ORIGINAL

Legal Department

MICHAEL P. GOGGIN
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5561

August 16, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 990970-TP (Promotional Practices)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss, or in the Alternative, to Strike the Petition, or for Summary Judgment, which we ask that you file in the above-referenced matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin

AFA
APP
CAF
CMU Marsh
CTR
EAG
LEG 1
MAS
OPC
RAI
SEC 1
WAW
OTH

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 990970-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 16th day of August, 1999 to the following:

Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Association for Local Telecomm. Svcs.
888 17th Street, N.W.
Washington, D.C. 20006
Represented by Messer law firm

Commercial Internet Exchange Assoc.
1041 Sterling Road
Suite 104A
Herndon, VA 20170
Represented by Messer law firm

CompTel
Terry Monroe
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036
Tel. No. (202) 296-6650
Represented by Messer law firm

e.spire Communications, Inc.
Riley M. Murphy, Esq.
133 National Business Parkway
#200
Annapolis Junction, MD 20701
Tel. No. (301) 361-4200
Fax. No. (301) 361-4277

Florida Competitive Carriers Assoc.
P.O. Box 10967
Tallahassee, FL 32302
Represented by Messer law firm

Florida Internet Svc. Providers Assoc.
1045 E. Atlantic Avenue
Delray Beach, FL 33483
Represented by Messer law firm

Greenberg, Traurig Law Firm (D.C.)
Mitchell F. Brecher
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. No. (202) 331-3152
Fax. No. (202) 261-0152

Messer Law Firm
Norman Horton
P.O. Box 1876
Tallahassee, FL 32302
Tel. No. (850) 222-0720
Fax. No. (850) 224-4359
Represents: ALTS/CIX/CompTel/ FCCA/ FISPA/TRA

Telecommunications Resellers Assoc.
4312 92nd Avenue, N.W.
Gig Harbor, WA 98335
Represented by Messer law firm

Florida Competitive Carriers Assoc.
P.O. Box 10967
Tallahassee, FL 32302
Represented by Messer law firm

Michael P. Goggin

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against promotional practices of BellSouth Telecommunications, Inc.	Docket No. 990970-TP
	Filed: August 16, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS, OR, IN THE ALTERNATIVE, TO STRIKE THE PETITION, OR FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc., ("BellSouth"), hereby files its Motion to Dismiss, or, in the Alternative, to Strike the Petition, or for Summary Judgment (the "Motion"), pursuant to Rule 28.106.204, Florida Administrative Code, and Rule 1.140 and 1.150, Florida Rules of Civil Procedure. In support hereof, BellSouth states the following:

1. On July 27, 1999, the Association for Local Telecommunications Services, the Commercial Internet Exchange Association, the Competitive Telecommunications Association, ACSI Local Services, Inc., d/b/a e.spire Communications, Inc., the Florida Competitive Carriers Association, and the Telecommunications Resellers Association (collectively, the "Complainants") filed a Complaint and Petition for Expedited Relief (the "Complaint"), accusing BellSouth of offering promotions in violation of Sections 364.08 and 364.09, Florida Statutes, of monopoly leveraging, and of other discriminatory and anticompetitive practices. In essence, this is an action brought in the interests of Internet Service Providers ("ISPs") to ask the Commission to prohibit BellSouth, which sells unregulated internet access services, from offering discounts or selling its services together with BellSouth's regulated services. The allegations of the Complainants fail to

state a cause of action and should be stricken as sham pleadings. In addition, they are not supported by the facts or the law. Accordingly, BellSouth's Motion should be granted and the Complaint dismissed.

2. The allegations of the Complaint are all targeted at one set of circumstances – BellSouth's offering of a discount on BellSouth.net internet access service and Fast Access[sm] service when a customer also elects to purchase BellSouth's Complete Choice® or Complete Choice® for Business plans. The Complainants' allegations focus on a promotion that is both legal and permitted.

3. BellSouth.net, which is an unregulated internet service provided by BellSouth Telecommunications, provides internet access service through dial up modems or through, Fast Access[SM,] which allows for a faster connection speed and is provided by BellSouth.net utilizing Asymetrical Digital Subscriber Loop ("ADSL") purchased at the tariffed prices from Section 7.2.17 of BellSouth's interstate services tariff on file with the Federal Communications Commission. Complete Choice® and Complete Choice® for Business are provided by BellSouth in Section A3 of BellSouth's Florida General Subscriber Services Tariff ("GSST") and are plans that package a residential or single business line with various vertical services.

4. As set forth in the Affidavit of Karen M. McCue ("McCue Affidavit"), attached as Exhibit "A", the retail price for BellSouth.net's internet access service is normally $19.95 for dial-up service and $59.95 for Fast Access[SM] service. From April 1, 1999 through June 30, 1999, BellSouth offered a promotion that provided discounts on BellSouth.net internet access service ($12.95) and Fast Access[SM] service ($49.95) if the customer also subscribed to BellSouth's Complete Choice® Plan.

5. In addition, as noted in the Affidavit of Scott W. Studier ("Studier Affidavit"), attached as Exhibit "B", from January 1999 through April 1, 1999, BellSouth.net offered a $10.00 discount off its regular price of $59.95 for Fast Access℠ Internet access service to BellSouth Business Choice® customers. In June, 1999, BellSouth introduced a new business version of its Complete Choice® plan, called BellSouth Complete Choice® for Business. Subsequent to July 26, 1999, BellSouth.net offered a discount of $4.95 off of the regular price of its dial-up or its Fast Access℠ internet access service to Complete Choice® for Business customers. Studier Affidavit at paragraphs 6-7.

6. The price paid by the customer for the Complete Choice® and Complete Choice® for Business plans is the price tariffed in BellSouth's General Subscribers Service Tariff filed in Florida. The discounts on the services offered by BellSouth.net are absorbed by BellSouth.net and appear on the unregulated portion of each customer's bill. The customer pays the price indicated by the applicable provisions of BellSouth's tariff for all regulated telecommunications services. McCue Affidavit at paragraphs 7, 10; Studier Affidavit at paragraphs 8, 11. Following the initial Complete Choice® promotion, BellSouth.net continues to offer a lesser discount on the internet access ($15.00) and Fast Access℠ ($50.00) services, provided the customer also subscribes to BellSouth's Complete Choice® plan. Again, the entire BellSouth.net discount is applied to the price of the internet service. At no time have customers been allowed to apply the BellSouth.net discount toward any aspect of their regulated local exchange service, including Complete Choice®, Business Choice®, or Complete Choice® for Business .

7. The Complainants allege that BellSouth is guilty of monopoly leveraging because of the bundling of a regulated local exchange service with an unregulated internet access service. Although the Complainants are quick to conclude that BellSouth has engaged in "monopoly leveraging," nowhere in the Complaint do they define what the elements of "monopoly leveraging" may be, or how the conduct of BellSouth might satisfy such a definition. The reason for this is simple: there has been no monopoly leveraging.

8. The Complainants further assert that they are harmed because they cannot complete with an Internet Service Provider ("ISP") who discounts its service and bundles its services with other telecommunications service because they allegedly do not have anything to bundle. Complaint at paragraphs. 17-20. This claim is without any merit whatsoever. Many companies can and are offering discounted and bundled internet services. For example, as set forth in the McCue Affidavit, AT&T and AllTel provide discounted internet access service if a customer also purchases long distance and wireless services. McCue Affidavit at paragraph 8. The Complainants (or their individual members) can provide their own local service, as e.spire does, (Complaint at paragraph 20), whether through their own facilities, unbundled network elements or resale, bundle such service with internet service and thereby compete against BellSouth's offering. Indeed, an ISP who is also an Alternative Local Exchange Company ("ALEC") could resell Complete Choice® together with its own internet offering.

9. The internet access market is thriving in the nine states served by BellSouth. There are dozens of ISPs in the nine states served by BellSouth. Studier

Affidavit at paragraph 9. Although BellSouth.net enjoys an excellent reputation for customer service, it is not the market leader in terms of numbers of subscribers. Id. Clearly, the internet access service market is thriving in this region and is a fully competitive market.

10. Furthermore, the prices charged by BellSouth.net, including the discounted prices at issue here, are competitive with those offered by other providers and, in some cases, much higher. The services comparable to BellSouth.net's Fast Access℠ offered by other providers range from $39.95 for cable modem service, to BellSouth.net's discounted price of $49.95. Some companies, like Gateway and Alta Vista, offer free internet service. Studier Affidavit at paragraph 10. Thus, even with the discounts, BellSouth.net's prices are comparable, and, in some cases, even higher than those offered by its competitors.

11. Rather than compete in the marketplace, however, the Complainants prefer to file complaints with the Commission seeking to prohibit BellSouth.net, an ISP it does not regulate, from offering these discounts and thereby deprive customers of additional competitive choices. The Complainants should not be rewarded for such misuse of the regulatory process.

12. The Complainants' claim that the bundling done by BellSouth is illegal is simply unsupported. In a telling admission, the Complainants state that BellSouth.net's discounted prices are not predatory or improper; they would have no objection if BellSouth.net offered similar discounts to all BellSouth customers (or customers of any other LEC, for that matter). Complaint at paragraph 24. Nor is there any suggestion that the prices charged for Complete Choice® plans are not appropriate. Accordingly,

the complaint boils down to a suggestion that BellSouth and BellSouth.net should not be sold as a package. Merely selling BellSouth.net service together with BellSouth's services clearly is not either anticompetitive or inappropriate.

13. Complainants have repeatedly, and incorrectly asserted that the BellSouth.net discounts, which are absorbed entirely by BellSouth.net, really are discounts or rebates on BellSouth's Complete Choice® plans. They cite a 1997 promotion by Ameritech in which customers who purchased cable television service from an affiliate of Ameritech received checks for specified amounts that could be used to pay for other Ameritech services, including local exchange service. Ohio and Michigan disallowed the program, holding that the acceptance of these checks by Ameritech for payment of local exchange service violated state laws prohibiting rebates, free service, or preferences in connection with local exchange service. *See* Deployment of Wireline Services Offering Advanced Telecommunications Capability *(First Report and Order and Further Notice of Proposed Rulemaking)*, 1999 LEXIS 1327 (1999), In the Matter of the Complaint of the Ohio Cable Telecommunications Association, Complainant v. Ameritech, Respondent, Case No. 97-654-TP-CSS, Public Utilities Commission of Ohio, July 17, 19997, 1997 Ohio PUC LEXIS 539, Order on Rehearing, July 31, 1997, 1997 Ohio PUC LEXIS 579, *aff'd.* Ameritech Ohio v. Public Utilities Commission of Ohio, 86 Ohio St. 3d 78 (1999), In the Matter of the Michigan Cable Telecommunications Association, et al., against Ameritech Michigan, Case No. U-11412, Michigan Public Service Commission, December 19, 1997, 1997 Mich. PSC LEXIS 359, 183 P.U.R. 4th 72. There is, however, such a major distinction between that promotion and the one at issue in this docket that these two cases are totally irrelevant

to the matter at hand. Unlike the Ameritech plan, the BellSouth.net discounts at issue here are not applied, directly, or indirectly, toward local exchange service. McCue Affidavit at paragraphs 7, 10; Sutdier Affidavit at paragraphs 8, 11. The BellSouth.net discounts Complainants assert are somehow improper only apply to the non-regulated, competitive internet access services provided by BellSouth. Thus, the Ameritech promotion is completely inapposite and inapplicable.

