

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 REPLY COMMENTS

IMAGE ACCESS, INC. D/B/A NEWPHONE  
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

August 10, 2006

## SUMMARY

The critical resale issues raised in NewPhone's Petition are not hypothetical, as the as the Regional Bell Operating Companies ("RBOCs") claim. The incumbent local exchange carriers' ("ILECs") anticompetitive conduct cited by NewPhone and the other commenters is pervasive and very real, and threatens to extinguish resale competition. As such, sound public policy favors granting NewPhone's Petition, which will enhance competition -- not undermine it.

NewPhone's Petition for Declaratory Ruling seeks clarification of existing law and does not ask the Commission to promulgate new rules. ILEC cash-back and non-cash-back promotions are price discounts which lower retail rates by creating an "effective retail rate" and should therefore be available for resale pursuant to section 251(c)(4) of the Act. Similarly, existing law entitles resellers to obtain the telecommunications service components of the ILECs' bundled offerings at the "effective retail rate." Contrary to the RBOCs' arguments, NewPhone's Petition is consistent with the pricing standard under section 252(d)(3) of the Act and will not result in "double-dipping" or a "super discount."

The Commission should view this matter from the retail customer's perspective in order to arrive at the proper conclusion. That is, the Commission must simply ask whether retail customers view the RBOCs' cash-back, non-cash-back, and bundled promotions as discounts on the RBOCs' retail rate. Clearly, common sense tells us that the promotions at issue, particularly the cash-back and bundled promotions, are discounts on the RBOCs' tariffed retail rates that create "effective retail rates" to which the wholesale discount should be applied.

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 .....	2
A. Joint Commenters' Concerns are Not Hypothetical and Must Be Addressed by the Commission Through a Clarification of Existing Rules .....	2
B. Sound Public Policy Favors Grant of NewPhone's Petition.....	5
C. NewPhone's Petition is Entirely Consistent with the Pricing Standard Under 252(d)(3) of the Act .....	7
D. ILEC Cash-Back and Non-Cash-Back Promotions Are Price Discounts Which Should Be Made Available to Resellers.....	11
E. Resellers are Entitled to Obtain the Telecommunications Service Components of ILEC Bundled Offerings at the Effective Retail Rate.....	14
F. ILEC Practices Regarding the Timing of Promotions are Unreasonable and Discriminatory in Violation of the Act and the Commission's Rules and Policies .....	19
III. CONCLUSION.....	22

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**JOINT REPLY COMMENTS**

Image Access, Inc. d/b/a NewPhone (“NewPhone”), 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 reply to the Oppositions filed on July 31, 2006 by BellSouth Corporation (“BellSouth”), AT&T, Inc. (“AT&T”), Qwest Corporation (“Qwest”), and the Verizon telephone companies (“Verizon”) (collectively, “RBOCs”) in the above-captioned docket.

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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.

## I. INTRODUCTION

Despite the Bells' rhetoric and legal gymnastics, existing law fully supports grant of NewPhone's Petition for Declaratory Ruling ("Petition"). The Commission need not promulgate new rules in order to allow resale carriers to receive the benefits of the RBOC cash-back, non-cash-back and bundled promotions. Indeed, the Commission should not be led astray by the RBOCs' Alice in Wonderland arguments where they would have us all believe that "wrong is right" and that eliminating competition is actually good for consumers.

The Commission need only view this matter from the retail customer's perspective in order to arrive at the proper conclusion. That is, the Commission must simply ask whether retail customers view the RBOCs' cash-back, non-cash-back, and bundled promotions as discounts on the RBOCs' retail rate. Clearly, common sense tells us that the promotions at issue, particularly the cash-back and bundled promotions, are discounts on the RBOCs' tariffed retail rates that create "effective retail rates" to which the wholesale discount should be applied. Adherence to this touchstone will help the Commission achieve the proper result and will allow resale competition to flourish. Conversely, failure to follow this guiding principle will lead to the wrong result and will effectively vitiate the Act's resale requirements.

## II. ARGUMENT

### A. **JOINT COMMENTERS' CONCERNS ARE NOT HYPOTHETICAL AND MUST BE ADDRESSED BY THE COMMISSION THROUGH A CLARIFICATION OF *EXISTING* RULES**

The RBOCs argue that the concerns set forth in NewPhone's Petition are simply hypothetical<sup>2</sup> and that NewPhone cannot change the Commission's rules through a Petition for

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<sup>2</sup> See Opposition of Verizon at 17 ("NewPhone's alleged concern is entirely hypothetical"). See also, Opposition of Qwest at 4 ("NewPhone has not shown that there is any controversy").

