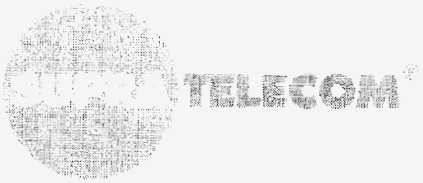
ORIGINAL



2901 SW 149th Ave., Ste. 300
Miramar FL 33027

August 18, 2005

Via Federal Express
Ms. Blanca Bayo, Director
The Commission Clerk and Administration Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 050387-TP

Dear Ms. Bayo,

Enclosed for filing in the above-referenced docket, please find the original and fifteen (15) copies of Supra Telecommunications and Information Systems, Inc.'s Response to BellSouth's Partial Motion to Dismiss and attachment.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me in the self-addressed envelope enclosed herein. Copies have been served to the parties shown on the attached certificate of service. Should you have any questions, please do not hesitate to call me at (786-455-4251

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
RCA ____
SCR ____
SGA ____
SEC 1
OTH KMP

Thanks.

Sincerely,

Esther Sunday

cc: All Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Supra Telecommunications and Information Systems, Inc. to Review BellSouth Promotional Tariffs.	Docket No. 050387-TP Filed: August 18, 2005

RESPONSE TO BELLSOUTH'S PARTIAL MOTION TO DISMISS

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel, hereby files this Response to BellSouth Telecommunications Inc.'s ("BellSouth") Partial Motion to Dismiss ("Motion"). For the reasons set forth hereinbelow, BellSouth's Motion should be denied in its entirety. In support thereof, Supra states as follows:

INTRODUCTION

BellSouth begins its Motion by claiming, on the one hand, that Supra seeks to insulate itself from the "rigors of a competitive marketplace." On the other hand, BellSouth seeks to dismiss Supra's Petition to the extent it seeks to enforce BellSouth's mandated resale obligations, which, of course, were enacted to ensure that fair and proper competition takes place. These two positions cannot be reconciled, particularly in light of the fact that **BellSouth only offers its massive cash back and other winback promotional incentives to customers of its competitors (i.e. non-BellSouth customers).** In a truly competitive marketplace, all consumers in BellSouth's service area would be entitled to take advantage of these tremendous offers. However, in light of BellSouth's monopoly market power and share, it is truly laughable to think that the parties exist in a level "competitive marketplace."[1]

[1] In a classic example of a red herring, BellSouth devotes a page and half outlining the past promotional offerings of Supra and other CLECs. Of course, none of these promotional offerings are at issue in this case, as neither BellSouth nor anyone has ever challenged the legality of such.

Notwithstanding, BellSouth is attempting to do that which the FCC strictly forbade it to do – namely, seek to avoid its wholesale resale obligations by using promotions to lower costs to end-users. This Commission should see through BellSouth's rhetoric and hold BellSouth accountable for its actions and attempts to circumvent the law.

THE FPSC HAS JURISDICTION TO ORDER BELLSOUTH TO MAKE ITS PROMOTIONAL OFFERINGS AVAILABLE FOR RESALE

BellSouth's sole argument to dismiss Supra's Resale Count (as such is defined in BellSouth's Motion) is that the Commission does not have authority to find that BellSouth is in violation of its **federal resale obligations** under the Act. However, the Commission does have authority to find that BellSouth is in violation of its **state resale obligations**. Section 364.161 (2), Florida Statutes, provides:

> Other than ensuring that the resale is of the same class of service, no local exchange telecommunications company may impose any restrictions on the resale of its services or facilities except those the commission may determine are reasonable. The local exchange telecommunications company's currently tariffed, flat-rated, switched residential and business services shall not be required to be resold until the local exchange telecommunications company is permitted to provide inter-LATA services and video programming, but in no event before July 1, 1997. In no event shall the price of any service provided for resale be below cost.

Furthermore, in its First Amended Petition, Supra cited to Section 364.01(4), Florida Statutes, which provides, in pertinent parts:

> The commission shall exercise its exclusive jurisdiction in order to:
>
> (a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.
>
> (b) Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.

> (c) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation.
>
> (g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.
>
> (h) Recognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services, where appropriate, if doing so does not reduce the availability of adequate basic local telecommunications service to all citizens of the state at reasonable and affordable prices, if competitive telecommunications services are not subsidized by monopoly telecommunications services, and if all monopoly services are available to all competitors on a nondiscriminatory basis.
>
> (i) Continue its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies.

As such, BellSouth's currently tariffed, flat-rated Florida state promotions must be made available for resale. BellSouth is currently in breach of these Florida statutes and Supra's action lies within the jurisdiction of this Commission. Should the Commission deem it necessary, Supra will file an amendment to its First Amended Petition making an additional citation to these Florida statutes as a basis for its claim.

It should be noted that, in Docket No. No. P-100, SUB 72b, before the North Carolina Utilities Commission ("NCUC"), in which the NCUC found that BellSouth must make its promotions available for resale, BellSouth never claimed that the NCUC lacked subject matter jurisdiction to make such a finding. Furthermore, BellSouth has appealed the NCUC's order, and, in its Preliminary Statement before the United States District Court for the Western Disctrict of North Carolina, did not claim that the NCUC lacked subject matter jurisdiction.[2]

---

[2] See copy of BellSouth's Preliminary Statement filed on August 2, 2005 attached hereto as Exhibit A.