14. It is interesting to note that while the Complainants also cite an Illinois Commerce Commission decision Cable Television and Communications Association of Illinois v. Illinois Bell Telephone Company, et al., 97-0344, Illinois Commerce Commission, 1999 Ill. PUC LEXIS 369, involving the same Ameritech promotion, that case was decided in favor of Ameritech, and the Complainants have blatantly misrepresented both the holding of that case and a concern expressed by the Illinois Commission. Complaint, footnote 8. The Complainants claim that the Illinois Commission denied a filed complaint simply on the basis that the Complainant failed "to demonstrate that specific cost allocation rules had been violated by Ameritech." Complaint, footnote 8. This is patently false. The Illinois Commission held that the Complaint failed to set forth any grounds to support the allegations, that Ameritech was receiving full payment of its tariffed rates, and that the source of payment was immaterial. Id. The Complainants in this case also falsely assert that the Illinois Commission "denied the Complaint notwithstanding its stated concern that the Ameritech program had 'many negative policy implications.'" Complaint, footnote 8. Once again, the Complainants in the instant case have misrepresented the facts. When the Illinois Commission stated that there were "many negative policy implications", it

was actually supporting Ameritech's program. The Illinois Commission was actually concerned with the negative policy implications that might arise if it disallowed the Ameritech program. Id. [1]

15. The Complainants further allege that BellSouth is violating Sections 364.08 and 364.09, Florida Statutes, by providing a discount on tariffed rates for local exchange service. Once again, they are simply incorrect. As described in the Affidavit of Ms. McCue and Mr. Studier, BellSouth's Complete Choice® and Complete Choice® for Business customers pay, and BellSouth receives the applicable tariffed rates for all tariffed local exchange services. BellSouth.net absorbs the entire cost of the discounts, not BellSouth's regulated telecommunications services. Therefore, there is no violation of Sections 364.08 and 364.09, Florida Statutes.

16. The Complainants also allege that the bundling of local exchange and Internet access services violate Section 254(k) of the Telecommunications Act of 1996. Section 254(k) prohibits the subsidy of competitive services by services that are not competitive. While, as described above, BellSouth disputes that local exchange services are not competitive, the fact remains that there is no cross-subsidization in the instant case. In fact, Complainants do not allege specifically any subsidy purportedly flowing from BellSouth to BellSouth.net. As the Commission knows, BellSouth is required to account for regulated and unregulated service separately and thus cannot and does not cross-subsidize. The Complainants do not allege anything to the contrary. Moreover, they concede that BellSouth.net's discounted prices are non-predatory and appropriate. Accordingly, the Complaint fails to state a claim for cross-subsidization.

[1] The Illinois Commission's Decision is attached as Exhibit "C".

17. This Complaint should be denied as a sham pleading pursuant to Rule 1.150, Florida Rules of Civil Procedure. A pleading is "considered a sham when it is palpably or inherently false and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue". Menke v. Southland Specialties Corp., 637 So.2d 285 (Fla. 2nd DCA 1994). *See also* Rhea v. Hackney, 157 So. 190 (Fla. 1934). As is clear from the Affidavits attached hereto, the Complaint is not based on facts, but rather false assumptions and misleading assertions.

18. It is apparent that there is no basis for the Complaint either in fact or law. Reviewing Attachments 1 and 2 to the Complaint clearly reveal that the facts as set forth in the Complaint are false and that the Complainants have no basis for their pleading.

19. Pursuant to Rule 1.150, Florida Rules of Civil Procedure, BellSouth requests that the Complaint be stricken as a sham pleading and that summary judgment be entered for BellSouth for the reasons set forth herein.

WHEREFORE, BellSouth respectfully requests that the relief sought herein be granted.

Respectfully submitted this 16th day of August, 1999.

BELLSOUTH
TELECOMMUNICATIONS, INC.

Nancy B. White

NANCY B. WHITE (NW)
MICHAEL P. GOGGIN
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5555

R. DOUGLAS LACKEY
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0747

174741

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against promotional practices of BellSouth Telecommunications, Inc.	)))	Docket No.: 990970-TP Filed: August 16, 1999

State of Georgia
County of Fulton

AFFIDAVIT OF KAREN M. MCCUE

Before me, the undersigned authority, personally appeared Karen M. McCue, who stated that she is currently Director - Consumer Marketing for BellSouth Telecommunications, Inc. ("BellSouth"), and further states the following:

1. I am a person over the age of 21 residing in the State of Georgia. My title is Director – Multi-Product Offers, Marketing for BellSouth Telecommunications, Inc., a Georgia corporation. I have been in that position since January 1999. My business address is 675 West Peachtree Street, N.E., Suite 32A23, Atlanta, Georgia 30375.

2. As Director – Multi-Product Offers, Marketing, I am responsible for the development and implementation of multi-product offers in BellSouth's nine-state region, including Florida. I am familiar with the promotion offered by BellSouth from April 1 through June 30, 1999, involving the BellSouth Complete Choice® plan and BellSouth.net internet service, that is at issue in this case and the pricing related to BellSouth's consumer internet services referred to in the Complaint.

EXHIBIT "A"

3. I am submitting this Affidavit in support of BellSouth's Motion to Dismiss, or, in the Alternative, to Strike or for Summary Judgment, filed in response to the pending complaint before the Florida Public Service Commission in this docket.

4. The information provided herein is based upon my personal knowledge.

5. BellSouth.net is an unregulated service offered by BellSouth Telecommunications, Inc. BellSouth.net provides internet access services to end users, either through dial-up modems or asymetrical digital subscriber loops.

6. I have read the complaint filed in this case and am familiar with BellSouth's promotion offering and the discounting of BellSouth.net service, as addressed in the complaint. The claims made in the complaint regarding these discounts are simply not true. The discounts offered on BellSouth.net service are just that – discounts on BellSouth.net's non-regulated internet services and not on BellSouth's regulated telecommunications services. From April 1, 1999 through June 30, 1999, BellSouth offered a promotion to customers who purchased both Complete Choice® (provided through Section A3.4.3 of BellSouth's Florida General Subscriber Services Tariff) and internet access service. BellSouth.net's regular price for dial-up internet service is $19.95 and $59.95 for Fast Access℠ service. This promotion allowed customers during the period of April 1 through June 30, 1999 who purchased BellSouth's Complete Choice® to also purchase BellSouth.net's internet service at a price of $12.95 per month and Fast Access℠ service for $49.95 per month. From July 1, 1999 on, BellSouth.net has allowed BellSouth's Complete Choice®

customers to purchase internet service for $15.00 per month and Fast Access[sm] service for $50.00 per month.

7. A copy of a sample BellSouth bill illustrating the discount on BellSouth.net service is attached hereto as Exhibit 1. As seen on Exhibit 1, the discount is applied to the non-regulated service on the non-regulated bill page. Customers have never been allowed to apply the discounts on BellSouth.net service toward their local exchange service.

8. I am personally aware of several internet service providers offering discounts on their internet services, similar to those discounts on BellSouth.net service. An example of these is AT&T, which recently offered its customers its Internet service for $14.95 per month for 150 minutes if the customers enrolled and remained enrolled in the AT&T Personal Network residential long distance component. Other companies that have discounted their internet service are U.S. West and AllTel in connection with other offerings.

10. In summary, the discounts on BellSouth.net service about which Complainants complain are not in any way discounts on local exchange service but are discounts applied solely to BellSouth.net's non-regulated internet services.

FURTHER, THE AFFIANT SAYETH NOT.

KAREN M. MCCUE

SWORN TO AND SUBSCRIBED

Before me, this 12th day of August, 1999.

NOTARY PUBLIC

My commission expires on Notary Public, Gwinnett County, Georgia
My Commission Expires March 17, 2003

173481

BELLSOUTH

FL COMPLETE CHOICE
Account Number: 305 555-0022 002 0481
Bill Period Date: May 19, 1999

Helpful Numbers (continued)

BellSouth Telecommunications, Inc. (BST)

NOTE: Numbers for other companies are listed on their bill pages.

Billing Questions or to Place an Order 24 Hours a Day - 7 Days a Week:
If calling from within the Florida BellSouth service area 305 780-2355
If calling from outside Florida or outside the Florida BellSouth service area 1 800 753-0710

Repair:
If calling from within the Florida BellSouth service area 611

Detailed Statement of Charges

Monthly Local Service Charges			*Amount*
Monthly Service - May 19 thru Jun 18			
Basic Services	*Quantity*		
1. Complete Choice® Plan	1 ...		29.70
You have selected the following Complete Choice® Plan feature(s):			
Telephone Line (Includes Touch-Tone Service)			
Three-Way Calling			
30 Code Speed Calling			
8 Code Speed Calling			
Call Waiting Deluxe			
Call Selector (*61)			
Repeat Dialing (*66)			
Call Return (*69)			
Call Tracing (*57)			
Call Block (*60)			
Caller ID Name and Number Delivery with Anonymous Call Rejection			
2. FCC Local Number Portability Line Charge - Line	1 ...		.35
3. Emergency 911 Charge. This charge is billed on behalf of Dade County.	1 ...	**	.50
4. FCC Charge for Network Access	1 ...		3.50
5. Telecommunications Access System Act Surcharge	1 ...	**	.09
Total Basic Services			34.14
Total Monthly Local Service Charges			34.14

** Unregulated Charge

(continued)▶

THIS EXHIBIT CONTAINS THE MONTHLY LOCAL SERVICE CHARGES SECTION AND THE NONREGULATED CHARGES SECTION FROM A SAMPLE BILL FOR A HYPOTHETICAL CUSTOMER

PAY PER CALL NONREGULATED CHARGES

FL BELLSOUTH.NET PAGE
Account Number: 305 555-0022 002 4567
Bill Period Date: May 16, 1999

Detailed Statement of Charges

Nonpayment of Nonregulated Service Charges will not result in disconnection of your local service. If you have questions about your charges a contact number for the Provider is listed with the charge(s) below.

