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August 12, 2009

FILED IN PDF FORMAT VIA ECFS

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

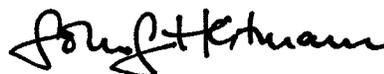
Re: **Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules, WC Docket No. 06-129 -- Notice of Ex Parte Presentation**

Dear Ms. Dortch:

On Tuesday, August 10, 2009, Gene Dry of NewPhone and I met with Priya Aiyar of Chairman Genachowski's office to discuss the above-captioned proceeding. The discussion focused on and was consistent with NewPhone's prior submissions in this docket. We also explained that the passage of time and recently announced policy changes by AT&T have made the need for a final Commission order on the pending petition more acute. The attached materials were discussed and distributed during the meeting.

In accordance with the Commission's rules, this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,



John J. Heitmann
Counsel for NewPhone

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Marlene H. Dortch
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cc: Priya Aiyar
Pamela Arluk
Bill Cook
Lynne Engledow
Al Lewis

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August 11, 2009

(1) Declaration Regarding Long Term Promotion – Telecommunications Services at Promotional Price Plus Gift Card or Other Incentive

For all promotions greater than 90 days in duration, ILECs shall make available for resale the telecommunications service that is the subject of the promotion at the promotional price minus the wholesale avoided cost service discount, and provide to the reseller the retail value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users within the same time frame that such items would be provided to a retail customer.

Explanation

This simplified, proposed declaration eliminates the alternative formulation proposed previously in the NewPhone Petition and by the Resale Coalition. The result is a single, clean and straightforward piece of guidance on how the FCC's resale rules apply to promotional offerings including cash-back, gift card, coupon, or other similar giveaways or incentives.¹ With this guidance, the FCC will ensure that resellers can resell ILEC retail services subject to the same terms and conditions applicable to retail customers at a price that reflects the true retail (rather than tariffed) rate minus the wholesale discount.²

In the absence of such guidance, ILECs will continue to misapply the Commission's resale rules by limiting their application to tariffed offerings only *or by inappropriately discounting the retail value of the cash-back, gift card, coupon, or other giveaways or incentives*. These unjust and unreasonable practices result in unlawful discrimination against resellers and their customers as resellers pay more on a wholesale basis for services than the Act requires and than ILEC retail customers do.

¹ ILECs typically provide to resellers the service connection fee waiver often associated with these types of promotions, but only when the reseller is reselling a package of telecommunications services that is not bundled with non-telecommunications services. The Commission should clarify that such fee waivers must be provided to resellers in the same manner as they are provided to retail customers regardless of the type of service bundle involved.

² Such guidance is entirely consistent with Commission precedent. *See, e.g., 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 (“our rules require the incumbent LEC to apply the wholesale discount to the special reduced rate”) (rel. Dec. 23, 1999).

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(2) **Declaration Regarding Long Term Promotion – Telecommunications Services within Mixed Bundle**

For all promotions greater than 90 days in duration, ILECs shall make available for resale the telecommunications services contained within “mixed bundle” promotions, i.e., bundles consisting of both telecommunications service and non-telecommunications service (e.g., information service), and apply the wholesale avoided cost discount to the effective “retail rate” of the telecommunications services contained within the mixed bundle.

The effective “retail rate” of the telecommunications component of a mixed service bundle shall be determined by *either*:

(a) *prorating* the telecommunications service component subject to section 251(c)(4) resale based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their standard retail unbundled component prices; *or*

(b) using a reasonable, consistent and publicly disclosed *allocation* set by the ILEC and used for the purpose of reporting for *state* universal service and regulatory fees, taxation, etc.

Once an allocation is declared, it is not subject to retroactive revision.

Any declared allocation above a standard/tariffed rate for the same or comparable service offering is per se unreasonable and *unreasonably discriminatory* and is deemed to be in violation of 47 U.S.C. §§ 201(b) and 202(a).

The *retail* value of all cash-back, gift card, coupon, or other similar giveaways or incentives that the ILEC provides to retail end-users must be provided to the reseller consistent with such prorating or allocation. The prorated or allocated *retail* value of all cash-back, gift card, coupon, or other similar giveaways or incentives must be provided to the reseller within the same time frame that such items would be provided to a retail customer.