Declaratory Ruling.<sup>3</sup> The RBOCs' contentions are entirely erroneous and are aimed at nothing more than distracting the Commission from the real issue here -- that *existing* law requires ILECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications services."<sup>4</sup> NewPhone described at length the procedural history of the matter before the North Carolina Utilities Commission in order to demonstrate the that there is an actual controversy here under *existing* law, and therefore that a Petition for Declaratory Ruling is the appropriate vehicle for resolving NewPhone's very real concerns regarding what the FCC's existing rules require. NewPhone's Petition clearly alleges that the RBOCs' restrictions on cash-back, non-cash-back and bundled promotions are unreasonable and discriminatory in contravention of the Act and the Commission's resale rules.<sup>5</sup> The RBOC comments do not demonstrate that their restrictions on such promotions are reasonable and nondiscriminatory.

Contrary to the RBOCs' position, the comments of ABC Telecom *et al.*, Angles Communication Solutions ("Angles"), COMPTTEL, and Southeast Telephone ("Southeast") also clearly demonstrate that there is a *real* controversy here. As ABC Telecom *et al.* effectively showed in their comments through examples of existing BellSouth promotions, BellSouth's resale practices create a price squeeze which renders resellers virtually helpless to compete.<sup>6</sup> Similarly, Angles' comments explained that BellSouth's Welcoming Rewards promotion was investigated by the Tennessee Regulatory Authority because that promotion created a price

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<sup>3</sup> See Opposition of Verizon at 1 ("NewPhone's petition . . . cannot change [] current rules through a petition for declaratory ruling"). See also, Opposition of AT&T at 1 ("NewPhone seeks to impose new requirements"); Opposition of BellSouth at 2 ("NewPhone has turned to the Commission seeking to unlawfully expand ILEC resale requirements").

<sup>4</sup> See, e.g., NewPhone Petition at 10-11, n. 25, *citing* 47 U.S.C. §251(c)(4).

<sup>5</sup> See NewPhone Petition, *passim*.

<sup>6</sup> See, e.g., Joint Comments of ABC Telecom *et al.* at 6, 11-12.

squeeze for resellers.<sup>7</sup> And if those examples are not “real” enough for the RBOCs, they should take notice of the complaint that was recently filed against AT&T Michigan by the Michigan Communication Carriers *et al.* in which the complainants allege *inter alia* that “AT&T does not offer for resale its retail services ‘on the basis of retail rates charged’” and that “these restrictions . . . amount to unreasonable or discriminatory conditions or limitations on the resale of telecommunications services, and thus are contrary to section 251(c)(4)(B) of the FTA.”<sup>8</sup>

While the RBOCs would like to sweep this matter under the rug with make-weight procedural arguments, the fact is that the problems cited by NewPhone and the supporting commenters are pervasive and very real. Indeed, aside from the North Carolina and Michigan proceedings, the Indiana Utility Regulatory Commission and the Kansas Corporation Commission also have investigated the RBOCs’ promotional and winback activities and found that they represent real and serious threats to competition.<sup>9</sup> In the Kansas proceeding, the commission used UNE rates and the resale avoided cost discount to set a “price floor” below which ILECs could not sell their retail services and thereby precluded ILECs from using their promotions in a predatory fashion.<sup>10</sup> In the Indiana proceeding, the commission *inter alia* addressed concerns that ILECs were using promotions to effectuate a competitive price squeeze,

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<sup>7</sup> Comments of Angles at 3-5.

<sup>8</sup> *In the Matter of the Complaint and Request for Declaratory Ruling of the Michigan Communications Carriers Association et al. against Michigan Bell telephone Co. d/b/a AT&T Michigan to Require AT&T to Afford Complainants Wholesale Rate Consistent with Applicable Law*, Michigan Pub. Serv. Comm’n Case No. U-14975, filed Aug. 1, 2006 at 17, attached hereto as **Exhibit A**.

<sup>9</sup> *See Investigation of Matters Related to Competition in the Telecommunications Industry in the State of Indiana Pursuant to Ind. Code 8-1-2 et seq.*, Indiana Util. Comm’n Cause No. 42530, Order, issued Dec. 9, 2005 (“Indiana Order”), attached hereto as **Exhibit B**. *See also, General Investigation into Winback/Retention Promotions and Practices*, Kansas Corp. Comm’n Docket No. 02-GIMT-678-GIT, Order 18: Establishing Policy for Win, Winback, and Retention Offerings by Incumbent Local Exchange Carriers, issued April 2, 2004 (“Kansas Order”), attached hereto as **Exhibit C**.

<sup>10</sup> Kansas Order ¶69.

and that, with respect to mixed bundles, the ILECs were cross-subsidizing their unregulated services with their regulated services. Like the Kansas commission, the Indiana commission set a price floor for bundles and packages of ILEC promotions and required the ILECs to produce costs studies in which they are required to demonstrate that “for a package of regulated and non-regulated services . . . the price of the offering must be adjusted for the value of any discounts associated with the non-regulated services or equipment in the *effective price* calculated for the regulated service.”<sup>11</sup> Accordingly, Joint Commenters concerns are not hypothetical but rather are real concerns based on their experiences with the RBOCs, and their review of evidence indicating similar unlawful RBOC misconduct throughout the country.

