were not in effect for 90 days or less.

29. Each month since this dispute arose, Image Access has transmitted to BellSouth a list of end users for whom Image Access claims it should receive a credit for various marketing incentives utilized by BellSouth. For example, for every customer in a given month to whom

Image Access contends it should be able to resell a \$50 gift card incentive, Image Access withholds payment for services it purchases under the resale provisions of the ICA.

30. For each month since October 2004, Image Access has continued to withhold increasing amounts of money owed to BellSouth based on this erroneous interpretation of the Act and the ICAs. To date, Image Access has wrongfully withheld approximately \$1,782,125 owed to BellSouth under the terms of the ICAs. This sum includes amounts that Image Access owes to BellSouth for purchases of telecommunications services in all nine states in which BellSouth operates as an ILEC.

31. In addition, Image Access has also wrongfully withheld \$300,462.14 in late payment penalties that are due to BellSouth under the terms of the ICAs.

32. Image Access has continued to wrongfully withhold amounts owed to BellSouth notwithstanding the facts that (a) this Court has preliminarily enjoined the enforcement of those portions of the Commission's First and Second Resale Orders that would entitle Image Access to take such action, and (b) none of the state commissions in the other eight states in which BellSouth operates as an ILEC have entered orders similar to the ones that BellSouth has challenged in the NCUC Action. As a result, Image Access' actions are contrary to existing law in all nine states in which BellSouth operates as an ILEC.

FIRST CLAIM FOR RELIEF
(Breach of Contract)

33. BellSouth restates and realleges the allegations in paragraphs 1-32 of this Complaint as if fully set forth herein.

34. The ICAs referenced above embody the terms of valid and enforceable contracts by and between BellSouth and Image Access.

35. BellSouth has performed all of its duties and obligations under the ICAs and is entitled to payment in full for all telecommunications services sold to Image Access under the Resale provisions of the ICAs.

36. By wrongfully withholding payment and refusing to pay BellSouth amounts due under the terms of the ICAs, Image Access has materially breached the ICAs.

37. As a result of Image Access' breach of contract, BellSouth has suffered actual damages in an amount to be determined at trial, but in excess of \$2,000,000.

SECOND CLAIM FOR RELIEF
(Breach of Covenant of Good Faith and Fair Dealing)

38. BellSouth realleges and incorporates herein by reference the allegations in paragraphs 1-37 of this Complaint.

39. The ICAs contain an implied covenant of good faith and fair dealing.

40. Image Access has breached its covenant of good faith and fair dealing by refusing to pay BellSouth amounts due under the terms of the ICAs.

41. As a result of Image Access' breach of its implied covenant of good faith and fair dealing, BellSouth has suffered actual damages in an amount to be determined at trial, but in excess of \$2,000,000.

PRAYER FOR RELIEF

WHEREFORE, plaintiff BellSouth Telecommunications, Inc. respectfully prays for judgment as follows:

1. That BellSouth recover damages in an amount to be determined at trial, but in excess of \$2,000,000, plus interest as allowed by law;
2. That BellSouth recover its reasonable attorneys' fees and costs of suit incurred herein;

3. That this matter be tried before a jury; and
4. That the Court grant BellSouth such additional relief as the Court may deem just and proper.

Respectfully submitted, this 4th day of April, 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.

By: s/ Kerry L. Traynum
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N.C. State Bar No. 20048
Kerry L. Traynum
N.C. State Bar No. 32968
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EXHIBIT I

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

P-100
Sub 72b

Civil Action 3:05-CV-345-MU

BELLSOUTH TELECOMMUNICATIONS,)
INC.,)

Plaintiff,)

v.)

JO ANNE SANFORD, Chairman;)
WILLIAM THOMAS CULPEPPER, III,)
Commissioner; ROBERT V. OWENS, JR.,)
Commissioner; SAM J. ERVIN, IV,)
Commissioner; LORINZO L. JOYNER,)
Commissioner; JAMES Y. KERR, II,)
Commissioner; and HOWARD N. LEE,)
Commissioner (in their official capacities)
as Commissioners of the North Carolina)
Utilities Commission),)

Defendants.)

OFFICIAL COPY

Notice of Appeal

FILED

JUN 12 2006

Clerk's Office
N.C. Utilities Commission

Notice is hereby given that Jo Anne Sanford, William Thomas Culpepper, III, Robert V.

Owens, Jr., Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II, and Howard N. Lee in their official capacities as Commissioners of the North Carolina Utilities Commission (together, "the Commissioners"), all of the defendants in the above-named case, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the Order granting Plaintiff BellSouth's Motion for Summary Judgment and denying the defendant Commissioners' Motion for Summary Judgment rendered in this action on the 15th day of May, 2006, and the judgment entered the 16th of May, 2006 in accordance with that Order.

Clerk
AG & Force
Bennink
Long
Hinton
Hoover
Sharpe
Kite

Wigfall
Kelly
Paschal
Sessions
Gruber
2 PSeco

3 PSLegal
2 PSEcts
3 PSComm

ROY COOPER
Attorney General

s/ Margaret A. Force
Margaret A. Force
Assistant Attorney General
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North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602

Counsel for Defendant Commissioners

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing document in the above titled action upon all other parties to this cause by depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Frank A. Hirsch, Jr.
Matthew P. McGuire
Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
4140 Parklake Ave.
Raleigh, NC 27612

This the 9th day of June, 2006.

s/ Margaret A. Force
Margaret A. Force
Assistant Attorney General