Explanation

This modified, proposed declaration allows an ILEC to elect either a prorated or allocated method of arriving at the effective/true/actual retail rate enjoyed by consumers of telecommunications services incorporated into mixed bundles. This modified proposal allows the ILEC flexibility bounded only by the principles of transparency, consistency and reasonableness. The result is simple and straightforward guidance on how the FCC’s resale rules apply to telecommunications services included in mixed bundles. With this guidance, the FCC will ensure that resellers can resell ILEC retail services subject to the same terms and conditions applicable to retail customers at a price that reflects the actual retail (rather than tariffed) rate minus the wholesale discount.

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To the extent a bundled offering is coupled with a cash-back or similar offer, the ILEC should be required to provide to the reseller the *retail* value of all cash-back, gift card, coupon, or other similar giveaways or incentives that the ILEC provides to retail end-users within the same timeframe such incentive would be provided to a retail customer, *subject to the same method (prorated or allocated) selected to arrive at the effective retail rate.*

In the absence of such guidance, ILECs will continue to misapply the Commission's resale rules by limiting their application to tariffed offerings only *or by inappropriately discounting the retail value of the cash-back, gift card, coupon, or other giveaways or incentives.* This results in unlawful discrimination against resellers and their customers as resellers pay more on a wholesale basis for services than the Act requires and than ILEC retail customers do.

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(3) Declaration Regarding Timing of Availability of Long Term Promotions for Resale

A requesting telecommunications carriers shall be entitled to resell an ILEC's promotions of greater than 90 days in duration at the wholesale avoided cost discount as of the first day the ILEC offers the promotion to retail subscribers.

An ILEC refusal to apply the wholesale discount to a promotion without a set expiration date as of the first day it is offered is an unjust and unreasonable restriction on resale, and an unjust, unreasonable and unjustly and unreasonably discriminatory practice, in each case where the promotion is not terminated in 90 days or less.

Explanation

This proposed declaration provides guidance that will eliminate the ILECs' unreasonable and unreasonably discriminatory practice of refusing to apply the wholesale discount to a long term promotion (one lasting more than 90 days) until day 91. Consistent with the Commission's rules and policies, the avoided cost discount should apply to a long term promotion as of the first day it becomes available. An ILEC refusal to apply the wholesale discount to a promotion without a set expiration date as of the first day it is offered should be deemed an unjust, unreasonable and unjustly and unreasonably discriminatory practice, in each case where the promotion is not terminated in 90 days or less.

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(4) **Declaration Regarding Short Term Promotions**

For all promotions of 90 days or fewer in duration, ILECs shall:

(i) make available for resale the telecommunications service that is the subject of the promotion as of the first day the ILEC offers the promotion to retail subscribers; and

(ii) make available for resale the telecommunications service that is the subject of the promotion at the promotional price, and provide to the reseller the retail value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users within the same time frame that such items would be provided to a retail customer.

Explanation

This proposed declaration is intended to eliminate potential gamesmanship that may result if ILECs' current abuses and violations of the Commission's resale rules and policies are curbed by the Commission's adoption of the proposed declarations specified herein. The only distinction in the Commission's resale rules and policies applicable to long term and short term promotions is that short term promotions (those offered for 90 days or less) are not subject to the wholesale avoided cost discount. Short term promotions are subject to all other resale rules and obligations. Thus, short term promotions must be available for resale: (1) as of the first day they are offered; (2) at the promotional price; and (3) with the *retail* value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users provided to the reseller within the same time frame that such items would be provided to a retail customer. To the extent a short term promotion includes a mixed bundle of telecommunications and non-telecommunications services, the declarations set forth above with respect to mixed bundles apply and the ILEC may elect to either prorate or allocate to arrive at the effective retail rate.

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(5) **Declaration Regarding Unreasonable Restrictions on Resale and Unjust and Unreasonable Practices and Discrimination**

An ILEC's refusal to make available for resale at wholesale rates telecommunications services subject to cash-back, non-cash-back, coupons, giveaways and bundled promotional discounts is an unreasonable restriction on resale, an unjust and unreasonable practice, and unjust and unreasonable discrimination in violation of the Act and the Commission's rules and policies.

Explanation

This proposed declaration is intended to clarify that an ILEC's avoidance of compliance or refusal to comply with its resale obligations under the Act and the Commission's rules and policies is unlawful.

