

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

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

WC Docket No. 06-129

JOINT COMMENTS

ABC TELECOM D/B/A HOME PHONE  
ALTERNATIVE PHONE, INC.  
AMERIMEX COMMUNICATIONS CORP.  
BUDGET PHONE  
CGM, INC.  
CONNECT PAGING, INC. D/B/A GET A  
PHONE  
DPI TELECONNECT  
EXPRESS PHONE SERVICE, INC.  
FLATEL, INC.  
GANOCO, INC. D/B/A AMERICAN DIALTONE  
LOST KEY TELECOM  
QUALITY TELEPHONE  
SEVEN BRIDGES COMMUNICATIONS  
SMART TELECOM CONCEPTS, LLC  
NALA/PCA - THE NATIONAL  
ALTERNATIVE LOCAL EXCHANGE  
CARRIER ASSOCIATION/ PREPAID  
COMMUNICATIONS ASSOCIATION

July 31, 2006

## SUMMARY

The Joint Commenters fully support NewPhone's Petition for Declaratory Ruling. Incumbent local exchange carriers ("ILECs") regularly use cash-back, non-cash-back, and bundled promotional offers to discount the price of telecommunications services to retail customers, but then refuse to permit resellers to use that same price as the retail price to which the wholesale discount is applied. The ILECs' actions are unreasonable and discriminatory in violation of the Communications Act of 1934, as amended, as well as the Commission's rules and policies concerning the resale of telecommunication services. Additionally, the ILECs' refusal to allow carriers to resell their promotions as of the first day those promotions are offered to retail subscribers is *per se* unreasonable and discriminatory.

The incumbents' unlawful practices strike at the heart of competition and threaten to destroy all remaining resale competition by creating a classic "price squeeze" in which the incumbents sell telecommunications services to their retail customers for less than resellers can obtain the same services at wholesale.

Accordingly, the Joint Commenters request that the Commission grant NewPhone's Petition for Declaratory Ruling in its entirety.

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	2
II. ARGUMENT.....	5
A. BellSouth’s Practice of Requiring Resellers to Base their Wholesale Rates on Retail Rates that Exclude the Value of Cash-Back and Non-Cash-Back Promotions Is Unreasonable and Discriminatory in Violation of the Act and the Commission’s Rules and Policies .....	5
B. BellSouth’s Practice of Requiring Resellers to Base their Wholesale Rates on Retail Rates that Exclude the Value of Bundled Promotions is Unreasonable and Discriminatory in Violation of the Act and the Commission’s Rules and Policies.....	10
C. ILEC Practices Regarding the Timing of Promotions are Unreasonable and Discriminatory in Violation of the Act and the Commission’s Rules and Policies .....	13
III. CONCLUSION.....	15

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<b>as Amended, and Sections 51.601 <i>et seq.</i></b>	)	
<b>of the Commission's Rules</b>	)	

**JOINT COMMENTS**

ABC Telecom d/b/a Home Phone, Alternative Phone, Inc., AmeriMex Communications Corp., Budget Phone, CGM, Inc., Connect Paging, Inc. d/b/a Get A Phone, dPi Teleconnect, Express Phone Service, Inc., FLATEL, Inc., Ganoco, Inc. d/b/a American Dialtone, Lost Key Telecom, Quality Telephone, Seven Bridges Communications, Smart Telecom Concepts, LLC, and the National Alternative Local Exchange Carrier Association/Prepaid Communications Association (“NALA/PCA”), on behalf of all of its member companies<sup>1</sup> (collectively, the “Joint Commenters”), through undersigned counsel, hereby respond to the Federal Communication Commission’s (“FCC” or “Commission”) July 10, 2006 *Public Notice* requesting comment on the Petition for Declaratory Ruling filed by Image Access, Inc. d/b/a NewPhone (“NewPhone”) in the above-captioned docket.<sup>2</sup>

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<sup>1</sup> NALA/PCA is a non-profit association dedicated to ensuring that the concerns of the prepaid dialtone industry are heard in federal and state regulatory and legislative arenas.