Current Charges

Questions Concerning Internet Charges
Call Toll Free 1 800 436-8638
305 555-0022

BellSouth.net Charges		Amount
BellSouth.net User ID: justeday		
1. Reward under BellSouth.net Complete Choice (R) Plan	**	7.00CREDIT
2. BellSouth.Net Flat Rate from May 1 thru May 31	**	17.50
Total BellSouth.net Current Nonregulated Charges		10.50

Questions Concerning Internet Charges
Call Toll Free 1 800 436-8638
305 555-0022

InterLata Internet Provider Charges		
3. WorldCom InterLATA Flat Rate	**	2.45
Charges from May 01 thru May 31		
1 Users @ $2.45 per User		
Total WorldCom Current Nonregulated Charges		2.45

This portion of your bill is provided as a service to the above Service Providers.

(continued)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against promotional practices of BellSouth Telecommunications, Inc.	Docket No.: 990970-TP Filed: August 16, 1999

State of Georgia
County of Fulton

AFFIDAVIT OF SCOTT W. STUDIER

Before me, the undersigned authority, personally appeared Scott W. Studier, who stated that he is currently Director – Small Business Marketing for BellSouth Telecommunications, Inc. ("BellSouth"), and further states the following:

1. I am a person over the age of 21 residing in the State of Georgia. My title is Director – Small Business Marketing for BellSouth Telecommunications, Inc., a Georgia corporation. I have been in that position since March 1998. My business address is 1057 Lenox Park Blvd., Suite 3A5, Atlanta, Georgia 30319.

2. As Director – Small Business Marketing, I am responsible for a variety of activities including the development and implementation of the multi-product offers to Small Businesses in BellSouth's nine-state region, including Florida. I am familiar with BellSouth Business Choice® product.

EXHIBIT "B"

3. I am submitting this Affidavit in support of BellSouth's Motion to Dismiss, or in the Alternative, to Strike, or for Summary Judgment filed in response to the Complaint in this docket before the Florida Public Service Commission.

4. The information provided herein is based upon my personal knowledge.

5. BellSouth.net is an unregulated corporation under common ownership with unregulated division of BellSouth Telecommunications, Inc. BellSouth.net provides internet access services to end users, either through dial-up modems or asymmetrical digital subscriber loops.

6. I have read the complaint filed in this case and am familiar with BellSouth's promotion offering to business customers and the discounting of BellSouth.net service, as addressed in the complaint. The claims made in the complaint regarding these discounts are simply not true. During the time period at issue in the Complaint, April 1, 1999 through June 30, 1999, BellSouth did not offer a discount on BellSouth.net service for BellSouth Business Choice® customers or in connection with the BellSouth Business Choice plan. However, during the period of January 1999 through April 1, 1999, BellSouth did in fact offer a promotion to customers who purchased BellSouth Business Choice® plan and BellSouth Fast Access℠ internet access service. Those customers received a $10.00 discount off of the regular monthly price of $59.95. Only four customers participated in that promotion in BellSouth's entire nine-state region.

7. In June, 1999, a new tariff went into effect in Florida creating the business version of the Complete Choice plan, which is called the BellSouth® Complete Choice® for Business package. Subsequent to July 26, 1999, Business Customers purchasing BellSouth Complete Choice® for Business were offered BellSouth.net dial-up internet access for $15.00 per month, or $4.95 off the regularly monthly charge. BellSouth Complete Choice® for Business customers choosing any other internet service, such as Fast Access℠, would also receive a $4.95 discount off of that service as well.

8. Any of the discounts off internet service mentioned above that are associated with either the Business Choice® or Complete Choice® for Business plans were applied to the non-regulated service. Customers have never been allowed to apply the discounts on BellSouth.net service toward their local exchange service.

9. The market for internet services has been thriving for a number of years. There are currently dozens of internet service providers in BellSouth's nine-state region offering internet service to business customers, in addition to the top three players – AOL, AT&T WorldNet and CompuServe.

10. Several internet service providers offer discounts on their internet services and make them available to small business customers. These discounts are similar to those discounts offered on BellSouth.net service. AT&T, for example, recently offered its customers its internet service for $14.95 per month for 150 minutes if the customers enrolled and remained enrolled in the AT&T Personal Network

residential long distance component. Many leading computer manufacturers are also providing Internet service at extremely low prices, or not charging at all. Dell Computer and Gateway Computer whom aggressively targets the small business market provide free Internet access with most new PC purchases. In addition, many PC retailers are also aggressively discounting PC prices, subsidizing them with lengthy Internet contracts with leading providers like AOL and CompuServe. Additionally, as reported in the August 13, 1999 edition of USA Today (section B, page 1), Alta Vista, "one of the 10 most popular internet sites," is now offering free internet access to its registered users. The article goes on to mention Microsoft's MSN Internet service is considering the same move.

11. In summary, the discounts on BellSouth.net service about which Complainants complain were not and are not in any way discounts on local exchange service but are discounts applied solely to BellSouth's non-regulated internet services and are, very simply, a response to current market conditions in which the customer benefits in terms of quality, value and convenience.

FURTHER, THE AFFIANT SAYETH NOT.

SCOTT W. STUDIER

SWORN TO AND SUBSCRIBED

Before me, this 13th day of August, 1999.

NOTARY PUBLIC

My commission expires on

TERESA L. ROCKWELL
Notary Public, Gwinnett County, Georgia
My Commission Expires October 28, 2001

173481

1999 Ill. PUC LEXIS 369 printed in FULL format.

Cable Television and Communications Association of Illinois
-vs- Illinois Bell Telephone Company, Ameritech Corporation,
and Ameritech New Media, Inc.
Complaint for an investigation and relief from
cross-subsidizing transfers in violation of Article IX of
the Public Utilities Act

97-0344

ILLINOIS COMMERCE COMMISSION

1999 Ill. PUC LEXIS 369

May 19, 1999

OPINION:
[*1]

ORDER

By the Commission:

On July 22, 1997, the Cable Television and Communications Association of Illinois ("CTCA" or "Complainants") filed a verified complaint alleging that Illinois Bell Telephone Company ("IBT," "Ameritech," or "Illinois Bell") was violating the Public Utilities Act ("PUA" or the "Act") by engaging in rate discrimination through Ameritech New Media ("New Media") by offering vouchers in the form of "AmeriChecks" to customers of New Media which provide up to $ 120 of free telephone service to Illinois Bell customers who agree to purchase New Media's cable television service. The complaint alleged that this practice violated various sections of the PUA, including Sections 5/9-240, 241, 243 and 5/13-505.2. The complaint also alleged that Illinois Bell illegally subsidized the creation and operation of New Media by transferring other substantial goods and services, at cost, to New Media in violation of Sections 7-102, 203 and 5/13-507 of the PUA.

In response, Illinois Bell, Ameritech Corporation ("Ameritech") and Ameritech New Media (collectively the "Respondents") filed a motion to dismiss which was granted in part by the Hearing Examiner. The Hearing Examiner [*2] concluded that CTCA's claims for rate discrimination and unlawful cross-subsidization could proceed. Because of complexity in the discovery process concerning the various transfers of property supporting some of the cross-subsidization claims, all claims relating to issues of cross-subsidization through transfers of property were removed to Docket No. 98-0385 and that docket is currently proceeding. Hearings were held in this docket on September 17, 1997, December 9, 1997, December 17, 1997, January 8, 1998, January 21, 1998, January 27, 1998, February 4, 1998, March 30, 1998, May 27, 1998, June 12, 1998 and July 14, 1998. At the conclusion of the July 14, 1998 hearing, the docket was marked "Heard and Taken."

I. THE FACTS

EXHIBIT "C"

At the May 27, 1998 hearing, the following individuals testified: Mr. James Highers on behalf of CTCA; Christopher Graves on behalf of Staff of the Illinois Commerce Commission; Gregory Dolezalek, Robert Reter and Stanford Levin on behalf of Respondents. Numerous exhibits were admitted into the record and cross-examination of all witnesses was elicited. While the testimony and cross-examination is voluminous, the facts are relatively straight forward and largely [*3] uncontested. To that end they are summarized briefly here.

Illinois Bell Telephone Company is an Illinois corporation providing public telecommunications and services in the State of Illinois. Ameritech Corporation owns Illinois Bell. Ameritech also owns Ameritech New Media, which provides cable television services in several Chicago area communities. Ameritech, through its subsidiary, New Media, provides vouchers to customers of New Media which may be used in the payment of New Media subscribers' telephone bills, including basic local exchange service. Under the AmeriChecks campaign, individuals who sign a one-year customers agreement with New Media cable receive twelve $ 10 AmeriChecks that may be redeemed over a 12-month period. From August, 1997 to May, 1998, Illinois Bell honored 32,954 AmeriChecks. The AmeriChecks campaign has now ended. Upon receiving an AmeriCheck from a customer, Illinois Bell remits it to Ameritech New Media and is reimbursed the face amount plus a processing fee. In addition to reimbursing Illinois Bell for the face value of the vouchers, New Media has also paid Illinois Bell the amount of $ 7,104 in processing fees.

The receipt and acceptance of promotional [*4] checks similar to AmeriChecks is a long-standing promotional practice in the telecommunications industry as well as the cable television industry. Ameritech Illinois honors 15,000 to 20,000 promotional checks issued by interexchange carriers ("IXC's") every month. Cable television companies have also issued promotional checks that may be used to pay for regulated telecommunications service, both local and long distance. TCI, for example, provides its cable television customers with a full year of free telephone service. Ameritech Illinois would honor promotional checks issued by CTCA members and would provide CTCA members with the opportunity to issue AmeriChecks if they so desired. In addition to utilizing AmeriChecks for the payment of local telephone service bills, customers receiving the vouchers can also use the checks to pay for cable television service provided by New Media or to pay for Ameritech Cellular Telephone, paging or security monitoring services. New Media both issues and reimburses Ameritech for the use of AmeriChecks. The checks are drawn against New Media bank accounts that are entirely separate and apart from those of Ameritech Illinois. While New Media pays a [*5] service charge of approximately 20 cents per check to cover the cost of handling AmeriChecks and all other corporate loadings, other issuers of promotional checks do not pay the service charge. The service charge recovers the costs of processing payment envelopes that contain anything other than a payment stub and a single check, which are the only costs to IBT of processing the AmeriChecks.