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 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.³

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).⁴

In the *Local Competition Order*, the Commission concluded that "resale restrictions are presumptively unreasonable" and "in violation of section 251(c)(4)."⁵

Similarly, section 51.605(e) of the Commission's rules provides that, "[e]xcept as provided in Sec[tion] 51.613, an [I]LEC shall not impose restrictions on the resale by a

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

⁴ 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."

⁵ *Local Competition Order*, 11 FCC Rcd. at 15966, ¶ 939.

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requesting carrier of telecommunications services offered by the [I]LEC.”⁶ 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.⁷ **Section 51.613(b)** 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 to the state commission that the restriction is reasonable and nondiscriminatory.”⁸ The Resale Coalition is not aware of any state in which an ILEC has proven that its restrictions on resale are either reasonable or nondiscriminatory.⁹

Section 51.603(a) of the Commission’s rules requires all LECs to make their telecommunications services available for resale on “terms and conditions that are reasonable and non-discriminatory.”¹⁰

Section 51.603(b) of the Commission’s rules requires all LECs to make their telecommunications services available for resale “subject to the same conditions and provided within the same provisioning time intervals that the LEC provides these services to others, including end users.”¹¹

ILEC practices that:

- (1) offer services for resale at the standard (tariffed/posted) rate only and not at the retail rate;
- (2) for resale promotions of greater than 90 days in duration, apply the resale avoided cost discount to the standard (tariffed/posted) rate rather than retail rate;
- (3) refuse to provide to resellers connection fee and other fee waivers as provided to retail customers;
- (4) refuse to provide to resellers the value of all cash-back, gift card, coupon, or other similar giveaways or incentives within the same time frame that such items would be provided to a retail customer;

⁶ 47 C.F.R. § 51.605(e).

⁷ 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.

⁸ 47 C.F.R. § 51.613(b).

⁹ *The Commission should clarify that the ILECs have both the burden of proceeding and of proof and that they must obtain state commission approval before any restriction is imposed.*

¹⁰ 47 C.F.R. § 51.603(a).

¹¹ 47 C.F.R. § 51.603(b).

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- (5) refuse to make available for resale the telecommunications services contained within “mixed bundle” promotions, *i.e.*, bundles consisting of both telecommunications service and non-telecommunications service (*e.g.*, information service);
- (6) for resale promotions of greater than 90 days in duration, refuse to apply the wholesale avoided cost discount to the effective retail rate of the telecommunications services contained within a mixed bundle;
- (7) refuse to make available for resale promotions of greater than 90 days in duration at the wholesale avoided cost discount as of the first day the ILEC offers the promotion to retail subscribers;
- (8) refuse to apply the wholesale discount to a promotion without a set expiration date as of the first day it is offered, in each case where the promotion is not terminated in 90 days or less;
- (9) refuse to make available for resale the telecommunications service that is the subject of a short term promotion as of the first day the ILEC offers the promotion to retail subscribers; and
- (10) refuse to make available for resale the telecommunications service that is the subject of a short term promotion at the promotional price, and provide to the reseller the retail value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users within the same time frame that such items would be provided to a retail customer

are unjust, unreasonable and discriminatory and constitute unreasonable restrictions on resale in violation of sections 251(c)(4)(B), 271(c)(2)(B)(xiv), 201(b) and 201(a) of the Act, the *Local Competition Order*, and sections 51.603 (a) and (b), 51.605(e), and 51.613(b) of the Commission’s rules.



Accessible

Date: **July 1, 2009**

Number: **CLECSE09-100**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Resale of Cash-Back Promotions**

Related Letters: **NA**

Attachment: **NA**

States Impacted: **Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee**

Issuing AT&T ILECS: **AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee (collectively referred to, for purposes of this Accessible Letter, as "AT&T Southeast Region")**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

AT&T Southeast Region is sending this letter to provide notice that it will change the manner in which it calculates the credits available to CLECs that purchase certain retail cash-back promotional offers (including but not limited to promotional offers involving checks, coupons, and other similar items) that are available for resale.

The change will be implemented initially for residential acquisition cash-back promotion offers requested on or after September 1, 2009, in all AT&T ILEC states, regardless of whether the underlying promotion is new or existing.

Details regarding the specific resale credits available for applicable promotions will be communicated via separate Accessible Letters. The formulae AT&T Southeast Region will use to calculate these credits is available in the Resale Product section of the CLEC Handbook on CLEC Online at:

<https://clec.att.com/clec/hb/index.cfm>

AT&T Southeast Region reserves the right to make any modifications to or to cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. Should the information be canceled, AT&T Southeast Region will send additional notification at the time of cancellation. AT&T Southeast Region will incur no liability to the CLECs if the above mentioned information and/or approach is modified or discontinued for any reason.