WHEREFORE, Supra respectfully requests that this Commission:

(1) Deny BellSouth's Motion in its entirety;

(2) Alternatively, grant Supra leave to file a Second Amended Petition specifically identifying the Florida Statutes and law which provide the basis for BellSouth to provide a resale discount on the promotional offerings at issue in this case; and

(3) Grant such other relief as deemed appropriate.

Respectfully submitted this 18th day of August 2005.

SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.
2901 S.W. 149th Avenue, Suite 300,
Miramar, Florida 33027
Telephone: (786) 455-4248
Facsimile: (786) 455-4600

By: _____
BRIAN CHAIKEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered by U.S. Mail to the persons listed below this 18th day of August 2005.

Ms. Nancy White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street
Suite 400
Tallahassee, FL 32301

James Meza
BellSouth Telecommunications, Inc.
675 West Peachtree Street, N.W.
Suite 4300
Atlanta, GA 30375

Ms. Beth Keating
Legal Division
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

By: _____
BRIAN CHAIKEN

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

Civil Action No.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

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

Defendants.

PLAINTIFF BELLSOUTH TELECOMMUNICATIONS, INC.'S MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

For nearly ten years, the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 251, *et seq.*, has required incumbent local exchange carriers ("ILECs") such as Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Pursuant to this provision, competing local providers ("CLPs") may purchase telecommunications services at a significant discount and resell them to consumers. Through this system, competition has flourished and consumers have more choices than ever before when purchasing telecommunications services.

As a result of this open and competitive marketplace, both ILECs such as BellSouth and CLPs spend significant sums of money on marketing in an attempt to distinguish themselves, establish brand identity, retain existing customers, and attract new customers. Indeed, marketing expenses comprise a significant portion of any telecommunications service provider's budget. BellSouth and other telecommunications service providers frequently use marketing incentives such as gift cards, coupons and the like, to retain existing customers who may be thinking about switching carriers and to attract new customers, some of which may be new to a particular geographic market and others of which may simply be comparison shopping.

Notwithstanding the fact that (1) such marketing incentives are not telecommunications services and are not regulated by the Act, and (2) the Act includes an unambiguous section on how wholesale prices for telecommunications services are to be set, the North Carolina Utilities Commission (the "Commission") has entered two Orders that will require BellSouth to offer CLPs an additional discount on top of the wholesale discount for the "real" value of any marketing incentives that BellSouth offers to retail consumers for more than ninety (90) days. The Commission's Orders are based on the novel and wholly unsupported legal fiction that *anything* of value provided to a consumer constitutes a promotional discount on the retail tariff rate for the telecommunications services that a particular customer purchases.

BellSouth seeks the protection of this Court to prevent the Commission from ignoring the clear and unambiguous resale provisions of the Act, and from completely upsetting the competitive marketplace that the Act has promoted for almost a decade.

STATEMENT OF THE CASE

BellSouth seeks a declaratory judgment that portions of the two Orders described herein -- which would require BellSouth to provide the value of long-term marketing incentives to CLPs at a discount -- violate federal law and are unenforceable. BellSouth also asks this Court to enjoin the Commission and its individual Commissioners from enforcing the illegal portions of those two Orders during the pendency of this action. In determining whether to grant this interim injunctive relief, the Court must consider four questions:

(1) Is BellSouth likely to succeed on the merits of its claim that the Commission has misinterpreted and misapplied federal law?

(2) Is BellSouth likely to suffer irreparable harm if an injunction is not granted and BellSouth is forced to comply with the Commission's erroneous Orders?

(3) Does the harm likely to be suffered by BellSouth in the event an injunction is denied outweigh the harm, if any, to be suffered by any other parties in the event the requested injunction is granted?

(4) Does enjoining enforcement of portions of the Commission's Orders during the pendency of this action benefit the public interest?

The answer to each of these four questions is "yes."

STATEMENT OF PERTINENT FACTS

A. Statutory and Regulatory Background

To foster competition, the Telecommunications Act of 1996 imposes specific requirements on BellSouth and other ILECs to make their retail telecommunications services available to CLPs at significantly discounted wholesale rates. Specifically, the Act requires ILECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers[.]"[1] The Act further

[1] 47 U.S.C. § 251(c)(4)(A).

requires ILECs "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of . . . telecommunications service[.]"[2]

The Federal Communications Commission ("FCC") has concluded that this statutory resale obligation includes promotional price discounts offered on retail telecommunications services. The FCC has defined "promotions" to include "price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts."[3] The FCC has also concluded that "short-term promotional prices," which are defined as "promotions of up to 90 days," "do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation."[4] Thus, promotional prices on retail telecommunications services offered to consumers for a period of 90 days or less need not be offered to resellers at a wholesale discount, whereas promotional prices offered for periods greater than 90 days must be offered for resale at the wholesale discount.