II. POSITIONS OF THE PARTIES

A. CTCA

CTCA argues that the AmeriChecks campaign is unlawfully discriminatory, relying upon Sections 9-240 and 9-241 of the Public Utilities Act. Section 9-240 of the PUA provides, in pertinent part:

Except as in this Act otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product, or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time . . . nor shall any public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, [*6] nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons;

Section 9-241 of the Public Utilities Act provides, in pertinent part:

No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable differences as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

CTCA argues that the facts here demonstrate that Ameritech provided discounted service to telephone customers because those customers chose to subscribe to Ameritech's cable television services. CTCA cites Shortino v. Illinois Bell Telephone Company (1st Dist. 1990) 207 Ill.App3d 52, 565 N.E.2d 170 for the proposition that Section 9-241 of the PUA prohibits unreasonable difference in charges between customers or classes of customers. In Shortino [*7] , telephone customers obtained a permanent injunction preventing Illinois Bell from charging a pay telephone users tax across monthly billed customers arguing that the practice was prima facia discriminatory because it benefited one class of Illinois Bell customers (coin payphone users) at the expense of another class (monthly billed customers). Noting that Ameritech has produced no documents showing that the cost of serving Ameritech New Media customers is less than the cost of serving customers who do not subscribe to Ameritech New Media, CTCA notes that the cost difference reflects only (1) a customer's decision to subscribe to Ameritech's cable televisions services; (2) whether the customer can afford to pay for cable television services; and (3) whether Ameritech's cable television services are available in a customer's community. CTCA concludes that just as spreading the pay telephone tax across non-pay telephone users was found to be unreasonable in Shortino, the Commission should also conclude here that charging Ameritech New Media customers less for telephone service is equally unreasonable.

CTCA notes that the Public Utilities Commission of Ohio, when faced with the same [*8] AmeriChecks marketing campaign and a similar regulatory framework, held that the AmeriChecks campaign constitutes discriminatory pricing. Based upon its conclusion that the AmeriChecks campaign separates its customers into two discreet classes, those who can and do subscribe to New Media cable television and those who cannot or do not choose to do so, the Public Utilities Commission concluded that Ameritech Ohio had extended a preference to customers of its affiliate by relieving those customers of the requirement of full cash payment, while still requiring customers who do not subscribe to Ameritech's affiliate to satisfy the totality of their bills by full payment in cash or by

check. Because such a classification bore no rational relationship to rate justifications or any other non-discriminatory segmentation of customers of a monopoly service, it must be considered the granting of an undue preference.

CTCA finds irrelevant the fact that Illinois Bell is reimbursed by Ameritech New Media for the full face value of the AmeriCheck plus a processing fee because, in CTCA's view, rate discrimination is defined not by how much Illinois Bell receives in total from all sources for a service, [*9] but how much Illinois Bell actually receives from its customers. CTCA urges the Commission to look at the charges actually paid by certain classes of customers to determine whether the PUA's prohibitions against discriminatory pricing are violated. CTCA concludes that because customers who subscribe to Ameritech's cable television services paid less than those who either choose not to subscribe or who cannot subscribe and there is no reasonable basis for such a classification, the rate differential created by the AmeriChecks' scheme is discriminatory. CTCA finds equally irrelevant the fact that Ameritech accepts promotional checks from IXCs, because IXCs are not affiliates of Ameritech. CTCA argues that the distinction is crucial because the PUA prohibits utilities from either directly or indirectly charging more or less than published rates. CTCA posits that if Illinois Bell cannot directly offer rebates to its telephone customers who subscribe to Ameritech's cable television services, then Illinois Bell may not indirectly engage in that activity through an affiliate.

The CTCA finally argues, with respect to price discrimination or the granting of preferences, that the AmeriChecks [*10] campaign is contrary to Illinois policy favoring competition in the telecommunications industry and would harm competition in the telecommunications industry because carriers seeking to enter the market to provide telephone services in Illinois, as regulated entities, would normally be required to charge full rates required by their tariffs without discrimination. CTCA argues that if indirect discrimination through the use of AmeriChecks is permitted, unless the new market entrants were sufficiently financed to establish their own subsidiaries and to offer rebates, the new market participants would face a serious artificial barrier to entry.

CTCA next argues that by permitting New Media to use the AmeriChecks vouchers in a marketing campaign with Illinois Bell, but without market cost to New Media, Ameritech forces Illinois Bell to dispose of utility assets without Commission approval in violation of Section 7-102 of the Public Utilities Act. CTCA further posits that by giving New Media the benefits of revenues rightfully belonging to Illinois Bell, Ameritech violates Section 13-507 of the Public Utilities Act. Section 7-102 of the PUA provides, in pertinent part:

Unless the consent [*11] and approval of the Commission is first obtained or unless such approval is waived by the Commission in accordance with the provisions of this Section: (c) no public utility may assign, transfer, lease, mortgage, sell (by option or otherwise), or otherwise dispose of or encumber the whole or any part of its franchises, licenses, permits, plant, equipment, business, or other property . . . .

Section 13-507 of the Public Utilities Act provides, in pertinent part:

In any proceeding permitting, approving, investigating, or establishing rates, charges, classifications, or tariffs for telecommunications services offered or provided by a telecommunications carrier that offers or provides both

non-competitive and competitive services, the Commission shall not allow any subsidy of competitive services or non-regulated activities by non-competitive services . . . .

In addition, Section 13-103 of the PUA provides, in pertinent part:

. . . . The General Assembly declares that it is the policy of the State of Illinois that: (d) In no case should rates or charges for non-competitive telecommunications services include any portion of the cost of providing competitive telecommunications [*12] services, as defined in Section 13-209, or the cost of any unregulated activities . . . .

CTCA argues that New Media is not paying market value to Illinois Bell for the right to offer AmeriChecks to cable television customers because Illinois Bell does not charge New Media for the right to use Illinois' name and goodwill in New Media's marketing campaign. CTCA witness Highers testified that the AmeriChecks campaign does not benefit Illinois Bell in any way since Illinois Bell already has a captive customer base. Illinois Bell receives no customers from the AmeriChecks campaign and instead Illinois Bell is merely reimbursed for the cost of each AmeriChecks voucher used.

CTCA witness Highers went on to testify that if this were an arms-length transaction between Illinois Bell and New Media, Illinois Bell would charge New Media a premium that represents the true value of this service of attracting new customers to New Media. In Mr. Highers' opinion, the value of this service would exceed $ 120 for each customer who signs a one-year subscription agreement because that is the cost generally reflected in cable companies attracting a new customer. CTCA argues that in an analogous situation, [*13] the Commission and courts have found illegal cross-subsidization pointing to the case of Illinois Bell Telephone Company v. Illinois Commerce Commission (2nd Dist. 1996) 283 Ill.App3d 188, 204 (Commission Order entered in Docket No. 93-0239 on October 11, 1994). That case involved a proposed Staff adjustment to Illinois Bell Telephone Company's revenue requirement to reflect the value that Yellow Page advertising would have had to Ameritech had a contract with the Yellow Page Publishing Company been negotiated in an arms-length manner. In arriving at the conclusion that the revenue requirement should be adjusted to reflect the fact that the negotiations were not conducted at arms-length, the Commission concluded that it will not, and by law could not, allow cross-subsidization of revenues to occur from regulated to non-regulated entities in any form. In the Yellow Pages case, the Commission found that the corporate parent (Ameritech) had demonstrated an inappropriate willingness to shift directory revenue from the regulated entity to the non-regulated entity through its manipulation of contractual arrangements. CTCA argues that by allowing the unregulated affiliate to benefit [*14] from a contractual right owned by the regulated affiliate (the use of the affiliate name) without approval of the Commission that the transaction violates 7-102(c).

B. Illinois Bell Telephone

IBT first posits that in reaching its determination in this complaint, the Commission must do so in light of the well established principle that the complainant bears the burden of proof on all issues and that a carrier's conduct is presumed reasonable unless the complainant proves that it was not. IBT argues that in order to prove that Ameritech has engaged in unreasonable

discrimination, CTCA must prove, first, that Ameritech Illinois treated different classes of customers differently and, second, that any differences in treatment were arbitrary and unreasonable. In terms of cross subsidies, Ameritech posits that CTCA must establish that goods or services were transferred from Ameritech Illinois at a price less than that required under the relevant accounting rules of the Commission. Because CTCA has alleged that the proper value of the transfer here is "market value" it is incumbent upon the complainant to prove that a relevant market exists and what the market value of the goods or services [*15] at issue are.

Ameritech Illinois argues, as a threshold matter, that it has not created two different classes of customers and therefore cannot be guilty of price discrimination. Ameritech notes that the only conduct alleged on its part is the act of honoring new media promotional checks when those checks are presented by IBT customers as payment for telephone bills. Ameritech indicates that it treats AmeriChecks no differently than any other checks presented by its customers, including hundreds of thousands of promotional checks issued by IXCs or cable television companies. In addition, Ameritech Illinois had nothing to do with the planning, financing or issuing of the checks, which were done in the first part by New Media. Ameritech notes that Section 9-240 of the PUA expressly permits a utility to provide any privilege which is regularly and uniformly extended to all corporations and persons and concludes that because it has and will honor promotional checks issued by IXCs, that it has and will honor promotional checks issued by CTCA members, and that CTCA members may even issue AmeriChecks if they so choose, it is regularly and uniformly extending this privilege to all corporations [*16] and persons. Because it is doing so, there can be no violation of Section 9-240 of the Act.

Ameritech also takes issue with CTCA's assertion that customers using AmeriChecks are paying less for telephone service than others. Ameritech argues that AmeriChecks are a discount on cable television service, not telephone service, because the customer receives the discount when he obtains the AmeriChecks, not when he spends them. Ameritech notes that the FCC has described a virtually identical promotion by Southern New England Telecommunications as a beneficial form of price competition in the cable television market, not as a rebate on telephone service. (citing Fourth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 13 FCC Rcd. 1034, par. 208 (1998). Ameritech goes on to note that this is equally true from Ameritech's perspective because Ameritech is fully reimbursed by New Media and, thus, invariably receives the full tariffed rate for any service it provides. Because of this, according to Ameritech, there can be no discrimination or rebate involved. Ameritech notes that this is consistent with the Commission's regulatory [*17] treatment of promotional offers which is that such offers are promotions for the service for which the promotion is provided, not the one for which the promotion is redeemed.

Ameritech then assumes, arguendo, that it has, in fact, created two separate classes of customers but argues that because New Media, not Ameritech Illinois or its ratepayers have paid for the AmeriChecks, there can be no harm to customers or competition and thus no unreasonable discrimination, which is the only thing prohibited by the Act. Citing City of Chicago v. Commerce Commission (1st Dist. 1996) 281 Ill.App.3rd 617, Ameritech argues that the question to be addressed is whether any differences in the treatment of customers are unreasonable or arbitrary. Ameritech argues that the City of Chicago case must

be read as establishing a test for unreasonable discrimination as a situation wherein one group of ratepayers is charged for the cost of serving another group. Because New Media and not Ameritech Illinois ratepayers are paying the cost of the program, there can be no differential treatment of any regulatory concern. Ameritech argues that where, as here, the carrier's unregulated affiliate has [*18] ultimately paid for a promotional discount, neither customers nor competition could be harmed.