#### **B. SOUND PUBLIC POLICY FAVORS GRANT OF NEWPHONE’S PETITION**

The RBOCs’ arguments that granting NewPhone’s Petition will undermine competition are nothing short of absurd.<sup>12</sup> Moreover, the RBOCs fail to disclose that the level of resale competition they actually face is quite small. According to BellSouth’s 2005 10-K filing, BellSouth leased a total of 236,000 residential and business access lines to *all resellers* in 2005, which represents just 1.2% of all BellSouth access lines.<sup>13</sup> Furthermore, despite their rhetoric about needing the flexibility to offer promotions to combat cable company inroads, the truth is that the RBOCs also face limited competition from cable. Indeed, AT&T’s Chief Financial Officer, Rick Lindner, stated in a recent earning’s call with financial analysts that:

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<sup>11</sup> Indiana Order at 30-31.

<sup>12</sup> See Opposition of AT&T at 2 (“any such requirements would seriously limit the ability of ILECs to compete vigorously in the market by offering customers innovative and attractive marketing incentives and service bundles, to the detriment of consumers”); see also, Opposition of BellSouth at 15 (“to avoid eliminating the ILECs as players in this arena and ensure that consumers continue to enjoy innovative, competitively priced offerings, the Commission should deny the Petition”); see also, Opposition of Verizon at 2 (arguing that NewPhone’s Petition “would neutralize and important means by which carriers compete for consumers and which benefits those consumers”).

<sup>13</sup> BellSouth 2005 10-K at 28 of 124.

when we talk about cable VoIP competition, we're talking primarily about our consumer regional business. And that is about 16 to 17 percent of our total revenues today . . . So in a lot of respects, I think the discussion and cable competition and its impact on the business – certainly with the profile we have today – is somewhat overblown.<sup>14</sup>

In any event, the Act's resale requirements and the Commission's resale rules apply notwithstanding the RBOCs' modest encounter with limited intermodal competition and intramodal resale competition.

In reality, granting the Petition will remove the RBOCs' unfair and anticompetitive advantage and will enhance competition. As ABC Telecom *et al.* and COMPTTEL explain in their respective comments, the RBOCs' various promotional schemes threaten to wipe-out what little resale competition that currently exists.<sup>15</sup> The Commission reaffirmed its commitment to resale in the *Qwest Omaha Forbearance Order*, expressly finding that “section 251(c)(4) resale continues to be necessary to existing competition and makes future competitive entry possible.”<sup>16</sup> Central to that finding, however, is that section 251(c)(4) works as Congress and the Commission intended, *i.e.*, that ILECs are prohibited from imposing unreasonable or discriminatory conditions or limitations on the resale of telecommunications service such as using promotions to offer retail customers a rate that is lower than the rate offered to the ILECs' wholesale customers. Absent that recognition, section 251(c)(4) will not be necessary to existing competition and will not make future competitive entry possible. The

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<sup>14</sup> 1Q2006 AT&T Earnings Conference Call, April 25, 2006, SEC Form 425, filed April 25, 2006, at 14.

<sup>15</sup> *See, e.g.*, Comments of ABC Telecom *et al.* at 4; Comments of COMPTTEL at 4.

<sup>16</sup> *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*”).

Commission must therefore ignore the RBOCs' collective cry that the sky is falling and grant NewPhone's Petition in order to preserve resale competition in the local exchange marketplace.

**C. NEWPHONE'S PETITION IS ENTIRELY CONSISTENT WITH THE PRICING STANDARD UNDER 252(d)(3) OF THE ACT**

The RBOCs maintain that NewPhone's Petition ignores the Act's pricing standard for wholesale rates set out in section 252(d)(3) and that NewPhone's proposal would result in a "super discount" or "double-dipping."<sup>17</sup> For instance, Qwest argues that "NewPhone ignores that the Act requires a discount off the retail rates charged to subscribers. It does not authorize discounts off of a hypothetical "effective retail rate."<sup>18</sup> As explained below, none of the arguments have merit.

Section 252(d)(3) provides that

[f]or the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of *retail rates* charged to subscribers for the telecommunications services requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.<sup>19</sup>

For avoidance of doubt, NewPhone is not challenging the state commissions' determinations of the wholesale avoided cost discount. Rather, NewPhone is challenging the RBOCs' characterization of the "retail rate" as that term is used in section 252(d)(3). Although the Act does not define "retail rate" as that term is used in section 252(d)(3),<sup>20</sup> the Commission stated in the *Local Competition Order* that a long-term promotion should "be treated as a retail rate for an

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<sup>17</sup> See, e.g., Opposition of Qwest at 5-6; Opposition of BellSouth at 10-11, 13-14; Opposition of AT&T at 5-6; Opposition of Verizon at 5, n. 5 ("existing discounts are significantly greater than those that would result from application of the correct legal standard . . . [and] would result in double-dipping").