B. The Public Staff Initiative

The issue of marketing incentives requiring a further reseller discount was *not* one brought before the Commission from the arena of competition by a complaining CLP. *No CLP has ever complained that BellSouth's use of marketing incentives constitutes a promotional price discount covered by section 251(c)(4)(A) of the Act.* Rather, on June 25, 2004, the Public Staff of the North Carolina Utilities Commission ("Public Staff") filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions

[2] *Id.* § 251(c)(4)(B).
[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499, (rel. Aug. 8, 1996) ("First Report and Order"), ¶ 948.
[4] First Report and Order, ¶¶ 949 & 950.

to Resellers.[5] Among the issues for which the Public Staff sought guidance was the following: "If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?"

On July 7, 2004, the Commission issued an order seeking comments on the Public Staff's Motion. On August 6, 2004, the Public Staff filed comments advocating, in pertinent part, that ILECs such as BellSouth be required to offer non-regulated marketing incentives such as gift cards to resellers in addition to the wholesale discount on regulated telecommunications services.[6] Also on August 6, 2004, BellSouth, ALLTEL Carolina, Inc., Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, "Sprint"), and Verizon South, Inc. ("Verizon") filed comments with the Commission advocating, in pertinent part, that ILECs are only required to sell to CLPs at wholesale rates any "telecommunications service" that the ILEC offers to retail customers. Furthermore, marketing incentives are not telecommunications services and do not reduce the retail rates customers pay for telecommunications services, and thus as a matter of law are not subject to the resale requirements of the Act.[7]

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

[5] *See* Exhibit 3, attached hereto.
[6] *See* Exhibit 4, attached hereto.
[7] *See* Exhibits 5 and 6, attached hereto.

elsewhere."[8] On August 31, 2004, BellSouth, Sprint and Verizon filed their respective reply comments, which emphasized that the Public Staff's position regarding ILECs' resale obligations with regard to marketing incentives was wholly unsupported by law, basic principles of statutory interpretation, and common sense.[9]

C. The First Resale Order

On December 22, 2004, the Commission issued its Order Ruling on Motion Regarding Promotions (the "First Resale Order").[10] The Commission ruled, in pertinent part, that marketing incentives such as gift cards "are in fact promotional offers subject to the FCC's rules on promotions."[11] The Commission expressly acknowledged that marketing incentives "are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings."[12] However, the Commission opined that a marketing incentive "reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway."[13] Specifically, the Commission held that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation."[14]

[8] *See* Exhibit 7, attached hereto.
[9] *See* Exhibits 8, 9, and 10, attached hereto.
[10] *See* Exhibit 1, attached hereto.
[11] First Resale Order, p. 11.
[12] *Id.*
[13] *Id.*
[14] *Id.*, pp. 11-12.

On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, For Clarification, and for a Stay of the Commission's First Resale Order.[15] In this Motion, BellSouth argued that the Commission's First Resale Order created a novel resale obligation that is contrary to the resale requirements of the Act and is unprecedented in the nine states in which BellSouth operates. BellSouth also argued that this unprecedented interpretation of the Act would require BellSouth to incur significant expenses creating North Carolina-specific exceptions in its marketing operations, which could compel BellSouth to offer North Carolina consumers fewer and/or less attractive marketing incentives than it offers to consumers in other states.

BellSouth noted that pursuant to the Act and the FCC's rules, the Commission already had deducted the costs attributable to marketing expenses in calculating the wholesale discount CLPs receive when they purchase BellSouth's retail telecommunications services for resale. Thus, requiring BellSouth to resell marketing incentives (or the value thereof) at a wholesale discount would force BellSouth to subsidize the CLPs' marketing efforts and allow the CLPs to avoid the very costs that the resale provisions of the Act require each carrier to bear.

D. The Second Resale Order

On June 3, 2005, the Commission issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (the "Second Resale Order").[16] Although the Commission acknowledged that section 252(d)(3) of the Act provides that the wholesale rates to be charged to resellers shall be determined on the basis of retail rates charged to subscribers – which necessarily excludes unregulated marketing incentives, which do not affect in any way the retail rate that a subscriber pays – it nonetheless effectively rewrote section

[15] *See* Exhibit 11, attached hereto.
[16] *See* Exhibit 2, attached hereto.

252(d)(3) of the Act by holding that marketing incentives have the effect of lowering "the actual, 'real' retail rate."[17]

The Commission imposed a new requirement that BellSouth determine "the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price" and pass the benefit of such a reduction on to resellers through a wholesale discount on the "lower actual retail price."[18] The Commission provided no guidance on how this hypothetical "real retail price" should be calculated; instead, it "intentionally left this matter open so that the parties would be free to negotiate."[19] If a negotiated solution is not possible, BellSouth and the CLPs may bring the matter before the Commission. However, if it is too difficult to calculate the "real retail price," the Commission will presume that a marketing incentive "would be unreasonable and discriminatory."[20]

ARGUMENT

I. Jurisdiction, Standard of Review, and Interim Injunction Standard

This Court has subject matter jurisdiction over this action pursuant to the judicial review provision of the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6), and pursuant to 28 U.S.C. § 1331.[21] Because this action concerns an interpretation of *federal* law by a *state*

[17] Second Resale Order, p. 5.
[18] *Id.*, p. 6.
[19] *Id.*
[20] *Id.*, pp. 6-7.
[21] *See Verizon Maryland, Inc. v. Public Serv. Comm'n of Maryland*, 535 U.S. 635, 643 (2002) (reviewing a decision of the Fourth Circuit Court of Appeals and finding that federal courts have the authority under 28 U.S.C. § 1331 to review state commission decisions for compliance with federal law); *see also Iowa Network Servs. v. Qwest Corp.*, 363 F.3d 683, 692-93 (8th Cir. 2004) (acknowledging that federal courts have the ultimate authority to interpret federal law).