Ameritech notes that the FCC has reached the same conclusion in Bank America Corp. v. American Telephone and Telegraph Co., 8 FCC Rcd. 8782 (1993) ("Bank America"). In Bank America, AT&T (then a dominant long distance carrier) offered a credit card through its non-regulated subsidiary, AT&T Universal Card Services ("UCS"). Cardholders were given a 10% discount on all of the services provided by AT&T's regulated telecommunications subsidiary, which expenses were reimbursed by UCS. The reimbursement occurred through intracorporate transfers. Several banks complained that AT&T's role in the UCS credit card marketing scheme violated the Federal Communications Act, arguing that the challenged marketing program violated provisions banning unreasonable discrimination, off-tariff discounts, and cross-subsidization. The FCC rejected the bank's claim, finding that, despite the fact that AT&T had admittedly created two separate classes of customers, because UCS ultimately paid for the discount on the AT&T service, the arrangements between the companies could not be characterized as discriminatory [*19] discounts or off-tariff rebates. The Commission concluded that its main concern was that AT&T receive its full tariffed rates for regulated services and that because the evidence showed that this was the case, the banks had failed to establish a claim of unreasonable discrimination or unreasonable practices. Ameritech argues for the same ruling here based upon its conclusion that the substance of any unlawful rebate claim must be that the regulated entity charged or received a rate less than its tariffed rate and that where the full tariff rate was ultimately paid, regardless of the source, there can be no discount granted by the regulated entity.

Ameritech argues that this result is consistent with sound regulatory policy because the regulator's primary concern in this context is whether the regulated entity is able to cross-subsidize its unregulated affiliates at the expense of the regulated company's ratepayers. If such a cross-subsidy were permitted, the regulated entity could finance below cost, predatory pricing by its unregulated affiliate, with the revenue foregone in the unregulated market being recovered in the regulated market. Ameritech concludes that because New Media, [*20] not Ameritech Illinois ratepayers, ultimately pay for the AmeriChecks, neither Ameritech nor its ratepayers has financed the subsidy. Ameritech concludes that the Ohio Commission simply reached the wrong decision in arriving at a contrary conclusion.

In further arguing that the acceptance of AmeriChecks is not unreasonable discrimination, Ameritech argues that past industry practice bears upon the question of what conduct is reasonable. Ameritech concludes that because the established industry practice is the acceptance of promotional checks, the practice must be found to be reasonable and thus not unlawful.

In terms of CTCA's reliance upon the decision of the Ohio Public Utilities Commission, Ameritech argues that the Commission missed the point that Ameritech is reimbursed for the cost of the AmeriCheck, resulting in the case being

wrongly decided.

Ameritech next addresses CTCA's cross-subsidy arguments. Ameritech agrees that transactions between telephone companies and affiliates are governed by the cost allocation rules adopted by the FCC and this Commission and that the Commission generally follows federal cost allocation principles when it evaluates affiliate transactions. Ameritech [*21] then argues that the only evidence in this docket is that Ameritech Illinois' treatment of the costs associated with the AmeriChecks promotion is entirely consistent with the cost allocation rules of the Commission and the FCC. Ameritech notes further that the FCC explicitly relied on those rules in rejecting similar cross-subsidization arguments in the Bank America decision. Ameritech notes that while CTCA has argued that Ameritech Illinois failed to charge New Media the market value for the use of Ameritech's trade name and goodwill, it failed to provide any evidence to establish that a market value exists or to show that a relevant market exists. Relying upon the FCC's Bank America decision, Ameritech argues that the lack of evidence to support the existence of a market price must result in a conclusion that the cost of a particular transaction is the requisite valuation basis, not prevailing price or some external market price.

Ameritech goes on to argue further that the only evidence in the record is that cost, rather than market price, is the proper valuation basis for the services provided by Ameritech Illinois to New Media. Ameritech witness Reter described the cost [*22] allocation process and explained that Ameritech Illinois' treatment of the costs associated with the AmeriChecks program complies in all respects with the cost allocation rules of the FCC and the Commission which are governed by Parts 32 and 64 of the FCC's accounting rules and Parts 710 and 711 of the Commission's rules. Mr. Reter first noted that there are no "costs" associated with goodwill or trade name and that Ameritech Illinois does not show any trade name or goodwill assets on its books. Ameritech Illinois, in fact, does not own the "Ameritech" brand name, which is owned by Ameritech Corporation. In addition, Ameritech Illinois' rates have never included any costs associated with trade name or goodwill.

Mr. Reeder went on to testify that even if Ameritech Illinois owned the assets which it allegedly had failed to record appropriately, the current cost allocation rules would not support the CTCA's market value theory because the rules provide a specific hierarchy of valuations that must be followed for regulatory purposes. To adopt a market valuation for any service, there must first be an established market for that service. The established market for honoring promotional [*23] checks, according to Ameritech, is zero, as Ameritech Illinois has performed that function for many years for others at no charge. Because there is no market price, cost is the appropriate valuation for providing that service to New Media and cost is reflected in the service charge paid to Ameritech Illinois by New Media, but not by other issuers of promotional checks.

Ameritech attempts to distinguish the Illinois Bell Telephone case by arguing that that case involved the establishment of a revenue requirement and the effect of the failure to engage in arms-length negotiations had on the development of that revenue requirement. Ameritech argues that the case did not address cost allocation rules or the amount that a yellow pages affiliate would pay for any services rendered by Ameritech Illinois, thereby distinguishing the case on both a legal and factual context. Further, the assets at issue in this

docket are fundamentally different than those at issue in the Illinois Bell Telephone case because Ameritech Illinois has never included any assets for either trade name or goodwill in its accounts and no such assets have ever been used by Ameritech Illinois or the Commission in determining [*24] Ameritech Illinois rates.

Finally, Ameritech responds that CTCA's allegations concerning purported violations of Section 7-102 in failing to obtain the Commission's approval of any arrangements with New Media related to AmeriChecks are frivolous because telecommunications carriers are not required to obtain the Commission's approval of affiliate transactions, being required instead to only provide notice to the Commission of transactions with a value in excess of $ 5 million. (see 220 ILCS 5/13-601) Because the total value of New Media AmeriChecks honored by Ameritech Illinois, including services charges, was less than $ 350,000, there was no reporting requirement under Section 7-102.

C. Staff

Staff first argues that IBT's acceptance of AmeriChecks is inconsistent with the policy initiatives embodied in the non-discrimination provisions of the Public Utilities Act because it creates a distinction between customers by creating two classes, those who can participate in the AmeriChecks promotion and those who cannot. Staff takes the position that the AmeriChecks campaign arguably violates the Public Utilities Act because Ameritech Illinois is indirectly providing discounted service [*25] to its telephone customers who subscribe to Ameritech New Media. Staff notes that the issue of rate discrimination is a matter of fact that must be judged on the evidence presented. Staff notes that if the Commission accepts IBT's position, the test need not be reached because IBT does not charge its telephone customers using AmeriChecks less than the tariff rate because IBT is paid in full by New Media for the difference between the customer's phone bill and the $ 10 AmeriCheck.

Staff urges the Commission to not consider the narrow set of facts presented by IBT without first examining the affiliate relationship of IBT and the nature of the AmeriChecks promotional campaign. Staff notes that the undisputed facts are that in order to build a customer base in various suburbs in the Chicago area, Ameritech Corporation, through its subsidiary, New Media, began the AmeriChecks campaign and that only customers in those areas were afforded the opportunity to participate in that campaign. Staff goes on to note that an argument could be made that IBT, by accepting AmeriChecks, is dividing its customer base into two classes of customers, those who live in those Chicago suburbs and can participate [*26] in the program and those customers who do not live in the area or do not choose to subscribe to New Media services. Staff concludes that IBT's acceptance of AmeriChecks allows telecommunications customers who subscribe to New Media's cable service to receive IBT telecommunications services, including non-competitive local service, at reduced rates with no cost justification. Staff finds this problematic because Section 9-240 of the Public Utilities Act provides that public utilities may not refund or remit, directly or indirectly, in any matter or by any device, any portion of rates or other charges contained in tariffs, nor extend to any corporation or person any form of privilege except such as are regularly and uniformly extended to all corporations and persons. In addition, Section 9-241 of the Public Utilities Act requires that public utilities may not grant any preference or advantage to any corporation or purchase either as between localities or as

between classes of service. Staff concludes that by accepting AmeriChecks, IBT is creating a new class of customers, subscribers to cable service, which is given preferential treatment relative to other IBT telecommunications customers [*27] for no reason other than subscribing to cable service. Staff goes on to note that customers in different geographic localities are the only customers who can choose to participate in the rebate program from New Media and indicates that it believes this type of discrimination is not allowed under the PUA because IBT is accepting an indirect refund from its affiliate and maintaining an unreasonable difference between localities.

In terms of Ameritech's argument that the AmeriChecks marketing campaign is no different than marketing campaign carried on by other telecommunications carriers, Staff notes that when applying its rationale to promotional checks, Ameritech Illinois accepts from interexchange carriers, it would also be creating a separate class of customers, those who can benefit from interexchange carrier promotions and those who cannot. Staff nonetheless believes that there are distinctions between the AmeriChecks campaign and interexchange carrier promotions despite the fact that it agrees that IBT indirectly benefits from interexchange carriers promotional campaigns just as it indirectly benefits from New Media's promotional campaign.

In terms of the distinctions between [*28] the interexchange carriers promotions, Staff notes that MCI is not affiliated with Ameritech Illinois and targets long distance subscribers all over the nation from which it concludes that MCI is not rewarding just IBT local phone users for subscribing to their long distance service and IBT local phone service. Staff notes that IBT is, however, rewarding a customer for subscribing to cable service when it redeems an AmeriCheck. Staff then finds a crucial distinction in the fact that MCI's reduction in service reflects the price for that service since it goes toward long distance service. Staff finds the distinction crucial since IBT asserts that the reason for the price reduction for AmeriChecks is because of competition in the cable market, not competition in the local telephone market.

Staff agrees with CTCA that the AmeriChecks campaign could have an adverse effect on competition in the telecommunications industry because it allows IBT to circumvent the ratemaking process through the use of rebate or voucher offers of affiliated or non-affiliated companies. Staff argues that the acceptance of AmeriChecks allows IBT to offer service, after rebate, at rates that are below LRSIC costs [*29] which violates the Commission's order in the alternative regulation proceeding. In addition, Staff argues that pursuant to 83 Ill. Adm. Code 792.30(b)(2), all competitive services subject to imputation must be retested for imputation every time the rate for the competitive services are reduced, but here Ameritech has never performed an imputation test to reflect the reduction in the tariffed rates for its competitive services that results from accepting an AmeriCheck if the AmeriCheck were submitted for a competitive service.