<sup>18</sup> Opposition of Qwest at 5-6.

<sup>19</sup> 47 U.S.C. §252(d)(3) (emphasis added).

<sup>20</sup> Opposition of Verizon at 5, citing *Local Competition Order* ¶949.

underlying service,” while short-term promotions do not constitute retail rates.<sup>21</sup> Thus, the Commission has always embraced the concept of an “effective retail rate.” NewPhone does not seek a change to existing law or the imposition of new rules; the relief requested in the NewPhone Petition is entirely consistent with both the Act and Commission precedent, and the RBOCs’ arguments to the contrary are patently erroneous.

Moreover, it is almost certain that, with the increasing use of promotions such as cash-back and bundles, most retail subscribers are never charged the RBOCs’ tariffed retail rate. To the extent that the RBOCs’ tariffed rates do not serve as their true retail rates (as the Commission already has recognized is the case with respect to long-term promotions), it simply makes no sense to apply the wholesale discount to those tariffed rates. Furthermore, it is unlawful (the Act requires the discount to be applied to the retail rate and not the tariffed rate that increasingly serves little, if any, purpose). The instant situation is akin to the room rates listed on the back of most hotel room doors. While those may be “rack rates” of some sort, hardly anyone is ever charged those rates. Instead, the promotional rate is the *de facto*, if not the *de jure*, retail rate. Indeed, we live in a society where, increasingly, no one pays retail prices anymore. We don’t pay the rack rate for a hotel room, we don’t pay the sticker price for a car, we don’t pay the tagged price on a piece of jewelry, and we don’t pay the ILECs’ tariffed rates for telecommunications services. For example, Verizon boasts in its 2005 10-K that its

Freedom service plans offer local services with various combinations of long distance, wireless and Internet access services in a discounted bundle available on one customer bill . . . As of December 31, 2005, approximately 65% of Verizon’s residential customers have purchased local services in combination with either Verizon long distance or Verizon DSL, or both.<sup>22</sup>

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<sup>21</sup> *Local Competition Order* ¶950.

<sup>22</sup> Verizon 2005 10-K at Management’s Discussion and Analysis of Results of Operations and Financial Condition, Operating Revenues.

Additionally, SBC (now AT&T) stated in the Indiana commission case, discussed previously herein, that the percentage of residential customers that subscribe to a bundle or package of service is nearly 50%.<sup>23</sup> Naturally, that figure is only for Indiana and does not include AT&T's other promotions such as its cash-back and non-cash-back promotions, which also effectively lower subscribers' retail rates.

The RBOCs also make unsupported claims that the "marketing incentives" at issue here are already encompassed within the wholesale rate charged to resellers.<sup>24</sup> For instance, BellSouth avers that "the wholesale discount necessarily functions to remove BellSouth's marketing expenses from the retail rate so that the reseller pays a lower rate that does not include these expenses. The incentives at issue here represent marketing expenditures that BellSouth makes to compete for the customers' business."<sup>25</sup> The RBOCs' arguments lack merit. The RBOCs only started to introduce cash-back, non-cash-back and bundled promotions in the last three or four years, well after most state commissions set their wholesale avoided cost discounts. Indeed, the RBOCs have not even cited to any state commission cost proceeding, much less demonstrated here that the costs of their cash-back, non-cash-back, and bundled promotions are actually reflected in those cost-studies as avoided costs that were then factored into a state commission-set wholesale discount. Joint Commenters' research did not reveal a single RBOC wholesale rate that included the cost of the types of promotions at issue here. Instead, the Joint Commenters found that just that opposite is true.

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<sup>23</sup> *Investigation of Matters Related to Competition in the Telecommunications Industry in the State of Indiana Pursuant to Ind. Code 8-1-2 et seq.*, Indiana Util. Comm'n Cause No. 42530, SBC Indiana's Responses to Questions from the June 17, 2005 Docket Entry, filed June 27, 2005, at 5.

<sup>24</sup> See, e.g., Opposition of AT&T at 5-6; Opposition of BellSouth at 10.

<sup>25</sup> Opposition of BellSouth at 10.

Remarkably, in contrast to BellSouth's claims to the Commission that the cost of the promotions at issue here are already included in the avoided cost discount set by state commissions, BellSouth's 2004 10-K states that "marketing incentives, including cash coupons, package discounts and free service *are recognized as revenue reductions* and are accrued in the period the service is provided."<sup>26</sup> Thus, BellSouth does not consider these cost as marketing expenses, which are legitimate avoided costs, but rather accounts for them as a reduction in revenue. As such, these promotions are properly treated as such under the Commission's resale rules and are not avoided costs that get factored into the wholesale discount. Thus, for reasons both factual and legal, the RBOC claims of super discounts and double-dipping are simply without merit.