regulatory body, the Commission's interpretation is not entitled to any deference, and this Court may consider the merits of this action *de novo*.[22]

In determining whether to grant interim injunctive relief, this Court must consider four factors: (1) BellSouth's likelihood of success on the merits; (2) the likelihood of irreparable harm to BellSouth if interim relief is denied; (3) the likelihood that the Commission or other interested parties would be irreparably harmed if an injunction issued; and (4) the public interest.[23] In this case, each of the four factors weighs strongly in favor of BellSouth, and this Court should grant a preliminary injunction preserving the status quo until the merits of this case are resolved.

II. BellSouth Is Likely to Prevail on the Merits of This Action Because Federal Law Does Not Require BellSouth To Provide Its Marketing Incentives (or the Value Thereof) To Resellers.

BellSouth is likely to prevail on the merits of this action because the Commission misinterpreted and misapplied the relevant federal law. The Commission erred as a matter of law when it held that marketing incentives are "promotions" which reduce the "real" retail rate for telecommunications services because consumers arguably receive some value from them.[24] This finding ignores the crucial fact that the value of a marketing incentive is not a discount on the retail rate that a consumer pays for telecommunications services. The Commission held, in essence, that a gift card to Wal-Mart or a toaster is no different from a discount offered on the retail rate for telecommunications services. That is not what the Act requires, however.

[22] *See, e.g., GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (acknowledging that "state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes"); *see also AT&T Communications, Inc. v. BellSouth Telecommunications, Inc.*, 20 F. Supp. 2d 1097, 1100 (E.D. Ky. 1998) (recognizing that federal courts have found it inappropriate to defer to state agencies' interpretation of the Telecommunications Act because "fifty state commissions could apply the Telecommunications Act in fifty different ways").

[23] *Blackwelder Furniture Co. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 193-96 (4th Cir. 1977).

[24] *See* First Resale Order, p. 11.

Neither the Act nor the supporting regulations support the Commission's ruling that BellSouth's long-term marketing incentives are discounts on the retail rate or create a promotional rate. The Act does not even mention promotions or promotional rates.[25] The governing regulations define "promotion" in terms of "promotional rate," but they offer no illumination on the meaning of this term.[26] The dearth of commentary on "promotions" or "promotional rate" in the Act and regulations belies any suggestion that the Commission's novel interpretation is derived from federal law.

Indeed, the plain meaning of "promotional rate" supports BellSouth's argument that the Act's resale provisions do not encompass unregulated marketing incentives. The clear term "promotional *rate*" should control.[27] The literal meaning of "promotional rate" must refer to a discounted *rate*, as opposed to the ordinary tariff rate, offered as a BellSouth promotion. It makes sense that the FCC would regulate these promotional rates to prevent ILECs from charging customers lower retail rates masquerading as "long-term promotional rates" while charging the higher retail rates for resale to CLPs. Such a practice would have a decidedly anti-competitive effect and would undermine the goals of the Act.[28]

The marketing incentives at issue in this case do not comport with the premise underlying the regulation of long-term promotional rates. Gift cards or similar incentives do not reduce the retail rates paid by BellSouth's customers and, therefore, do not create a promotional rate to be passed on through the resale obligations. No credible argument can be

[25] *See* 47 U.S.C. § 251.
[26] *See* 47 C.F.R. § 51.613.
[27] *See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 674, 683 (E.D.N.C. 1998) (applying the "plain and ordinary meaning" to "retail" where this term was not defined by the Telecommunications Act of 1996 and had been wrongly interpreted by the North Carolina Utilities Commission).
[28] *See Cavalier Tel., LLC v. Verizon Va., Inc.*, 330 F.3d 176, 187-88 (4th Cir. 2003) (describing the competition-focused purposes underlying the Telecommunications Act of 1996).

made that unregulated marketing incentives fall within the plain meaning of "promotional rate," particularly in light of section 252(d)(3) of the Act, which states very plainly that "a State commission *shall* determine wholesale rates *on the basis of retail rates charged to subscribers* for the telecommunications service requested, *excluding the portion thereof attributable to marketing* . . . and other costs that will be avoided by the local exchange carrier."[29] Had Congress wished to give State commissions leeway to craft their own formulas for determining wholesale rates, it easily could have done so. Similarly, had Congress intended that wholesale rates be based on *anything of value* provided to a consumer (i.e., the hypothetical "real" retail rate emphasized by the Commission), it could have altered the language of section 252(d)(3) accordingly. In the absence of Congressional authorization, however, the Commission is not free to rewrite the Act.