<sup>2</sup> *Petition of Image Access d/b/a NewPhone for Declaratory Ruling Pleading Cycle Established*, Public Notice, WC Docket No. 06-129, DA 06-1421 (rel. July 10, 2006).

Joint Commenters provide resold local exchange services to thousands of customers throughout the United States and therefore have a substantial interest in this proceeding.<sup>3</sup> As provided in further detail below, Joint Commenters fully support NewPhone's Petition for Declaratory Ruling ("Petition") and urge the Commission to grant the Petition in its entirety.

## I. INTRODUCTION

As NewPhone's Petition makes clear, Congress has expressly recognized the importance of resale by making it one of the three methods of entry into the local exchange market.<sup>4</sup> In Section 251(c)(4), Congress required 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 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.<sup>5</sup>

In implementing Congress' mandate under Section 251(c)(4), the Commission explained that "it is consistent with the procompetitive goals of the 1996 Act to presume resale

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<sup>3</sup> CGM, Inc., Lost Key Telecom, and Smart Telecom Concepts are telecommunications consultants that offer third-party billing, auditing, reconciliation, dispute management and provisioning optimization services to telecommunications providers. CGM, Lost Key and Smart Telecom do not offer or provide telecommunications services to end users. See the Declaration of Thad Pellino of Smart Telecom Concepts, attached hereto as *Exhibit A*.

<sup>4</sup> See, e.g., Petition at 11.

<sup>5</sup> 47 U.S.C. §251(c)(4) (emphasis added).

restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4).”<sup>6</sup> Thus, the Commission determined that “Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates ‘any telecommunications service’ that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings...”<sup>7</sup> The Commission also determined that “promotional prices offered for a period of 90 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 section 251(c)(4)(A).”<sup>8</sup>

The Joint Commenters agree with NewPhone that preserving resale competition is even more important now in light of the Commission’s recent series of orders limiting ILEC unbundling obligations.<sup>9</sup> The Commission just recently reaffirmed the important role that resale plays in fostering local exchange competition in its December, 2005 *Qwest Omaha Forbearance Order*. In that order, the Commission concluded 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,” and therefore found that “section 251(c)(4) resale continues to be necessary to existing competition and makes

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<sup>6</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶939 (rel. Aug. 8, 1996) (“*Local Competition Order*”).

<sup>7</sup> *Id.* ¶ 948.

<sup>8</sup> *Id.* ¶ 950.

<sup>9</sup> *See, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) (“*Triennial Review Order*”) (“*TRO*”); *See also, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) (“*Triennial Review Remand Order*”) (“*TRRO*”).

future competitive entry possible.”<sup>10</sup> The Commission must demonstrate a similarly strong commitment here, where the ILECs’ resale practices strike at the very heart of competition, as explained below. This is especially the case because promotions (either as cash-back, non-cash-back or other giveaways, or as part of bundled offerings) are the norm in the telecommunications industry today. For resale to be a viable competitive option, the value of these promotions must be taken into account to calculate an “effective retail rate.”

As NewPhone demonstrates in its Petition, BellSouth has severely restricted, and in some cases altogether prohibited, the resale of certain telecommunications services at wholesale rates by refusing to make promotional price discounts given to retail subscribers available to resellers, or by prohibiting resale in the first instance.<sup>11</sup> Having effectively limited local exchange competition via unbundled network elements, BellSouth is now focused on systematically destroying all resale competition through the use of its unreasonable and discriminatory resale practices, as described in detail below. Accordingly, the Joint Commenters maintain that the Commission must act swiftly to ensure that resale remains a viable alternative for competitors and consumers by declaring *inter alia* that ILECs are required under the Act and the Commission’s rules to ensure that resellers are able to resell at the “effective retail rate” of the telecommunications services included in an ILEC’s cash-back, non-cash-back, and bundled service promotions, minus the wholesale discount, in cases where such promotions last longer than 90 days.