Even if it were true (which, evidently, it is not) that the RBOCs' cash-back, non-cash-back and bundled promotions at issue here were included in the avoid cost discount set by state commissions, those rates would be unlawful as the RBOCs have apparently confused the procedural mechanism by which they offer their promotions with the very substance of the promotions themselves. For example, compare the cost of an RBOC \$100 cash-back promotion with the cost of radio or television commercials for that same cash-back promotion. The cost of the radio and television commercials represent legitimate avoided cost marketing expenses, whereas the \$100 cash-back does not. The \$100 is simply the discount off the RBOC's tariffed rate; it is not a marketing cost. Stated differently, the promotions at issue here are not marketing expenses because they result in value to the customer and reduced revenue to the RBOC, whereas a radio or television commercial does not provide value to customers or reduced

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<sup>26</sup> See BellSouth 2004 10-K at 63 of 93 (pdf p. 67 of 102), which is attached hereto as **Exhibit D** and is available at <<http://www.bellsouth.com/investor/pdf/annualrpt04.pdf>> (emphasis added).

revenues to the RBOC. Additionally, as Angles states in its comments, if the costs of the RBOC promotions were already included in the wholesale discount, the wholesale rate would be lower than the retail rate,<sup>27</sup> which as ABC Telecom *et al.* pointed out, is not the case.

Accordingly, the Bells cannot demonstrate that these discounts have already been or should be incorporated into the wholesale discounts and their arguments should be rejected. On the other hand, NewPhone's Petition is entirely consistent with existing law and should therefore be granted in its entirety.

**D. ILEC CASH-BACK AND NON-CASH-BACK PROMOTIONS ARE PRICE DISCOUNTS WHICH SHOULD BE MADE AVAILABLE TO RESELLERS**

The Joint Commenters agree with COMPTTEL and the other parties supporting NewPhone's Petition that ILEC cash-back and non-cash-back promotions are price discounts which create an "effective retail rate" to which resellers' wholesale discount should be applied.<sup>28</sup> In response to those parties' comments, the RBOCs contend that their cash-back and non-cash back promotions are neither "promotional discounts" nor "telecommunications services" and thus are not available for resale pursuant to section 251(c)(4) of the Act.<sup>29</sup> While the Joint Commenters concede that the RBOCs' \$100 gift checks do not meet the definition of "telecommunications service" under the Act,<sup>30</sup> cash-back and non-cash back promotions are clearly "price discounts from [the RBOCs'] standard offerings."<sup>31</sup> Indeed, the Joint Comments of ABC Telecom *et al.* explain that there can be no serious dispute that the RBOCs' promotions,

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<sup>27</sup> Comments of Angles at 5.

<sup>28</sup> See, e.g., Comments of COMPTTEL at 4.

<sup>29</sup> See, e.g., Opposition of BellSouth at 7; Opposition of AT&T at 4.

<sup>30</sup> See 47 U.S.C. §153(46).

<sup>31</sup> See *Local Competition Order* ¶948.

particularly the cash-back promotions, have the effect of lowering subscribers' retail rates.<sup>32</sup> Verizon, however, maintains that the Commission has declined to include in the definition of "promotion" any items of value other than a price discount.<sup>33</sup> Contrary to Verizon's claim, even BellSouth acknowledges that the Commission has defined "promotions" to *include* price discounts<sup>34</sup> and, as such, promotions available for resale under section 251(c)(4) are broader simply than those that provide direct price discounts. Indeed, the Commission in the *Local Competition Order* discusses "promotions *and* discounts,"<sup>35</sup> indicating that promotions available for resale are not only those that offer price discounts. The Joint Commenters agree with COMPTTEL that the Commission recognized that it could not predict every potential restriction or limitation an ILEC may seek to impose on a reseller, but nonetheless recognized the probable anticompetitive effects of such actions, and therefore broadly defined the term "promotion."<sup>36</sup> Therefore, even if the promotions at issue are not "price discounts" (which is not the case), they are nevertheless promotions that are available for resale pursuant to section 251(c)(4) of the Act.

Verizon also argues that the an ILEC's refusal to give resellers the value of their promotions is not a restriction on resale, alleging that the prohibited discriminatory condition or limitations in the Act "are those on what a reseller may do with the resale telecommunications services that it obtains at wholesale."<sup>37</sup> Verizon's argument turns section 251(c)(4) on its head.

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<sup>32</sup> Comments of ABC Telecom *et al.* at 6-13.

<sup>33</sup> Opposition of Verizon at 5, citing *Local Competition Order* ¶¶948-50.

<sup>34</sup> Opposition of BellSouth at 8 ("the Commission has defined 'promotions' to *include* price discounts from standard offerings") (emphasis added).