Next, Staff argues that pursuant to the FCC's interconnection order (FCC Order in C.C. Dockets 96-98 and 95-185), IBT is required to make promotional offerings and discounts available to resellers on a wholesale basis if the promotion or discount is available to retail customers for periods longer than 90 days. Because the AmeriChecks promotion provides telecommunications customers with reduced rates for periods as long as 6 to 12 months, it allows IBT to circumvent the requirements that these reduced rates be made available to

resellers thereby reducing the resellers ability to compete in the local exchange market. Staff expressed additional concerns that allowing [*30] this to occur would place IBT in the position of being able to place a price squeeze on its local competitors who do not have a large corporate affiliate sponsoring promotional campaigns discounting services or a monopoly hold on the local telephone market.

Staff concludes that by accepting AmeriChecks from customers who choose to subscribe to Ameritech Corporation's non-regulated cable service, IBT is offering discriminatory rates by favoring a customer class that chooses to subscribe to New Media's cable service. Staff notes that its witness testified that cable customers should not make decisions about cable services based upon the prices of phone service and that in any competitive market, prices should reflect the cost of the product or service purchased. Here the AmeriChecks promotion lowers the perceived price of phone service to New Media customers without any cost justification for that change. Staff posits that if IBT's assertions that the price reductions result from competition in the cable market are true, then the price of cable service should reflect this change, not the price of local telephone service. Staff concludes that IBT customers who do not or cannot subscribe [*31] to New Media are paying discriminatory prices which are unreasonable because the difference in pricing is based on whether or not the IBT customer is also a customer of IBT's non-regulated affiliate.

III. REPLIES

Complainant, Respondents and Staff all filed reply briefs. To the extent those briefs reiterate arguments raised in the initial briefs, they will not be repeated here.

A. CTCA

CTCA first takes issue with Ameritech's assertion that it treats every customer and company absolutely identical. CTCA argues that by accepting AmeriChecks from New Media customers, Illinois Bell has enabled New Media customers to be charged less than other Illinois Bell ratepayers, in violation of Section 5-9240 which prohibits public utilities from charging more or less for a service than the published rate for that service. CTCA also takes issue with Ameritech's view that the Public Utilities Commission of Ohio simply "missed the point in arriving at its conclusion that the AmeriChecks campaign constitutes discriminatory pricing." CTCA urges the Commission to adopt the reasoning of the Ohio PUC which is that rate discrimination is defined by how much Illinois Bell actually receives from [*32] its customers, not by how much Illinois Bell receives in total from all sources. CTCA distinguishes the Bank America Corporation holding by arguing first that any AT&T customer could have received the AT&T long distance discount by obtaining the credit card at issue. In addition, CTCA argues that non-competitive rates charged by Illinois Bell have a direct impact on the development of local exchange competition, whereas providing discounts by AT&T had no impact upon the development of long distance competition. In terms of Ameritech's argument that AmeriChecks are a discount on cable television service, not telephone service, CTCA argues that AmeriChecks have no value or worth until redeemed, are not transferable and confer no benefit until used and that the New Media customer receives no discount from an AmeriCheck until using it to reduce his local telephone bill.

In responding to Ameritech's assertion that the AmeriChecks campaign is reasonable because it does not harm customers or competition, CTCA argues that the AmeriChecks campaign causes direct and quantifiable harm to customers who do not subscribe to New Media because they pay higher telephone rates than New Media subscribers. [*33] This is despite the fact that there is no dispute that the underlying cost of providing telephone service to these customers is identical.

In terms of Ameritech's arguments that the AmeriChecks campaign should be found reasonable because it is consistent with industry practice, CTCA argues that the fact that other entities may provide customers with checks that can be applied to their local telephone bill, is irrelevant to the issue here because the AmeriChecks campaign involves a non-competitive, regulated company offering discounts on local, non-competitive telephone service as an inducement for its ratepayers to use the services of a competitive, unregulated affiliate. CTCA argues that Ameritech has adduced no evidence that any other regulated utility is providing a discount that is similar to the discount being provided by the AmeriChecks. Finally, CTCA argues that the industry practice defense is a thinly disguised version of the unclean hands defense which is applicable in cases of equity, but not in cases of law such as that before the Commission.

In terms of the cross subsidy issues, CTCA reasserts its view that Illinois Bell must charge New Media the higher of fair market [*34] value or cost, citing 83 Ill. Adm. Code 711.25. In terms of Ameritech's arguments that transfers need to be recorded at cost unless there is proof of a higher fair market value and of a relevant market, CTCA urges that the evidence in this matter satisfies that claim because the relevant market is Illinois Bell's marketing of an affiliate's promotional checks while the market value is established by comparison with the customer acquisition costs of New Media's competitors. CTCA notes that the FCC's Bank America decision is apparently based upon a misunderstanding of FCC regulations, which provide that when assets are sold by a carrier to its affiliate, the assets must be recorded at the higher of fair market value and net book cost, but not when assets are sold by the affiliate to the carrier. In addition, CTCA argues that the Bank America decision is readily distinguishable from this case in that the FCC has in place a regulation at 47 C.F.R. Section 32.27, which concerns the manner in which a carrier is entitled to charge "prevailing price" for services received from or sold to an affiliate, but that this regulation has no counterpart under the Illinois regulatory scheme. [*35] Because, in CTCA's view, it is uncontested that Illinois Bell has charged cost for AmeriChecks, not fair market value, the only issue is whether the fair market value exceeds the cost. CTCA argues that since cost is negligible (a small processing fee), the issue boils down to whether New Media would pay Illinois Bell for its participation in the AmeriChecks marketing scheme and that the evidence amply confirms that New Media would pay for this benefit if the affiliate would only ask. Instead, New Media has capitalized on the goodwill of the phone company and, free of charge, it has capitalized on the valuable trade name of its affiliate. CTCA finds immaterial the fact that ratemaking principles do not allow a utility to consider goodwill and trade names a part of its revenue requirement because, in its view the intangible assets have considerable market value and routinely command substantial premiums. CTCA notes that Ameritech recently obtained an emergency injunction against One-Step Billing requiring it to cease misrepresenting its relationship with Ameritech in an attempt to cause confusion among Ameritech's customers and to use Ameritech's name recognition and reputation to One-Step

[*36] Billing's benefit.

In terms of the response of Ameritech to assertions that the utilities cannot forego bargaining opportunities to benefit competitive affiliates raised by the alternative regulation order, CTCA argues that Ameritech's "asset" distinction is no distinction at all because the asset at issue in the alternative regulation order (a foregone bargaining opportunity) is no different than the assets of goodwill at stake here. Finally, CTCA finds Ameritech's interjection of price cap regulation as a substitute for prohibiting cross-subsidization to be non sequitur. CTCA argues that price cap regulation does not prevent cross-subsidies, especially where price caps are not permanent and are periodically reviewed.

B. Staff

In terms of IBT's contention that it has not created two different classes of customers, Staff argues that the AmeriChecks scheme results in different rates being paid by customers because New Media customers are provided with indirect rebates on the basis of their location and that this is inconsistent with the non-discrimination standards set forth in the PUA. In terms of IBT's assertions regarding similar campaigns conducted by IXCs, Staff urges the [*37] Commission to consider that IBT's acceptance of an AmeriCheck is not the same as any other promotional check because IBT is not affiliated with the companies conducting the promotional campaign. Because IBT is not affiliated with the companies conducting the promotional campaign, it cannot be said that IBT's participation in the AmeriChecks campaign is based upon an arms-length transaction with another company. Instead, by accepting a promotional check from its non-regulated affiliate, IBT is indirectly rebating its tariffed rate to customers living in New Media's service area. Regarding IBT's assertions that because they were not part of the planning, financing or issuing of AmeriChecks, they could not possibly be viewed as creating two classes of customers, Staff argues that IBT's assertions do not take into account its affiliation with New Media and bears no relevance in this proceeding. Staff argues that IBT's non-participation in the program makes IBT more culpable because they are unable to identify any cost justification for offering the indirect rebate to its telephone customers.

In terms of IBT's arguments concerning the distinctions between reasonable and unreasonable discrimination, [*38] Staff argues that in determining what constitutes unreasonable discrimination, the Commission should consider such factors as "difference in the amount of product used, the time the product when used, the purpose for which used, or any other relevant factors reflecting a difference in cost." (citing Austin View Civic Association v. City of Palos Heights, 405 N.E.2nd 1256, 85 Ill.App.3rd 89 (1980)) Under this view, unreasonable discrimination occurs if the difference in rates is unreasonably related to the difference in the cost of providing service. To that end, IBT's assertions that unreasonable discrimination results from charging one group of ratepayers for the cost of serving another group is erroneous. This is because IBT has failed to recognize that reasonable discrimination occurs when the rate is reasonably related to the cost of providing service. In the case at bar, however, the price of IBT's local telephone service is not reasonably related to the cost of providing New Media cable service, therefore, the differential treatment between those IBT customers who are located in New Media's service area and subscribe to New Media and those IBT customers who cannot subscribe

[*39] to New Media is unreasonable.

In terms of IBT's reliance on the Bank America decision, Staff first argues that the FCC was applying federal law to a different set of facts, making IBT's argument irrelevant. Staff does note that the FCC recognized that advertising and promotional programs raised concerns and so ordered AT&T to provide the FCC with informational filings for any future credit or discount programs in order to enable the FCC to evaluate in a timely manner that future promotional activities are in accordance with the requirements of the Communications Act. Staff urges the Commission to require IBT to submit similar descriptions of promotional activities within 30 days of the beginning of each promotional campaign. In addition, Staff urges the Commission to initiate a rulemaking to examine affiliate transactions in the telecommunications industry.

C. IBT

IBT responds to the assertions made by Staff of the Commission. IBT first notes that Staff's theory of the case is fundamentally different from the one alleged in CTCA's complaint. The CTCA complaint alleges that the AmeriChecks promotion is discriminatory because it involved a cross subsidy from Ameritech Illinois [*40] to Ameritech New Media, Inc. Staff, however, has expressly declined to address the CTCA's cross-subsidization claims and the Staff witness testified that he viewed the question of whether New Media properly reimbursed Ameritech Illinois for the cost of the AmeriChecks promotion as entirely irrelevant to the case. Ameritech concludes that because Staff's theory of the case ignores any connection between discrimination and cross-subsidization, the view is fundamentally at odds with the central legal theory of the complaint. IBT goes on to argue that, more importantly, Staff's view is wrong, both as a matter of law and as a matter of policy and that reimbursement is, in fact, crucial to the decision in this case.