Accessible

Date: **July 1, 2009**

Number: **CLECSE09-106**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Revision to Win-back Cash Back Promotion - GA**

Related Letters: **CLECSE09-100**

Attachment: **NA**

States Impacted: **Georgia**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

Effective September 1, 2009, Competitive Acquisition Customers who purchase Complete Choice® Basic or Enhanced will receive a one-time cashback amount of \$3.73 using the methodology announced in **CLECSE09-100**, dated July 1, 2009.

AT&T Georgia reserves the right to modify or cancel the above information. Should any such action be taken, it will be reflected in a subsequent letter to CLECs. AT&T Georgia will incur no liability for the foregoing.

RPMA (Resale Promotion Methodology Adjustment)

The following model reflects the calculation AT&T will use effective September 1, 2009, to determine the impact that the retail cash-back offer has on the monthly rate the average AT&T retail customer pays for the telecommunications service(s) eligible for a cash back type promotion, as well as the promotional credits available to resellers.

The model inputs and calculations are as follows:

(A)	\$	Retail Cash-Back Offer - One-Time	
		Effective Retail Cash-Back Offer - One	
(B)	\$	Time	(A) × (G)
(C)	\$	Effective Retail Cash-Back Offer - Monthly	PMT((F)/12,(E),(B),,,)
(D)	\$	Resale Cash-Back Offer - Monthly	(C) × (1-H)
	\$	Resale Cash-Back Offer - One Time	PV((F)/12,(I),(D),,,)
(E)	#	Average Retail In-Service Life (months)	
(F)	%	Cost of Capital (annual)	
(G)	%	Retail Redemption Rate	
		Resale discount (State specific as	
(H)	%	applicable)	
		Average Wholesale In-Service Life	
(I)	#	(months)	

where $PMT(F/12,E,B,,)$ is the monthly payment equivalent over E months of an upfront payment of \$B and $PV(F/12,I,D,,)$ is the discounted present value of \$D per month over an I-month period; formulae are standard Microsoft Excel functions.

The process for notification of promotion availability will not change. AT&T will notify the CLEC community of impacted promotions subject to the RPMA change via Accessible Letter and/or CLEC Notification, as appropriate in each ILEC region.



Accessible

Date: **July 1, 2009**

Number: **CLECALL09-048**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Resale of Cash-Back Promotions**

Related Letters: **NA**

Attachment: **NA**

States Impacted: **Illinois, Indiana, Ohio, Michigan, Wisconsin, California, Nevada, Arkansas, Kansas, Missouri, Oklahoma, Texas and Connecticut**

Issuing AT&T ILECS: **AT&T Illinois, AT&T Indiana, AT&T Ohio, AT&T Michigan, AT&T Wisconsin, AT&T California, AT&T Nevada, AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, AT&T Texas, and AT&T Connecticut, (collectively referred to, for purposes of this Accessible Letter, as "AT&T 13-State")**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

AT&T 13-State is sending this letter to provide notice that it will change the manner in which it calculates the credits available to CLECs that purchase certain retail cash-back promotional offers (including but not limited to promotional offers involving checks, coupons, and other similar items) that are available for resale.

The change will be implemented initially for residential acquisition cash-back promotion offers requested on or after September 1, 2009, in all AT&T ILEC states, regardless of whether the underlying promotion is new or existing.

Details regarding the specific resale credits available for applicable promotions will be communicated via separate Accessible Letters. The formulae AT&T 13-State will use to calculate these credits is available in the Resale Product section of the CLEC Handbook on CLEC Online at:

<https://clec.att.com/clec/hb/index.cfm>

AT&T 13-State reserves the right to make any modifications to or to cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. Should the information be canceled, AT&T 13-State will send additional notification at the time of cancellation. AT&T 13-State will incur no liability to the CLECs if the above mentioned information and/or approach is modified or discontinued for any reason.

A copy of AT&T Texas' filing with the Public Utility Commission of Texas and any accompanying tariff sheets (if applicable) can be viewed on the Internet at the following website, typically on the effective date of the changes. <http://cpr.bellsouth.com/pdf/tx/filings/txfiling.htm>