<sup>35</sup> *See, e.g., Local Competition Order* ¶952 ("we are concerned that conditions that attach to promotions *and* discounts could be used to avoid the resale obligation to the detriment of competition . . . We conclude that the substance and specificity of rules concerning which discount *and* promotion restrictions may be applied to resellers . . .") (emphasis added).

<sup>36</sup> Comments of COMPTTEL at 5.

<sup>37</sup> Opposition of Verizon at 12-13.

Verizon is obviously confusing the limited restrictions that ILECs *may* impose on CLECs, *i.e.*, cross-class selling and short-term promotions, with the limitations or restrictions that ILECs *are prohibited* from imposing under the Act. Section 251(c) of the Act is entitled “Additional Obligations of Incumbent Local Exchange Carriers” and therefore the duty not to restrict the resale of telecommunications is an *ILEC* obligation -- not a CLEC obligation.<sup>38</sup>

The Joint Comments filed by ABC Telecom *et al.* effectively demonstrate that the RBOCs’ cash-back promotions result in a price squeeze for resellers and therefore are unreasonable and discriminatory restrictions on resale.<sup>39</sup> Surely, Congress and the Commission did not envision that ILECs would use cash-back promotions to lower retail rates below the rates charged to carriers purchasing RBOC products at the avoided cost discount. To the contrary, the restrictions imposed on the ILECs’ resale of telecommunications services were designed by Congress and implemented by the Commission to guard against this very situation. The RBOC comments do nothing to demonstrate otherwise. In fact, much if not all of their focus is directed at their non-cash-back and bundled promotions, while they avoid any serious discussion of their cash-back promotions. Indeed, the RBOCs appear to concede Joint Commenters’ position with respect to the RBOCs’ cash-back promotions.<sup>40</sup> Their silence on this issue is understandable, particularly for BellSouth, given that BellSouth acquiesced to CLECs and the Tennessee Regulatory Authority by acknowledging that its Welcoming Rewards Program “is clearly a long-term promotion for purposes of resale, and BellSouth will make the \$100 bill credit available at

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<sup>38</sup> See 47 U.S.C. §251(c)(4)(B). See also, 47 C.F.R. §51.605(e) (“...an *ILEC* shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC”) (emphasis added); see also, *e.g.*, *Local Competition Order* ¶948 (“[s]ection 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”) (emphasis added).

<sup>39</sup> Comments of ABC Telecom *et al.* at 5-13.

<sup>40</sup> See *e.g.*, Opposition of Verizon at Table of Contents.

the wholesale discount to reselling CLECs.”<sup>41</sup> The RBOCs’ position on their cash-back promotions is simply untenable and their virtual silence on the issue is tantamount to an admission.

Accordingly, the Commission should declare that for all promotions greater than 90 days in duration, at the option of the requesting telecommunications carrier, an ILEC 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 an ILEC provides 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 ILEC promotion. The Commission should also declare that the “effective retail rate” shall be determined by subtracting the face value of the promotion from the applicable tariffed or published rate, that the value of such discount shall be distributed evenly across any minimum term commitment up to a maximum of three months.

**E. RESELLERS ARE ENTITLED TO OBTAIN THE TELECOMMUNICATIONS SERVICE COMPONENTS OF ILEC BUNDLED OFFERINGS AT THE EFFECTIVE RETAIL RATE**

In response to NewPhone’s request that the Commission declare that ILECs shall make available for resale the telecommunications services component(s) of ILEC bundled promotions at the “effective retail rate,” BellSouth states that the Act does not mandate that

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<sup>41</sup> See Comments of Angles at 5. The Welcoming Rewards tariff in Tennessee involved giving the customer a \$100 per line credit on his or her bill in exchange for the purchase of additional telephone lines. BellSouth eventually conceded there and apparently concedes here that giving a customer a credit on his or her bill constitutes a “price discount” which must be passed on to resellers. BellSouth, however, attempts to distinguish between giving a customer a credit on his or her bill and giving the customer the same amount in cash. From a customer’s perspective, the result is the same. Likewise, the result is the same for BellSouth. In either case, BellSouth has sold the customer service and collected \$100 less in revenue.

ILECs tear apart bundles and develop hypothetical prices which provide resellers a “super discount.”<sup>42</sup> Similarly, Qwest argues that “the Act does require an ILEC to calculate internal discount prices of components offered in a mixed 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.”<sup>43</sup> Verizon states that “to the extent a mixed bundle costs less than the sum of the prices of its component parts, that is normally due to *discounts* on the non-tariffed components of the bundle, not on the tariffed incumbent LEC service, which means that there is no retail rate reduction on the only service in the mixed bundle subject to [section] 251(c)(4).”<sup>44</sup> Thus, the RBOCs contend that competitive carriers should not be able to receive discounts on the telecommunications service components of mixed bundles because they have successfully been shielded from the Commission’s resale requirements by being included in a mixed bundle or because the discounts can somehow be assigned (completely or mostly) to all the non-telecommunications services parts of the bundle. Neither argument is persuasive.