The one piece of federal authority on which the Commission relies confirms the plain meaning of "promotional rate" and refutes the Commission's suggestion that the marketing incentives at issue constitute "promotions" in this regulatory context. The Commission cites paragraph 948 of the FCC First Report and Order for the proposition that BellSouth's marketing incentives are promotions and must therefore be accounted for in BellSouth's resale obligations.[30] The FCC actually stated, however, that "[i]n discussing promotions here, *we are only referring to price discounts from standard offerings* that will remain available for resale at wholesale prices, i.e., temporary price discounts."[31] The Commission interprets this plain language, which is entirely consistent with the plain meaning of "promotional rate" (discussed above), in a contrived way. The Commission suggests that the FCC was not attempting to

[29] *See* 47 U.S.C. § 252(d)(3) (emphasis added).
[30] *See* First Resale Order, pp. 9-10.
[31] First Report and Order, ¶ 948 (emphasis added).

define or limit the term "promotion," but was merely speaking to the temporary nature of a promotion.[32] Such a reading puts gloss on the Act which is unsupported by experience, precedent, or logic.

A broader contextual reading of the resale regulations further refutes the Commission's "effective" promotional rate theory. The Commission infers that because BellSouth's market incentives are promotions, then the "value" creates a promotional rate. This approach is contrary to the precise definitions and methodologies for other rate structures throughout the resale regulations. Specifically, the resale regulations provide detailed guidelines for determining the wholesale pricing standard,[33] avoided retail costs,[34] and interim wholesale rates.[35] The valuation mandated by the Commission to determine the promotional rate created by marketing incentives is no doubt as complex as those addressed in the regulations. Given the inclination of the FCC to provide precise methodologies for determining rates associated with the resale obligations, it is illogical to argue that the FCC intended there to be a "real retail rate," created by unregulated marketing incentives, without saying more.[36]

In sum, there is no statutory or regulatory support for the Commission's position. Furthermore, the FCC's First Report and Order, on which the Commission relies, defines "promotion" in such a way that it could not include marketing incentives like gift cards or coupons. The precise valuation methodologies provided to other resale rate structures as well

[32] *See* First Resale Order, p. 10.
[33] *See* 47 C.F.R. § 51.607.
[34] *See* 47 C.F.R. § 51.609. This section modifies the retail price to be discounted by mandating the subtraction of specific avoided retail costs, including marketing costs related to product sales and management, from the retail figure to be discounted as CLPs will incur these same costs through their own retail efforts.
[35] *See* 47 C.F.R. § 51.611 (allowing for the calculation of an "interim wholesale rate" in the event a state cannot accurately establish a wholesale rate pursuant to the methodology of § 51.607).
[36] *See Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 174 (8th Cir. 1989) (stating the general principle that "where a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

as the plain meaning of "promotional rate" cut firmly against the suggestion that market incentive values were to be evaluated for resale obligation purposes. Congress' regulatory intent in this area is manifest, and yet the Commission chose to substitute its own. For these reasons, the portions of the Resale Orders discussed herein violate federal law, and BellSouth is likely to succeed on the merits of this action.

II. BellSouth Will Suffer Immediate and Irreparable Harm Absent Injunctive Relief.

The likelihood of irreparable harm is the focal point of any preliminary injunction analysis.[37] The likelihood of irreparable harm to a movant must also be balanced against the likelihood of harm to the non-movant if an injunction is granted.[38] Given the likelihood of irreparable harm to BellSouth, a preliminary injunction preventing enforcement of the Commission's Resale Orders is critical to preserving the status quo during the pendency of this action so that BellSouth does not suffer loss of market share, damage to goodwill, and market dislocation which cannot be recaptured or remedied in money damages.

A. The Resale Orders would impose substantial, unwarranted restructuring costs on BellSouth and would upset the competitive playing field created by the Telecommunications Act of 1996.

If the Commission's Resale Orders are not enjoined, BellSouth will be forced to (1) absorb substantial costs associated with restructuring its marketing efforts, and (2) either subsidize its competitors' marketing efforts should it choose to continue long-term marketing incentive programs in North Carolina, or cease offering such marketing incentives in North

[37] *See Blackwelder Furniture*, 550 F.2d at 195 (stating that "[t]he controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated") (citation omitted).
[38] *See id.* at pp. 194-96.

Carolina. Regardless of the outcome, BellSouth will suffer irreparable harm for which no adequate remedy at law exists.

The Resale Orders place BellSouth in an untenable position. BellSouth has no guidelines or precedent from which to attempt to calculate a hypothetical "real retail rate" based on the value of marketing incentives to consumers. Indeed, no other state commission within BellSouth's operating territory requires ILECs to value marketing incentives and pass along further discounts to CLPs. Many of the marketing incentives at issue do not have a readily ascertainable economic value.[39] BellSouth provides a variety of marketing incentives to customers across the nine states in which it operates.[40] These marketing incentives have included, among other things, gift cards, checks, and cash back coupons, each with its own unique set of valuation challenges and uncertainties.[41]

If the realized customer benefit is the proper measure to be calculated, then the value will vary depending on the type of marketing incentive and the amount of each individual customer's use or redemption of the giveaway. BellSouth currently has no means of monitoring the usage, redemption, or transfer of marketing incentives purchased from outside vendors (e.g., Wal-Mart gift cards). Thus, any attempt to determine the actual benefit realized by customers will be time consuming and extremely burdensome.[42] The marketing value of such an incentive will quickly be outstripped by the internal administrative costs associated with tracking it.