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<sup>10</sup> See Petition at 12. *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, ¶88 (“*Qwest Omaha Forbearance Order*”).

<sup>11</sup> Petition at 2-3.

**II. ARGUMENT**

**A. BELLSOUTH’S PRACTICE OF REQUIRING RESELLERS TO BASE THEIR WHOLESALE RATES ON RETAIL RATES THAT EXCLUDE THE VALUE OF CASH-BACK AND NON-CASH-BACK PROMOTIONS IS UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF THE ACT AND THE COMMISSION’S RULES AND POLICIES**

BellSouth has made extensive use of cash-back and non-cash-back promotions.

However, BellSouth refuses to allow Joint Commenters to obtain and resell the telecommunications services subject to the cash-back, check, gift cards and other discounts that are part and parcel of BellSouth’s promotions. This is a clear violation of the Act and the Commission’s rules, as these promotions effectively reduce the price of the telecommunications service purchased by retail subscribers by the value of the promotions, and undercuts the ability of Joint Commenters and others resellers to compete.<sup>12</sup>

North Carolina	After 8/14/06 Increase		Retail Rate
	Retail Rate	Resale Rate	w/Cash Back
Complete Choice	\$ 30.00	\$ 23.55	\$ 19.85
FCC Charge for Network Access	\$ 6.50	\$ 6.50	\$ 4.30
Non Listed Directory Listing	\$ 1.89	\$ 1.48	\$ 1.25
Directory Assistance (5 calls)	\$ 5.60	\$ 4.39	\$ 3.70
Pay Per Use (5 calls)	\$ 5.25	\$ 4.12	\$ 3.47
<b>Total</b>	<b>\$ 49.24</b>	<b>\$ 40.04</b>	<b>\$ 32.57</b>
Effective Resale Discount to CLEC		18.7%	
\$100 Cash Back Effective Discount			33.8%

Note: Assumes 6 month customer life

To better illustrate the point, take the case of a North Carolina residential customer. As the chart above demonstrates, after BellSouth’s proposed rate increase goes into effect on August 14, 2006, a customer that subscribes to BellSouth’s Complete Choice plan for local service will pay approximately \$49 (not including taxes). That figure includes the cost of

<sup>12</sup> 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).

ancillary services such as directory assistance and the Commission-mandated subscriber line charge. At the North Carolina Utilities Commission-approved wholesale discount, Joint Commenters can obtain the same local service package for resale at a cost of approximately \$40, giving Joint Commenters a margin of about \$9. However, if the subscriber takes advantage of BellSouth's \$100.00 cash-back or \$100 Visa Rewards Card promotion,<sup>13</sup> he or she will pay an effective retail of \$32.57, which is below the cost at which Joint Commenters can even obtain those services. Thus, BellSouth's promotions create a "price squeeze" for Joint Commenters and render them unable to compete with BellSouth.

The chart below provides another example of a cash-back promotion currently available on BellSouth's web site.<sup>14</sup> As shown below, the total retail price (*i.e.*, the value) of the stand-alone components in the package is approximately \$95. However, if retail customers purchase this package from BellSouth, because of the cash-back promotional discounts, the "effective" retail discount is nearly 42%, or about \$55. On the other hand, when North Carolina carriers cannot avail themselves of this promotional discount, they receive only a wholesale discount of 21.5%, which creates a classic prize squeeze in which BellSouth sells these service at retail for less than resellers can obtain those the same services from BellSouth at wholesale. That is, resellers must pay about \$75 to obtain what BellSouth sells to its retail customers for approximately \$55.

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<sup>13</sup> See Petition at Exhibit A.