First, 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.”<sup>45</sup> Although the Commission also explained that “[s]ection 251(c)(4) does not impose on incumbent LECs the obligation to disaggregate a retail service into more discrete retail

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<sup>42</sup> Opposition of BellSouth at 13-14.

<sup>43</sup> Opposition of Qwest at 9.

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Local Competition Order*, 11 FCC Rcd at 15936 ¶877.

services,”<sup>46</sup> this pronouncement clearly applies only as to bundles of telecommunications services, and is not applicable mixed bundles of telecommunications and non-telecommunications service offerings. Otherwise, RBOCs would be required to make the entire mixed bundle available for resale at the wholesale discount. If mixed bundles are not required to be disaggregated to enable resale of their telecommunications service components, as the RBOCs’ claim, then the ILECs would need an exemption from the Commission’s resale rules that they have not yet secured. Such an exemption would allow ILECs to engage in the unlawful conduct that NewPhone and the other commenters have alleged is ongoing already -- namely, that the ILECs price their bundled telecommunications components below the rate at which resellers can obtain those products and services on a stand-alone basis from the ILECs’ tariffs. Accordingly, 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 the “effective retail rate” minus wholesale discount. Anything less is discriminatory and is an unreasonable restriction on resale in violation of the Act and the Commission’s rules.

Second, regardless of what the RBOCs may claim, the true price of the RBOCs’ bundled telecommunications service components is not their tariffed retail rates. As discussed above, many retail subscribers are never charged the RBOCs’ tariffed retail rate, whether as the result of an RBOC cash-back, non-cash-back or bundled promotional offer. The Joint Commenters are not asking for a “super discount;” they are merely asking for what the law already entitles them to -- which is a discount on the real retail rate and a fair chance to compete. As it currently stands, resellers have increasingly limited chances to compete against the ILECs

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<sup>46</sup> *Id.*

because the ILECs have tilted the field heavily in their favor by discriminating against resellers through a number of unlawful resale practices.

For instance, Verizon claims that the ILECs typically reduce the price of the non-telecommunications service components of a mixed bundle while offering very little discount on the telecommunications service components. If that is truly the case (and there is no evidence to suggest that it is), it is likely that the ILECs are pricing their non-telecommunications services at below-cost levels and cross-subsidizing those services with their much higher rates for telecommunications services and passing the discounts through to retail end users under the guise of “bundling efficiencies.” That is exactly the concern the Indiana commission attempted to guard against when it set a price floor beneath which SBC (now AT&T), Verizon and Sprint could not offer their bundled telecommunications and non-telecommunications services. In its December 9, 2005 Order, the IURC expressly found that

in the demonstration of cost recovery for a package of regulated and non-regulated services provided to the Commission . . . the price of the offering must be adjusted for the value of any discounts associated with the non-regulated services or equipment in the *effective price* calculated for the regulated service.<sup>47</sup>

Stated differently, the Indiana commission found elsewhere in its Order “that *the value* of any discounts associated with non-regulated products or services must be reflected in *the effective price* of the regulated products and services when testing compliance with the price floor. This information should be clearly shown in the cost studies.”<sup>48</sup>

As the above-referenced language demonstrates, the Indiana commission ensured that ILEC would not be able to cross-subsidize the non-telecommunications service components of their mixed bundles by requiring SBC to account for the true cost of the telecommunication

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<sup>47</sup> Indiana Order, *supra* n. 9, at 31 (emphasis added).

<sup>48</sup> *Id.* at 43 (emphasis added).

service component of a mixed bundle. Thus, contrary to BellSouth's contentions that providing resellers the value of ILEC promotions is tantamount to unlawfully subsidizing resellers,<sup>49</sup> it is actually the ILECs' non-telecommunications services that are being unlawfully subsidized by their telecommunications services.<sup>50</sup> The Joint Commenters believe that the Commission should take steps to ensure that resale remains a viable competitive alternative and declare that ILECs must make the telecommunication service components of mixed bundles available at the effective retail rate using the methodology described in NewPhone's Petition.<sup>51</sup>

Verizon also argues that a bundle is not a "promotion" or a "discount" under the Commission's rules governing the treatment of promotions.<sup>52</sup> This argument appears to be based on nothing more than semantics. Indeed, in the example which ABC Telecom *et al.* append to their comments, BellSouth's Web site advertising its bundles clearly states "click here for promotion details." To be sure, the RBOCs' bundled offerings, by any name, are simply promotions which provide discounts and disguise the true retail price of the telecommunications services provided in the bundle. As indicated above, the Joint Commenters agree with COMPTTEL that the Commission recognized that it could not predict every potential restriction or limitation an ILEC

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<sup>49</sup> See Opposition of BellSouth at 15 ("[t]he resale obligations under the 1996 Act were designed to foster competition by enabling new entrants to either eliminate or minimize the financial costs associated with building their own networks, not to subsidize resellers' marketing efforts").