[39] *See* Affidavit of James Hydrick ("Hydrick Aff."), ¶ 3, attached hereto as Exhibit 14; *see* Affidavit of Kristy Seagle ("Seagle Aff."), ¶¶ 4, 5, attached hereto as Exhibit 15.
[40] *See* Seagle Aff., ¶¶ 4, 5.
[41] *See id.*, ¶¶ 2-6; *see* Affidavit of Carlos Salinas ("Salinas Aff."), ¶ 4, attached hereto as Exhibit 16.
[42] *See* Seagle Aff., ¶¶ 3-6.

If BellSouth cannot determine the value of marketing incentive benefits, either by agreement with CLPs or litigating the issue before the Commission, it might even have to abandon offering long-term marketing incentives to consumers in North Carolina. This result would force BellSouth to significantly alter the way it conducts its business. BellSouth operates under a uniform marketing strategy that is not tailored to individual states.[43] BellSouth's more than 6,000 sales representatives have been trained to offer marketing incentives to select customers in all states in which BellSouth operates.[44] If forced to stop offering long-term marketing incentives in North Carolina, BellSouth's current marketing system would be impossible to maintain.[45]

BellSouth would be forced to undertake a burdensome and costly overhaul of its marketing strategy and would face three problematic choices: (1) adopt a different, short-term (less than 90 days) marketing incentive program for North Carolina while maintaining the current long-term marketing incentive program in the other states in which BellSouth operates; (2) adopt short-term marketing incentive programs in all states in which BellSouth operates; or (3) abandon all marketing incentive programs in North Carolina.[46]

Option 1 would create a bifurcated marketing campaign with separate strategies for North Carolina and the remainder of BellSouth's operating territory.[47] The creation of a separate marketing campaign for North Carolina would require a company-wide revision of training materials and methods and retraining of all sales representatives to incorporate a

[43] *See* Hydrick Aff., ¶ 3.
[44] *See id.*
[45] *See id.*, ¶¶ 2, 3, 5.
[46] *See id.*, ¶ 2. *Cf. Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1178-79, 85-86 (D. Colo. 2001). In *Bioganic Safety Brands*, the movant complained that a Colorado advertising law would require a choice between four unacceptable revisions of its national marketing strategy, each of which presented the likelihood of irreparable harm. The Court allowed a preliminary injunction, in part, on this basis.
[47] *See* Hydrick Aff., ¶ 3.

revised marketing plan.[48] Furthermore, retraining of the sales representatives would be required every sixty to ninety days for each new marketing incentive offered in North Carolina.[49]

Option 2 sacrifices marketing effectiveness in favor of maintaining uniformity, while Option 3 sacrifices marketing incentives for North Carolina consumers for the sake of operational uniformity and cost controls. Under Option 2, the entire marketing strategy for all nine states would still need to be revised, and sales representatives would have to be retrained every sixty to ninety days for each new marketing incentive.[50] Option 3 would still create a bifurcated marketing plan of sorts, with no marketing incentives being offered in North Carolina.[51] Sales representatives would have to be trained to handle calls differently based on whether they came from North Carolina or another state in which BellSouth operates.[52]

Finally, while BellSouth attempts to value the marketing incentive benefits and potentially overhaul its entire marketing strategy, it will be forced to compete on an uneven playing field thanks to the regulatory bias created by the Resale Orders.[53] If BellSouth is forced to provide CLPs a further wholesale rate reduction based on the value of long-term marketing incentives, then it will effectively be subsidizing the CLPs' marketing incentive programs.[54] If BellSouth chooses not to offer long-term marketing incentives in North Carolina or is prohibited from doing so because of an inability to value them, CLPs may continue to offer these same long-term marketing incentives to North Carolina customers with

[48] *See id.*, ¶¶ 3, 4.
[49] *See id.*, ¶ 4.
[50] *See id.*, ¶ 6.
[51] *See id.*, ¶ 7.
[52] *See id.*
[53] *See* Salinas Aff., ¶ 7.
[54] *See id.*

no competitive response from BellSouth.[55] Either way, the Resale Orders will have an anti-competitive effect that is patently unfair to BellSouth.

B. BellSouth will suffer irreparable harm no matter what action it takes in an effort to comply with the Resale Orders.

The harm BellSouth will suffer as a result of the Resale Orders will be irreparable. The costs faced by BellSouth will be definite, immediate, and incalculable.[56] At a minimum, it will be forced to incur significant extra administrative costs to determine the value of its long-term marketing incentives. These added costs of doing business cannot be calculated by a simple mathematical formula (i.e., lost profits).[57] If BellSouth is forced to abandon its long-term marketing incentives program in North Carolina, the costs and effort required for restructuring also will be significant and incalculable.[58] When faced with such market dislocation and revenue losses, courts have routinely found such indeterminate damages to constitute irreparable harm.[59]

If BellSouth must abandon offering long-term marketing incentives in North Carolina, the irreparable harm will extend far beyond the administrative costs. BellSouth customers in North Carolina will not be able to receive the long-term incentives offered elsewhere. Market

[55] *See* Hydrick Aff., ¶¶ 2-7; *see* Salinas Aff., ¶ 7.

[56] *See Blackwelder Furniture*, 550 F.2d at 196-97 (stating that "the harm posed to Blackwelder's loss of goodwill . . . is incalculable -- not incalculably great or small [--] just incalculable" and therefore reflected irreparable harm).