Ameritech first asserts that the only conduct which is alleged to have violated the Act is its acceptance of AmeriChecks in exactly the same way it accepts any other third party negotiable instruments properly payable to Ameritech Illinois and presented by a customer. Instances of such acceptance include hundreds of thousands of promotional checks issued every year by interexchange carriers as well as many other kinds of third party checks, including checks provided by a customer's [*41] parents, children, roommates, charitable organizations, and even the FCC's school and library corporation. Ameritech Illinois has always accepted these checks in recognition of the requirement to do so in 83 Ill. Adm. Code 735.150. Ameritech reiterates that, contrary to Staff's position, Ameritech Illinois has treated all of its customers absolutely identically and has done nothing for New Media's customers than it has not done for any other customer that has presented it with a third party check in payment of a telephone bill. Because there has been no difference in the treatment of a company's customers, Ameritech argues that discrimination cannot possibly have occurred. Ameritech then argues that because the promotion here was developed by New Media, it cannot be said that Ameritech Illinois participated in any way in this promotion. In response to Staff witness Graves' testimony that Ameritech Illinois' lack of participation in the planning of the promotion is irrelevant, Ameritech responds that the marketing activities of Ameritech Corporation and New Media are beyond the Commission's substantive regulatory jurisdiction as a matter of state and federal law and that because of [*42] this, Staff's attempt to impute the actions of an unregulated affiliate

to Ameritech must be rejected.

Ameritech then notes that Staff's position apparently applies to all promotional checks in general, from which it infers that the AmeriChecks promotion and the acceptance of interexchange carrier promotions are exactly the same. In terms of Staff's suggestion that the promotions can be distinguished because the interexchange carriers are not affiliated with Ameritech Illinois and the interexchange carriers' promotional checks are used to pay for long distance, rather than local telephone service, Ameritech argues that the first of these arguments is inconsistent with Staff's own testimony and is legally irrelevant and the second argument is incorrect. First, Ameritech points out that Staff's witness repeatedly testified that he had viewed the acceptance of promotional checks as improper with respect to either affiliated or non-affiliated companies. In Ameritech's view, creating a distinction between the acceptance of promotional checks issued by affiliated and non-affiliated companies would, in fact, create illegal discrimination because it would require
Ameritech Illinois to discriminate [*43] against customers of Ameritech New Media by not accepting their checks while accepting checks issued by any non-affiliate. In terms of Staff's assertion that the interexchange company promotional checks are used only to pay for long distance service, Ameritech notes that this assertion is directly contrary to the undisputed facts in the record because such checks, just like AmeriChecks, are payable to Ameritech Illinois for whatever services appear on the customer's bill, including both long distance and local service and, in fact, the Staff witness agreed that this is true. In summary, Ameritech argues that accepting Staff's concession, that New Media AmeriChecks are identical to any of the third party checks would result in Ameritech being forced to refuse to accept third party checks from any of its customers.

Ameritech then turns to Staff's argument that by honoring AmeriChecks, Ameritech Illinois has allowed customers who subscribe to New Media's cable service to obtain telecommunications services at reduced rates with no cost justification. Ameritech first notes that any customer receiving an AmeriCheck can use the check to pay for cable television service provided by New Media, [*44] local telephone service, cellular telephone service, paging or security monitoring services or any other liability appearing on it's Ameritech bill. From this, Ameritech infers that the AmeriChecks are exactly like cash from a customer's perspective. Ameritech argues that the Staff witness conceded that AmeriChecks are equivalent to cash from the customer's perspective, but viewed it as irrelevant to the case. This is because the witness was unconcerned with what customers actually paid or what Ameritech Illinois actually received for telephone service, concerning himself instead with what customers perceive that they paid. In Ameritech's view, because Ameritech is reimbursed by Ameritech New Media for the amount of face value of an AmeriCheck, there has been no reduction in the price of telephone service either perceived or actual. In addition, Ameritech argues that nothing in the Act permits the Commission to decide the case based upon a witness' opinion of a customer's perception rather than the statutes and facts contained in the record.

Ameritech then turns to Staff's view of the case and argues that nothing in the record shows that Ameritech's conduct was arbitrary or unreasonable. [*45] Ameritech first argues that Staff has applied the wrong legal standard. Ameritech argues that Staff's view is that discrimination is an entirely

economic phenomenon and that all differences in prices charged to customers must be cost justified. The corollary of this position is that any differences not "reasonably related to the cost of providing service, are unreasonable and discriminatory." Noting that the Commission has, for many years, required Ameritech Illinois to charge business customers higher rates than residential customers for the same services, Ameritech argues that Illinois law does not recognize such a standard and instead recognizes that price differences need not be based entirely on *differences in cost*, but whether the difference in the treatment of customers are reasonable and not arbitrary. Ameritech points out that the courts of this state have specifically indicated that every discrimination is not unreasonable, citing Village of Niles v. City of Chicago, (1st Dist. 1980), 82 Ill.App.3d 60.

In terms of Staff's assertion regarding violations of Section 9-240 of the Act, Ameritech notes that this section of the Act only proscribes any public utility from charging, [*46] demanding, collecting or receiving a greater or less or different compensation for any product or any service rendered or to be rendered than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at any time. Ameritech notes that Section 9-240 limits only what Ameritech Illinois may charge, demand, collect or receive, but says nothing about the form of payment or the source of funds used for that payment. Because Ameritech receives the full tariffed price for its service, the payment of all or a part of a customer's bill by a third party cannot be found to violate the Act, whether that third party is a customer's roommate, an interexchange company or New Media.

Ameritech then goes on to argue that if Staff's position were to be accepted, all promotions must be per force unreasonably discriminatory. Staff's position is that the AmeriChecks promotion is discriminatory because New Media provided the checks only to customers who purchased its cable television service. Because the essence of any promotion is that it is provided only to purchasers of the product or service being promoted, it follows, from Staff's [*47] reasoning, that any discount or other inducement made available to those who buy a product or service would be discriminatory because it was not available to those who chose not to or were unable to buy the product or service. Ameritech notes that promotions are clearly lawful and that neither the Commission nor the FCC has ever suggested that promotions are discriminatory simply because their availability is limited to customers to whom the promotion is directed.

Finally, Ameritech argues that Staff's arguments relating to the violations of the various state statutes and regulatory orders not relied upon by the CTCA in its complaint are beyond the scope of this proceeding and should be ignored. (*Citing Alton v. Southern Railroad v. Commerce Commission*, 316 Ill. 625 (1925)) Ameritech goes on to argue that the additional arguments are also incorrect.

IV. COMMISSION ANALYSIS AND CONCLUSION

The complaint under consideration here raises issues concerning both discrimination and subsidization. The issues will be disposed of seriatim.

A. Discrimination

In addressing this issue, the Commission notes that its review of the cases

cited by the parties indicates that it is an issue [*48] of first impression in Illinois. The cases relied upon by the parties generally address instances in which a utility either seeks to recover from a broad group of customers, costs occasioned by a subset of that group or, conversely, recovers costs occasioned by less than the universe of ratepayers from the cost causing subset of the group. For instance, in the Shortino case, the utility was recovering taxes associated with the use of pay telephones, not from the pay telephone users, but from all monthly billed customers. The Court found that this amounted to unreasonable discrimination and affirmed an injunction preventing the practice. The converse of the situation is found in the two City of Chicago cases. In the first case, the court approved the recovery of the costs of providing non-standard service to municipalities from the citizens of the municipality rather than from all ratepayers. In the second case, the court approved the removal of local franchise fees from the bills of all ratepayers generally and allowing the recovery of the fees from ratepayers in the localities. Here, however, there are no allegations that any telephone subscribers are either supporting other [*49] subscribers by paying for services or obligations not congruent with the telephone service being taken by them or being supported by payments made by others. In light of this, the Commission concludes that none of
the reported Illinois cases cited by the parties are controlling.

While the Courts of Illinois have not examined the particular fact pattern before, the parties have cited the decisions of two administrative tribunals that have. It is perhaps a telling comment on the difficulty of the issue that the two came to diametrically opposed conclusions. The FCC, in the reviewing an AT&T credit card promotion, found nothing objectionable, relying primarily upon the point that AT&T was billing and receiving full compensation of its tariffed rates and finding the source of payment immaterial. The Ohio PUC, when reviewing the identical scheme at issue here, found that it violated statutes prohibiting the granting of preferences and the receipt of disparate levels of compensation from similarly situated ratepayers virtually identical to those found in the PUA. The Commission has reviewed the decisions and has concluded that there is no way to reconcile them. The issue becomes choosing [*50] one approach over the other.

After reviewing our statutes and considering the policy implications that the adoption of each approach might have, we have concluded that the FCC approach better comports with the law and sound policy. While the scheme under consideration here certainly appears suspicious at first blush, we can discern no statutory violations. Section 9-240 proscribes charging or receiving more or less than published rates. Here IBT charges its customers its full tariffed rates and receives full payment in the form of partial payment by the customer and partial payment by New Media. Section 9-240 also requires public utilities to extend to all corporations or persons any privileges extended to any person or corporation. The undisputed evidence in the record is that IBT regularly and without question accepts third party negotiable instruments from its customers, regardless of the maker and stands ready to extend the privilege to complainants, should they seek to engage in a similar promotion. Section 9-241 of the PUA contains similar restrictions, going on to prohibit unreasonable differences in charges, facilities or service either as between localities or classes of [*51] service. Again, the record is clear that IBT treats all customers in all service groups and localities similarly in that all may submit third party negotiable instruments in satisfaction of their telephone bill. In

short, on the facts in this record, we can find no statutory violation, but many negative policy implications.

The policy issues are best framed by distilling the issue of the discrimination portion of this complaint to its essence. The issue is whether only the customer may pay the monthly telephone bill or whether another party may pay some or all of it. A determination that only a customer may pay a utility bill (as was apparently the determination of the Ohio PUC, when it found that the Ohio non-discrimination concerned itself with "the amount received from the customer, and not from all other sources") would have far reaching effects. Such a result would preclude parents, children, trustees of trusts, holding companies and organizations specifically organized for the purpose of helping those who cannot pay their utility bill from paying all or part any one else's utility bill. Such a result could not have been intended by the legislature in adopting Sections 9-240 [*52] and 9-241. Rather, we adopt the reasoning of the FCC and conclude that, because IBT charges and receives its full tariffed rates for telephone service and extends the privilege of third party payment to all customers, it has not discriminated against anyone, as that term is used in the relevant sections of the PUA.