<sup>14</sup> See <<http://www.bellsouth.com/consumer/answers/answerspromo.html?src=rhpmg>>. A copy of BellSouth's promotion is attached hereto as **Exhibit B**.

<b>BellSouth Promotional Offer as of 7/21/06</b>		
<b>Bundle of Services (North Carolina)</b>	<b>Retail Rate</b>	<b>Cash Back Promotion</b>
Complete Choice (Local)	\$ 30.00	
Unlimited Long Distance Plan	\$ 24.99	\$ 25.00
Cingular Wireless	\$ 39.99	\$ 75.00
BellSouth Long Distance - online orders only		\$ 25.00
BellSouth Complete Choice plan - online orders only		\$ 25.00
<b>Total Cash Back Amount</b>		<b>\$ 150.00</b>
<b>Bell South Retail Effective Discount on Local</b> (Assume 12 month customer life)	<b>41.7%</b>	
<b>CLEC Resale Discount (North Carolina)</b>	<b>21.5%</b>	

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.”<sup>15</sup> 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.”<sup>16</sup> 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.”<sup>17</sup> 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.<sup>18</sup>

As demonstrated above, BellSouth today competes by offering a cash-back promotion that the end user views as reducing the retail price; yet, Joint Commenters, because of BellSouth’s illegal actions, cannot do the same. Joint Commenters’ inability to resell at the same

<sup>15</sup> 47 U.S.C. §251(c)(4)(B).

<sup>16</sup> *Local Competition Order*, 11 FCC Rcd. at 15966, ¶939.

<sup>17</sup> 47 C.F.R. §51.605(e).

<sup>18</sup> 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.

rates, terms and conditions (minus the wholesale discount, in cases of long-term promotions) under which BellSouth offers such services to its retail customers is patently discriminatory. Moreover, BellSouth's refusal to provide Joint Commenters the value of its cash-back promotions is not a "narrowly tailored" restriction. To the contrary, it is openly anticompetitive. BellSouth's practice constitutes an unreasonable restriction on resale in violation of Section 251(c)(4)(B), as well as Section 51.605(e) of the Commission's rules.

Furthermore, BellSouth's unreasonable and discriminatory conduct is only exacerbated every time BellSouth raises its rates for standalone voice services and increases the use of promotional offerings. In North Carolina, for instance, BellSouth has raised its rates twice in the last year or so -- first in July, 2005 and the second increase is slated to go into effect this August. As the chart below demonstrates, BellSouth has increased many of its rates 20% to 40%, with some increases as high as 75%, all in the past 12 months.

Residential Services	Effective Date	North Carolina		% Increase
		Old Rate	New Rate	
<b>Complete Choice</b>	7/22/2005	\$ 29.02	\$ 30.03	3.5%
<b>Features</b>				
Anonymous Call Rejection	7/29/2006	\$ 3.50	\$ 4.00	14.3%
Speed Call 30	7/29/2006	\$ 4.75	\$ 5.70	20.0%
Speed Call 8	7/29/2006	\$ 2.60	\$ 3.12	20.0%
Call Trace	7/29/2006	\$ 4.95	\$ 5.94	20.0%
Preferred Call Forwarding	7/29/2006	\$ 4.95	\$ 5.94	20.0%
Repeat Dialing	7/29/2006	\$ 4.95	\$ 5.94	20.0%
Call Block	7/29/2006	\$ 4.95	\$ 5.94	20.0%
Call Selector	7/29/2006	\$ 4.95	\$ 5.94	20.0%
Call Forward Variable	7/29/2006	\$ 3.05	\$ 3.66	20.0%
Remote Access to Call Forwarding	7/29/2006	\$ 6.15	\$ 7.00	13.8%
Three Way Calling	7/29/2006	\$ 4.35	\$ 5.22	20.0%
Three Way Calling w/Transfer	7/29/2006	\$ 5.85	\$ 6.95	18.8%
RingMaster	7/29/2006	\$ 4.60	\$ 5.00	8.7%
RingMaster II	7/29/2006	\$ 5.95	\$ 7.00	17.6%
<b>Pay Per Use</b>				
BusyConnect	8/14/2006	\$ 0.75	\$ 1.05	40.0%
Call Return	8/14/2006	\$ 0.75	\$ 1.05	40.0%