[57] *See id.* at 196-97; *see also Bioganic Safety Brands, Inc.*, 174 F. Supp. 2d at 1178-79, 85-86 (D. Colo. 2001) (acknowledging that disruption of uniform national marketing plan, loss of competitive advantage, and increased costs of doing business resulting from complying with Colorado state advertising law constituted irreparable harm). In this case, the court noted the expense the movant would incur from having to conduct two different advertising campaigns, one for Colorado and one for the rest of the nation.

[58] *See Bioganic Safety Brands, Inc.*, 174 F. Supp. 2d at 1178-79, 85-86 (acknowledging that disruption of uniform national marketing plan and increased costs of doing business resulting from complying with Colorado state advertising law constituted irreparable harm).

[59] *See Blackwelder Furniture*, 550 F.2d at 196-97; *see* also *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (finding irreparable harm where losses of revenue were not easily ascertainable due to the novelty of cable service that would be enjoined).

confusion and dislocation will be inevitable.[60] North Carolina customers will hear of marketing incentives offered elsewhere by BellSouth and likewise will expect them. Furthermore, CLPs will be able to continue to offer the same long-term marketing incentives within North Carolina. Customers will not understand (and likely will not care about) the reasons BellSouth cannot offer the same marketing incentives it offers elsewhere and its competitors continue to offer in North Carolina. Losses of customers, reputation, and goodwill are certain to ensue.[61] Multiple courts have recognized that the incalculable competitive disadvantages created by such losses constitute irreparable harm.[62]

The irreparable harm experienced by BellSouth will be compounded because the CLPs' competitive position will increase as a direct result of whatever action BellSouth takes in response to the Resale Orders. If BellSouth is forced to further discount sales of its telecommunications services to resellers based on the value of long-term marketing incentives, its revenues will decrease and it will effectively be subsidizing the marketing incentives of its competitors.[63] The harm to BellSouth as a result of this windfall to its competitors is certain but cannot be quantified.[64] If BellSouth cannot accurately value its long-term marketing

[60] *See* Hydrick Aff., ¶¶ 3-5.
[61] *See* Salinas Aff., ¶ 7.
[62] *See Blackwelder Furniture*, 550 F.2d at 196-97 (stating that "[w]ord of mouth grumbling of customers can convert Blackwelder's inability to honor Seilig orders into a reputation for general unreliability"); *see Multi-Channel TV*, 22 F.3d at 552 (finding irreparable harm where losses of customers and goodwill were likely to be suffered); *see also Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1156-57 (10th Cir. 2001) (acknowledging that a loss of reputation and credibility would result in irreparable harm); *see also Allied Marketing Group, Inc. v. CDL Marketing, Inc.*, 878 F.2d 806, 810 (5th Cir. 1989) (affirming district court's conclusion that loss of goodwill resulting from confusion in the marketplace constituted irreparable harm).
[63] *See* Salinas Aff., ¶ 7.
[64] *See Blackwelder Furniture*, 550 F.2d at 197 (acknowledging that "irreparability of harm includes the 'impossibility of ascertaining with any accuracy the extent of the loss . . . and I cannot see how the plaintiff will ever be able to prove what sales the defendant's competition will make it lose, to say nothing of the indirect, though at times far-reaching, effects upon its good will'") (quoting *Foundry Servs., Inc. v. Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir. 1952) (Hand, J., concurring)).

incentives to the Commission's satisfaction, it must abandon those incentive offers in North Carolina. CLPs, however, will be able to continue offering these same incentives, attracting new customers BellSouth will have lost or will not be able to reach. As a result, BellSouth's competitive position will be undermined and it will lose market share in an already competitive marketplace.[65] Such damage to BellSouth's competitive position constitutes irreparable harm.[66]

III. The North Carolina Utilities Commission and Any Interested Third Parties Will Not Be Harmed by the Entry of an Injunction.

While BellSouth faces irreparable harm on multiple fronts if the requested injunction is denied, no other parties face the prospect of harm if it is granted. This balancing test tips decidedly in BellSouth's favor. The Commission will not have to change its position, economic or otherwise, if a preliminary injunction is granted. BellSouth has provided long-term marketing incentives to North Carolina consumers for several years without challenges from any party. The Commission only recently took issue with this long-standing practice, and no other state commission in BellSouth's operating territory has held similarly. Just as it suffered no injury during the previous years in which BellSouth and other ILECs offered these long-term marketing incentives, the Commission cannot claim that it will suffer any injury from maintaining the status quo during the pendency of this action.

[65] *See* Salinas Aff., ¶ 7.

[66] *See Multi-Channel TV*, 22 F.3d at 552 (stating that "when the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill the irreparable injury prong is satisfied"); *see Dominion Video Satellite, Inc.*, 269 F.3d at 1156-57 (affirming that the loss of marketing potential would result in irreparable harm); *see also Bioganic Safety Brands, Inc*, 174 F. Supp. 2d at 1178-79, 85-86 (acknowledging that disruption of uniform national marketing plan and loss of competitive advantage and marketing opportunities resulting from complying with Colorado state advertising law constituted irreparable harm); *see also R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.*, 60 F. Supp. 2d 502, 509 (M.D.N.C. 1999) (holding that "lost advertising opportunities, and incalculable harm to their respective competitive positions, including threatened loss of market share and threatened loss of existing and potential customers" constitute irreparable harm).