In their briefs on exceptions and replies, Staff and CTCA raise several arguments addressing the BankAmerica case, some of which warrant comment. CTCA argues first that the case is distinct on its facts because the offer by AT&T's affiliate was available to all AT&T long distance customers, not just those in select locations. The FCC order, however, makes clear that only "charter members" (those who signed up for the card during the first year of its offering) were entitled to the 10 percent discount on regulated services, which is tantamount to the "geographic limitation" referred to the instant case. Further, and as noted previously, Ameritech has consistently indicated its willingness to accept promotional checks from all makers, rendering the "geographic limitation" meaningless and little more than a red herring in the resolution of this docket.

CTCA then argues that [*53] Bank America is distinct on its facts because AT&T is subject to competitive pressures in the long distance market while IBT is a monopolist in the local service market. CTCA posits that an AT&T customer that does not like the fact that long distance rates are being used to promote a credit card in which the customer has no interest can change long distance companies, whereas an Ameritech customer that does not wish to subscribe to Ameritech New Media cannot take local telephone service from another provider. From these facts, and without further argument, CTCA concludes that IBT is indirectly or directly refunding or remitting a portion of rates to selected customers in violation of Section 9-240 or granting a preference to its cable customers in violation of Section 9-241 of the Act. The Commission is unable to discern how the facts, even if taken as true, lead to the conclusions propounded by CTCA. The impact of the availability of customer choice on the remitter of rates or the granting of preferences is unexplained and unapparent. Finally, as noted above, IBT is not remitting anything to anyone. Ameritech New Media is remitting a portion of its cable rates to IBT. Cable TV [*54] subscribers may select from Ameritech New Media or another cable television provider since, for the purposes of this complaint, there exists cable competition in all markets entered by Ameritech New Media. In fact, the Ameritech New Media marketing scheme is designed to allow Ameritech New Media to gain a foot hold in current cable markets in the same way as the AT&T scheme was designed to allow AT&T to

gain access to the credit card market. CTCA's second attempt at distinguishing the AT&T case on the facts is equally unavailing.

Staff also attempts to distinguish the AT&T case. Staff first argues that AT&T provided rebates based upon a customer's purchase of services and products not provided or manufactured by AT&T or its affiliates. This assertion is apparently based upon the premise that the long distance rebates were triggered by consumer use of the AT&T credit card. Two matters bear comment. First, nowhere in the FCC order is it stated that the rebates were triggered by using the credit card to purchase non-AT&T services. In fact, the FCC order specifically notes that the AT&T card was the only commercial credit card accepted by AT&T for basic residential MTS service and that [*55] the 10 percent discount was applied on all regulated AT&T service charged to the card in a given month. Further, and perhaps more fundamental to this case, the 10 percent discount was not available to anyone who did not take out the credit card from AT&T, and, in so doing, enter into a credit agreement with a banking institute composed of three employees and a personal computer that obtained all of its financial resources to carry credit card receivables from AT&T through deposits and lines of credit. This results in the real purchase in the AT&T case being the purchase of a credit card arrangement from an affiliate of AT&T and making the purchase of non-affiliated goods and services extraneous to the 10 percent discount.

Staff then, in an argument similar to the first argument posed by CTCA, asserts that the AT&T promotion can be distinguished by the fact that it was not offered to a limited geographic area or contingent upon buying service from AT&T or its affiliates. There is nothing in the FCC's order that describes the geographic coverage of AT&T's offer. Nonetheless, the offer was made only to residential AT&T customers to "protect and enhance" its normal regulated calling card [*56] business. The geographic distinction (even if true) is without merit. Secondly, as noted above, the receipt of the 10 percent discount was contingent upon charging AT&T service to the card, which clearly conditions the discount on purchasing service from AT&T's credit card affiliate. In conclusion, the AT&T case is on all fours with the case sub judice. It also provides a more appropriate, policy based, resolution to this matter.

B. Cross Subsidization Issues

All of the arguments relating to CTCA's claims of cross subsidies in this docket stem from its view that IBT has violated 83 Ill. Adm. Code 711.25 by recording the costs of participation in the AmeriChecks scheme at cost, rather than an arguably higher market value. Ameritech responds that its accounting treatment is permitted by the Commission's accounting rules (at 83 Ill. Adm. Code 710) because it has adopted by reference the FCC's accounting rules, particularly 47 CFR 32.27. Staff did not address the accounting issues.

The Commission's examination of the two rules under scrutiny here reveals the following. Section 32.27(b) of the CFR, which has been adopted verbatim by the Commission, addresses transactions involving [*57] assets. Assets sold or transferred between a carrier and an affiliate pursuant to a tariff are to be recorded at the tariffed rate. Non-tariffed assets qualifying for prevailing price valuation, which are not germane to this case because of the requirement that such transactions involve a sale, are to be recorded at prevailing price. All other assets provided by a carrier to its affiliate are to be recorded at

the higher of fair market value and fully distributed costs, with the carrier to make a good faith determination of fair market value. Section 32.27(c) of the CFR, which has been adopted verbatim by the Commission, addresses transactions involving services. Tariffed services are to be recorded at the tariffed rate. Non-tariffed services provided pursuant to publicly filed contracts are to be recorded at the charges specified in the contracts. Non-tariffed services qualifying for prevailing price valuation, which are not germane to this case because of the requirement that such transactions involve a sale, are to be recorded at prevailing price. All other services provided by a carrier to its affiliate are to be recorded at the higher of fair market value and fully distributed [*58] costs, with the carrier to make a good faith determination of fair market value.

Section 711.25 of the Administrative Code provides that transactions between carriers and affiliates are to be recorded at market price if market price can be determined from a price list or tariff, otherwise transactions involving "assets" transferred between a carrier and an affiliate are to be recorded at the higher of net book cost or fair market value, while services for which there exists no list or tariff price, are to be valued using fully distributed cost.

The issue before the Commission is to first, determine which of the rules are applicable to IBT's conduct and then to determine whether IBT's actions satisfied the dictates of the applicable rules. The first question that must be answered is whether IBT's acceptance of AmeriChecks is the transfer of an asset or service. Once that determination is made, the Commission must then decide which rule applies. None of the parties directly addressed these issues. CTCA has implicitly argued that an asset is at stake by virtue of its attempts at placing a value on the trade name of Ameritech in Ameritech New Media's attempts at winning market share. [*59] Ameritech had implicitly argue that a service is at stake by arguing that it is the acceptance and processing of the vouchers that must be valued and that IBT is receiving appropriate compensation for this service, especially in light of the fact that it charges other third party issuers nothing for providing the identical service. On balance, the Commission concludes that IBT's participation in the AmeriChecks program appears to be more in the nature of a transaction involving an untariffed service than an asset. The unrebutted evidence is that IBT's only involvement in the promotion is the receipt and processing of the vouchers.

Once it has been determined that a service is at issue, the next issue is what rule applies. It must be noted that the rules themselves give no guidance and contain inconsistent requirements. The FCC requires transactions involving non-tariffed assets to be recorded at the higher of fair market value and net book cost, with the carrier to make a good faith determination of fair market value. The Commission requires transactions for services for which there exists no list or tariff price to be valued using fully distributed cost. Fortunately this conundrum [*60] does not need to be decided explicitly in this docket because the Commission can find no violation of either rule on the facts of this docket. Under the Commission's rules, the Commission concludes that IBT is charging its full cost for processing the vouchers. Under the FCC rules, the Commission concludes that IBT has made a good faith determination of the fair market value of the service provided because, again, it charges its full cost for processing the vouchers, a fact which no one had disputed.

In addition, we note that neither CTCA nor Staff have offered any evidence to

quantify the fair market value to be attributed to the service provided by IBT to New Media. Mr. Hires testified that, in his opinion, such a value exists, but neither he nor any other witness provided any evidence from which the value may be computed. Without such evidence the Commission has no record upon which to base a determination that there exists a fair market value that exceeds costs, a determination that would be necessary to any finding in favor of CTCA on this issue. As the Complainant, CTCA bears the burden of proof on all issues. The clear consequence of the lack of any record evidence upon which [*61] to reach an objective determination of the fair market of the services provided to New Media is that cost is the requisite valuation basis, not prevailing price or some subjective external market price (See Bank America).

While this would ordinarily end our discussion, one more matter requires brief comment. The parties spent a great deal of time arguing the impact of the AltReg Order on this docket. The Commission finds the case readily distinguishable. The Commission's acceptance of a staff adjustment to IBT's revenue requirement was just that, an adjustment to a revenue requirement in a case setting rates. The Commission was not faced with and made no determination on any issues involving issues of cross subsidies. Further, the Commission found specifically that Ameritech's guarantee that IBT would extend a directory agreement usurped IBT's right to an asset (an option to extend held by IBT) but that the guaranteed had not been approve by the Commission as required by 220 ILCS 5/7-203 and was, accordingly, invalid and of no force. Given the Commission's previous determination that no assets are involved in this docket, the AltReg case is inapplicable.

On other matter growing [*62] out of the AltReg case requires comment. CTCA has argued that in AltReg the Commission found that IBT "violated Sec. 7-102 . . . .for the same conduct" as is alleged here (CTCA Reply Brief at 14 n.10). In the AltReg Order the Commission began its discussion of the telephone directories issues by noting that "under Section 7-102(2) (sic) of the Public Utilities Act (PUA), the Commission has jurisdiction over affiliated interests having transactions with public utilities under the Commission's jurisdiction" (AltReg at 101). Two matters bear comment. The reference to "Section 7-102(2)" is an obvious typographical error in that section 7-102 of the PUA has no subsection (2). Further section 7-102 is not directed to affiliate transactions, that power stems from Section 7-101, which does, incidentally, have a subsection (2) and is the correct citation for the Order. Further, as noted above, the only finding of any statutory violation involved Section 7-203, which is not at issue in this docket. Finally, Ameritech is correct in asserting that the AmeriChecks promotion is not subject to Section 7-101(3) in the first instance by the operation of Section 13-601, which excused from the necessity [*63] of approval affiliate transactions, the value of which do not exceed five million dollars or five per cent of the carriers total revenues from noncompetitive services.

The Commission, having considered the entire record and being fully advised of the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction of the parties hereto and subject matter hereof:

(2) the recitals of fact and conclusions reached in the prefatory portion of this order are supported by the record and are hereby adopted as findings of

fact and conclusion of law;

(3) for the reasons set forth above the Commission has concluded that the Complainant had failed to set forth any grounds in support if its complaint and the complaint must, therefore, be denied.

IT IS THERFORE ORDERED that the complaint filed by the Cable Television and Communications of Illinois against Illinois Bell Telephone, Ameritech Corporation and Ameritech New Media, Inc. is denied.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this order is final, it is not subject to the Administrative Review Law.

By order of the Commission this [*64] 19th day of May, 1999.

(SIGNED) RICHARD L. MATHIAS

Chairman

Commissioner Kretschmer dissented.