Repeat Dialing	8/14/2006	\$ 0.75	\$ 1.05	40.0%
Three Way Calling	8/14/2006	\$ 0.75	\$ 1.05	40.0%
<b>Calling Plans</b>				
AreaPlus w/CompleteChoice	7/29/2006	\$ 39.40	\$ 41.00	4.1%
AreaPlus w/o CompleteChoice	7/29/2006	\$ 26.55	\$ 28.00	5.5%
<b>Directory Assistance</b>				
Directory Assistance (local and expanded)	8/14/2006	\$ 0.82	\$ 1.12	36.6%
Directory Assistance (outside local and expanded area but in same area code)	8/14/2006	\$ 0.80	\$ 1.35	68.8%
Directory Assistance (national)	8/14/2006	\$ 1.15	\$ 1.35	17.4%
<b>Operator Assisted Surcharge</b>				
Station-station customer dialed credit card local	8/14/2006	\$ 0.65	\$ 0.95	46.2%
Operator asst'd person-person local	8/14/2006	\$ 2.22	\$ 2.52	13.5%
Operator asst'd station-station	8/14/2006	\$ 1.10	\$ 1.40	27.3%
Operator Interrupt	8/14/2006	\$ 0.45	\$ 0.75	66.7%
Operator Verification	8/14/2006	\$ 0.40	\$ 0.70	75.0%
<b>Directory Listing</b>				
Nonpublished	7/29/2006	\$ 2.38	\$ 2.88	21.0%
Nonlisted	7/29/2006	\$ 1.39	\$ 1.89	36.0%

Assuming Joint Commenters do not increase the rates it charges its own customers, a 10% gross margin that existed a year ago is now at 0%, as indicated in the chart below. Naturally, Joint Commenters have no choice but to raise their retail rates, making it even more difficult to compete.

North Carolina	Prior to 7/22/05 Increase		After 7/22/05 Increase		After 8/14/06 Increase	
	Retail Rate	Resale Rate	Retail Rate	Resale Rate	Retail Rate	Resale Rate
Complete Choice	\$ 29.00	\$ 22.76	\$ 30.00	\$ 23.55	\$ 30.00	\$ 23.55
FCC Charge for Network Access	\$ 6.50	\$ 6.50	\$ 6.50	\$ 6.50	\$ 6.50	\$ 6.50
Non Listed Directory Listing	\$ 1.39	\$ 1.09	\$ 1.39	\$ 1.09	\$ 1.89	\$ 1.48
Directory Assistance (5 calls)	\$ 4.10	\$ 3.22	\$ 4.10	\$ 3.22	\$ 5.60	\$ 4.40
Pay Per Use (5 calls)	\$ 3.75	\$ 2.94	\$ 3.75	\$ 2.94	\$ 5.25	\$ 4.12
<b>Total</b>	<b>\$ 44.74</b>	<b>\$ 36.51</b>	<b>\$ 45.74</b>	<b>\$ 37.30</b>	<b>\$ 49.24</b>	<b>\$ 40.05</b>
% Increase in Monthly CLEC Cost				2.2%		9.7%
CLEC Customer Retail Rate		\$ 40.00		\$ 40.00		\$ 40.00
<b>CLEC Gross Margin</b>		10%		7%		0%
Effective Resale Discount to CLEC						18.7%
\$100 Cash Back Effective Discount						33.8%
(Assumes 6 month period)						

Joint Commenters contend that BellSouth's retail rate increases, the prevalence with which it offers cash-back and non-cash-back promotions, and the resulting affects of those actions on its competition, are not simply happenstance. Rather, they are part of a concerted effort by BellSouth to strategically distance itself from and eliminate its resale competition. In light of the BellSouth's predatory, unreasonable, and discriminatory conduct, Joint Commenters support NewPhone's request for a declaration 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. Likewise, Joint Commenters agree that the Commission should also declare that for all promotions, regardless of length, 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.