The CLPs who stand to gain from the enforcement of the Resale Orders similarly cannot be heard to complain of an injury if the Court enjoins enforcement of the Orders. BellSouth has offered long-term marketing incentives for years without further discounting the wholesale rates on telecommunications services offered to CLPs. No CLP has ever complained of this practice. Because CLPs have never received or even argued for the discounts mandated by the Resale Orders, they cannot now be heard to claim they would suffer harm from maintaining the status quo during the pendency of this action.

There can be no question that the irreparable harm faced by BellSouth in the event that an injunction is denied substantially outweighs any injury that could be claimed resulting from the grant of an injunction. Where, as here, the balance of hardships "tips decidedly in the favor of the plaintiff," the other factors of the *Blackwelder* test become less significant, and the Court should be more inclined to grant injunctive relief.[67]

IV. The Public Interest Strongly Favors The Requested Injunction.

The public interest weighs strongly in favor of the issuance of an injunction. From a practical perspective, the use of marketing incentives has promoted vigorous competition between ILECs and CLPs for several years without any artificial adjustment to the wholesale rates.[68] If the Resale Orders are enforced, the competitive balance between ILECs and the CLPs will be altered significantly.[69] The public has benefited from this competition in the past

[67] *See Rum Creek Coals Sales, Inc.* v. *Caperton*, 926 F.2d 353, 359 (4th Cir. 1991) (reversing denial of preliminary injunction where plaintiff proved it would suffer irreparable harm absent an injunction); *see Washington County, North Carolina* v. *U.S. Dept. of Navy*, 317 F. Supp. 2d 626, 632 (E.D.N.C. 2004) (noting that "the balance of irreparable harm to the plaintiff and the harm to the defendant if relief is granted is the most important aspect of the *[Blackwelder]* test").

[68] *See* Salinas Aff., ¶¶ 3, 4, 6.

[69] *See* Salinas Aff., ¶ 7; *see Lexington-Fayette Urban County Gov't v. BellSouth Telecommunications, Inc.*, 2001 U.S. App. LEXIS 16979, *8-9 (6th Cir. July 26, 2001) (holding that "it appears likely that increased competition and increased capacity in phone service would provide a public benefit by providing additional service and keeping rates low"). A copy of this case is attached hereto as Exhibit 17.

and has an interest in its continuation. In addition, the public also has an interest in avoiding the inefficiencies that will result if BellSouth is forced to restructure its marketing strategy prematurely, the costs of which will likely be passed on to consumers.[70]

CONCLUSION

Through this action, BellSouth seeks nothing more than enforcement of the resale provisions of the Telecommunications Act of 1996, as written. Should Congress wish to modify the Act to provide a different formula for calculating the wholesale rates that ILECs must offer to resellers, it undoubtedly will do so. Until that day, however, state Commissions are not permitted to deviate from the statutory formula based on a perceived notion that unregulated marketing incentives used by ILECs effectively create a hypothetical "real retail rate." For the reasons stated herein, BellSouth respectfully requests that the Court enter a temporary restraining order and preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure.

[70] *See Multi-Channel TV Cable Co.*, 22 F.3d at 554 (affirming a finding that *stabilization* of delivery of cable services to the community furthered the public interest) (emphasis added).

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

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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

CERTIFICATE OF SERVICE

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

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

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

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

Robert V. Owens, Jr., Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Sam J. Ervin, IV, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Lorinzo L. Joyner, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

James Y. Kerr, II, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

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

This the 2nd day of August, 2005

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

Civil Action No.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

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

Defendants.

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITITES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

ONLY ONE FORM NEED BE COMPLETED FOR EACH NONGOVERNMENTAL PARTY EVEN IF THE PARTY IS REPRESENTED BY MORE THAN ONE ATTORNEY. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUAL NONGOVERNMENTAL PARTIES AS WELL AS NONGOVERNMENTAL CORPORATE PARTIES. COUNSEL HAVE A CONTINUING DUTY TO UPDATE THIS INFORMATION. PLEASE FILE AN ORIGINAL AND ONE COPY OF THIS FORM. PLAINTIFF OR MOVING PARTY MUST SERVE THIS ON THE DEFENDANT(S) OR RESPONDENT(S) WHEN INITIAL SERVICE IS MADE.

BellSouth Telecommunications, Inc. (Name of party) who is Plaintiff (Plaintiff/moving party or defendant)

makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?
( ) Yes (X) No

2. Does party have any parent companies?
(X) Yes ( ) No

If yes, identify all parent corporations, including grandparent and great-grandparent corporations: BellSouth Corporation

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity?
(X) Yes ( ) No

If yes, identify all such owners: BellSouth Corporation

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation?
( ) Yes (X) No

If yes, identify entity and nature of interest:

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

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing **BellSouth Telecommunications, Inc.'s Rule 7.1 Disclosure Statement** was served on the persons indicated below by hand delivery and by placing a copy of thereof in the United States Mail, postage prepaid, certified mail, return receipt requested, and addressed as follows:

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

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

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

Robert V. Owens, Jr., Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Sam J. Ervin, IV, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

Lorinzo L. Joyner, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

James Y. Kerr, II, Commissioner
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, NC 27603-5918

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

This the 2nd day of August, 2005