<sup>50</sup> See 47 U.S.C. §254(k); 47 C.F.R. §64.901(c).

<sup>51</sup> See NewPhone Petition at 20 ("the 'effective retail rate' of the telecommunications service component . . . 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"). The Joint Commenters contend that NewPhone's proposed test for determining the "effective retail rate" of bundled telecommunications service components is eminently reasonable and is consistent with sections 251 and 254 of the Act, and the Commission's resale rules and prohibitions on cross-subsidization. Furthermore, NewPhone's proposed test is easy to administer and would allow both ILECs and competitive carriers to very easily determine the rates at which bundled telecommunications service should be available for resale.

<sup>52</sup> Opposition of Verizon at 7, 14-15.

may seek to impose on a reseller, but nonetheless recognized the probable anticompetitive effects of such actions, and therefore broadly defined the term “promotion.”<sup>53</sup>

Verizon also states that NewPhone offers little support for its mixed bundle arguments.<sup>54</sup> But Verizon offers little to refute NewPhone’s arguments, simply dismissing them with a wave of the hand as “hypothetical” since NewPhone, according to Verizon, did not provide any specific examples. The Joint Commenters believe that the specific and detailed examples provided by ABC Telecom *et al.* clearly show the anticompetitive nature of the ILECs’ bundling practices and are consistent with NewPhone’s description of the ILECs’ unreasonable and discriminatory resale practices.

**F. 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>55</sup> Verizon maintains that NewPhone never supports nor defends its position concerning the timing of ILEC promotions,<sup>56</sup> and contends that NewPhone’s proposal is anticompetitive, as it would reduce the ILECs’ incentive to offer such promotions.<sup>57</sup> Verizon also states that it is not always known whether a promotion will last more than 90 days,<sup>58</sup> and that NewPhone’s proposal under which

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<sup>53</sup> Comments of COMPTTEL at 5.

<sup>54</sup> Opposition of Verizon at 17.

<sup>55</sup> Petition at 17-18, 19.

<sup>56</sup> Opposition of Verizon at 17-19.

<sup>57</sup> *Id.* at 18.

<sup>58</sup> *Id.* at 20.

resellers could get the benefit of a promotion *before* the promotional price ceases to be short-term directly contradicts the Commission's holding in the *Local Competition Order*.<sup>59</sup>

Verizon's argument cannot hold. First, the ILECs' efforts to hamstring competitors by making them wait 90 days to resell long-term promotions at the wholesale discount is contrary to section 251(c)(4), which prohibits ILECs from imposing unreasonable restrictions or limitations on the resale of telecommunications services. Therefore, to the extent that existing law reduces the incentives for ILECs to offer promotions, it does so only with respect to *anticompetitive* promotions such as those at issue here. ILECs remain free to design their promotions in any way they see fit, so long as they are not unreasonable or discriminatory. Verizon arguments concerning the Commission's pronouncements in the *Local Competition Order* are similarly erroneous. The Commission merely stated in that order that "[w]e must also determine when a promotional price ceases to be 'short term' and must therefore be treated as a retail rate for the underlying service."<sup>60</sup> The Commission's pronouncement simply established a bright line between short-term promotions which are not eligible for resale at a wholesale discount, and long-term promotions which are subject to a wholesale discount. The Commission did not intend by that language that long-term promotions should only be available to resellers as of day 91, while retail customer are able to take advantage of such promotions as of day one, as such a disparity is clearly anticompetitive and discriminatory in violation of section 251(c)(4).

Verizon couples its implausible lack of advanced knowledge regarding the timing of promotions with the Commission "ceases" language above to make its case that ILECs are only obligated to offer long-term promotions once the promotion crosses the 90-day mark and becomes long-term. But, contrary to Verizon's claims, the ILECs generally must know in

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<sup>59</sup> *Id.* at 18.

<sup>60</sup> *Local Competition Order* ¶950.

advance how long their promotions will last, and more certainly they know whether particular promotions will be discontinued within a term so short as 90 days (Verizon's claim to the contrary is implausible). The promotions attached to NewPhone's Petition at Exhibit A shows as much. A close examination of the fine print in those BellSouth promotional offers reveals that most of these examples include promotion expiration dates. And those that do not contain expiration dates cannot be deemed short-term promotions, as there is no evidence whatsoever that they are not available for 90 days or more. Given that this is the case, there is no reason why the ILECs are not required to offer those long-term promotions to resellers at the wholesale discount at the same time they make such promotions available to retail customers. Accordingly, the Commission should declare that its long-standing rules enunciated in the *Local Competition Order* require ILECs to make all promotions, both short- and long-term promotions, available for resale on day one of the term of that promotion, and declare that ILECs are required to offer long-term promotions at the wholesale discount 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,

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