**B. BELL SOUTH'S PRACTICE OF REQUIRING RESELLERS TO BASE THEIR WHOLESALE RATES ON RETAIL RATES THAT EXCLUDE THE VALUE OF BUNDLED PROMOTIONS IS UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF THE ACT AND THE COMMISSION'S RULES AND POLICIES**

BellSouth also discriminates against Joint Commenters through the use of its bundled promotions, which BellSouth increasingly offers.<sup>19</sup> BellSouth offers two basic

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<sup>19</sup> See <<http://www.bellsouth.com/consumer/answers/answerspromo.html?src=rhpmg>>.

categories of bundles -- “pure” telecommunications bundles and “mixed” bundles. Pure telecommunications bundles are comprised solely of telecommunications services and typically include local exchange and long distance service. A mixed bundle is comprised of telecommunications services, such as local exchange service, with a non-telecommunications services, such as direct broadcast satellite service or Internet access. Through the use of bundling, BellSouth is able to disguise the true retail price of the telecommunications services provided in the bundle. As demonstrated below, BellSouth’s conduct is unreasonable and discriminatory because BellSouth applies the wholesale avoided cost discount to its tariffed, stand-alone retail rate rather than to the true rate -- the “effective retail rate” -- at which BellSouth offers the bundled telecommunications service to its own subscribers.

BellSouth Bundle of Services	BellSouth Retail Rate	Bundled Rate	Resale Rate
Local Service + 2 calling features	\$ 27.00	\$ 11.05	\$ 21.11
BellSouth Long Distance for \$.05 per min	\$ 5.95	\$ 3.95*	n/a
<b>Total Price</b>	<b>\$ 32.95</b>	<b>\$ 15.00</b>	<b>\$ 21.11</b>
<b>BellSouth Effective Retail Discount for Entire Bundle</b>		<b>55.5%</b>	
<b>BellSouth Effective Retail Discount for Local Service Only</b>		<b>59.1%</b>	
(Assume 12 month customer life)			
<b>CLEC Resale Discount (FL)</b>			<b>21.8%</b>

\* Value determined by \$3.95 monthly billing fee after promo expiration

The chart above provides an example of a bundled promotion offered by BellSouth. The bundle is comprised of local exchange service, with two calling features, e.g. caller ID, call waiting, plus long distance. As shown below, the total retail price (i.e., the value) of the stand-alone components in the package is approximately \$33. However, if retail customers purchase this bundle from BellSouth, the retail discount on the local service component is roughly 59%, resulting in an “effective retail rate” of about \$11. Florida carriers, on the other hand, only receive a wholesale discount of 21.8%, which creates a prize squeeze in

which BellSouth sells these service at retail for less than resellers can obtain those the same services from BellSouth at wholesale. That is, resellers must pay about \$21 to obtain what BellSouth sells to its retail customers for approximately \$11.

Additionally, BellSouth forecloses carriers from reselling the entire bundle depicted above, as BellSouth claims that it is not required to provide *nonregulated services* such as long distance to telecommunications carriers for resale. In other words, BellSouth treats bundles containing long distance products as “mixed bundles.”

As the North Carolina Utilities Commission stated in its *Second Resale Order*, 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 who are not telecommunications carriers. It follows from Section 251(c)(4) that an ILEC must sell all telecommunications service, *whether regulated or nonregulated*, at the true retail price minus the wholesale discount.<sup>20</sup>

Indeed, nowhere in the Act or the Commission’s rules is there a distinction between regulated and nonregulated telecommunications services. BellSouth’s failure to permit carriers to resell BellSouth’s long distance, either as a stand-alone telecommunications service or as part of a bundle, is unreasonable and discriminatory in violation of the Act and the Commission’s rules and policies.

The Joint Commenters support NewPhone’s position that the Commission should require ILECs to offer the telecommunications components contained within their bundled promotional offerings and price them using the formula used by taxing authorities to determine

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<sup>20</sup> See *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled, “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* North Carolina Utilities Commission Docket No. P-100, Sub 72b, Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, at 8 (June 3, 2005) (“*Second Resale Order*”) (internal quotations omitted) (emphasis added).

the effective retail rate of the telecommunications service component(s) of “pure” and “mixed” service bundles, *i.e.*, 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. Assume, for example, that an ILEC sells a bundled package of local exchange service, unlimited long distance service, and Internet access to its retail customers for \$75. Priced on a stand-alone basis, the individual service components are roughly as follows: local exchange service - \$20; unlimited long distance - \$40; Internet access - \$40. Thus, on a stand-alone basis, the total retail price of the services contained in the bundle is \$100, and the bundled price of \$75 therefore represents a 25% discount. As such, the “effective retail rate” of the individual components within the \$75 bundle are as follows: local exchange service - \$15; unlimited long distance - \$30; Internet access - \$30. NewPhone’s pricing methodology would result in application of the wholesale discount to the effective retail rate of the local service (\$15), as opposed to being applied to the stand-alone retail rate (\$20). Thus, if resellers are entitled to an 18% wholesale discount (applicable to promotions of greater than 90 days), for example, they could then obtain the ILEC’s local service for \$12.30 (\$15 effective retail rate at an 18% discount) instead of \$16.40 (\$20 retail rate at an 18% discount), and thereby better compete against the ILEC’s effective retail rate of \$15. Accordingly, the Commission should grant NewPhone’s Petition as it relates to determining the effective retail of telecommunications services contained in ILEC bundled offerings.

**C. ILEC PRACTICES REGARDING THE TIMING OF PROMOTIONS ARE UNREASONABLE AND DISCRIMINATORY IN VIOLATION OF THE ACT AND THE COMMISSION’S RULES AND POLICIES**

In its Petition, NewPhone asks the Commission to declare that telecommunications carriers shall be entitled to resell ILEC promotions greater than 90 days in

duration as of the first day the ILEC offers the promotion to its retail subscribers.<sup>21</sup> In light of the Joint Commenters' experiences with BellSouth and other ILECs respecting the timing and availability of promotion for resale, the Joint Commenters fully support NewPhone's request. Too often, BellSouth and other ILECs have refused to allow the Joint Commenters to resell long-term promotions (greater than 90 days) until the 91<sup>st</sup> day. Joint Commenters submit that such conduct is *prima facie* anticompetitive, unreasonable and discriminatory in violation of the Act and the Commission's rules and policies. By requiring Joint Commenters to wait three months to offer customers the same promotions that BellSouth and other ILECs offer immediately, the ILEC has the clear first mover advantage and can effectively lock-up a significant portion of the market before its competitors can even get out of the blocks. Indeed, in some cases, such as ILEC promotions that run only a short period longer than 90 days, Joint Commenters are effectively precluded from reselling the promotion in the first instance, never mind playing catch-up.

Moreover, the Joint Commenters have experienced problems obtaining some ILECs' short-term promotions for resale, despite that the Commission's rules clearly require ILECs to make such promotions available, albeit without a wholesale discount.<sup>22</sup> For example, Verizon has no mechanism by which to order promotional products at Verizon's full retail price. By contrast, AT&T Texas has USOCs which carriers can use to order some of AT&T's short-term promotions, and which actually pass the credit for such promotions onto carriers' invoices.

Thus, the Commission should reiterate its long-standing rule that ILECs are required to make *all* promotions, both short- and long-term promotions, available for resale in the first instance, and declare that ILECs are required to offer *all* promotions, both short- and

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<sup>21</sup> Petition at 17-18, 19.

<sup>22</sup> 47 U.S.C. 251(c)(4). *See also, Local Competition Order* 11 FCC Rcd 15954 at ¶949.

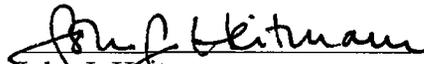
long-term promotions, for resale as of the first day the ILEC offers the promotion to its retail subscribers.

### III. CONCLUSION

Consistent with the foregoing, the Commission must act to preserve resale competition by granting NewPhone's Petition for Declaratory Ruling in its entirety.

Respectfully submitted,

By:



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July 31, 2006

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

# **EXHIBIT A**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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

**DECLARATION OF THAD PELLINO  
ON BEHALF OF SMART TELECOM CONCEPTS, LLC**

DECLARATION OF THAD PELLINO:

1. My name is Thad Pellino. I am the Managing Member of Smart Telecom Concepts, LLC ("Smart Telecom"). My business address is 2500 Cabot Drive, Suite 410, Lisle, IL 60532. I have been employed by Smart Telecom for seven years and I am responsible for directing the audits of the ILECs' wholesale electronic billing invoices to our CLEC clients.

2. Smart Telecom submits this declaration in support of the Joint Comments supporting the Petition for Declaratory Ruling filed by Image Access, Inc. d/b/a NewPhone ("NewPhone") in the above-captioned proceeding.

3. Smart Telecom is an experienced third-party bill auditing firm that has audited ILECs' resale, UNE-P and facility-based wholesale invoices for the CLEC industry for more than seven years.

4. As a result of Smart Telecom's experience with auditing the ILECs' wholesale invoices, Smart Telecom is very familiar with the ILECs' tariffed retail rates and monitors ILEC tariffs for rate increases and ILEC promotional offers for its CLEC clients.

5. Based on its review of BellSouth's tariffed retail rates and promotional offers, Smart Telecom prepared the tables set forth in the Joint Comments and declares that those tables and the data included therein are accurate to the best of its knowledge.

6. Smart Telecom has witnessed the damage inflicted on CLECs as a result of the ILECs' predatory and discriminatory practices, which Smart Telecom believes are designed to provide services to ILEC retail customers at lower prices than the ILECs sell those same service to their wholesale customers, and ultimately put CLECs out of business.

7. Smart Telecom believes that BellSouth, specifically, is systematically trying to put CLECs out of business by attempting to block CLEC access to many of its newer promotions. As such, BellSouth is effectively raising prices to its CLEC customers, while effectively reducing prices to their retail customers. The obvious impact of this is to drive the migration of customers away from CLECs and directly to BellSouth.

8. It is often less expensive for a CLEC to order service for their customers from BellSouth retail than it is to order wholesale service from BellSouth at the resale avoided cost discount. BellSouth has effectively lowered its tariffed retail rate by offering promotions to its retail customers that it refuses to provide to CLECs.

9. The BellSouth cash-back and non-cash-back promotions that are offered to BellSouth's retail customers expressly exclude CLEC resellers from eligibility without any legitimate explanation.

10. BellSouth is also employing the use of bundling as another means to disqualify CLECs from obtaining many of its new promotional offerings. Each of these newer promotions requires that the customer buy a service, such as Internet access, that is not offered to CLECs, thereby precluding CLECs from obtaining the entire bundle.

11. Smart Telecom has noticed that the number of promotions offered to the CLECs for resale has decreased, and believes that there is a strong possibility that BellSouth (or its successor in interest, AT&T) will not make any promotions available for resale by CLECs in 2007.

I assert under penalty of perjury that the foregoing is true and correct to the best of my information and belief. This concludes my declaration.

  
\_\_\_\_\_  
Thad Pellino

Dated: July 31, 2006

# **EXHIBIT B**

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