Legal Department

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May 22, 2006

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 060366-TP
In Re: Complaint regarding BellSouth Telecommunications, Inc.'s failure to offer its promotional tariff offerings for resale and request for relief, by Supra Telecommunications and Information Systems, Inc.

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Answer to Supra's Complaint Regarding BellSouth's Failure to Offer its Promotional Tariff Offerings for Resale and Request for Relief, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. A copy of the same is being provided to all parties of record.

Sincerely,

J. Phillip Carver /RN

Enclosure

cc: All parties of record
James Meza III

CERTIFICATE OF SERVICE
DOCKET NO. 060366-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 22nd day of May, 2006 to the following:

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J. Phillip Carver /RN
J. Phillip Carver

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint regarding BellSouth Telecommunications, Inc.'s Failure to Offer its Promotional Tariff Offerings for Resale and Request for Relief, by Supra Telecommunications And Information Systems, Inc.	)	Docket No. 060366-TP
	)	
	)	
	)	
	)	Filed: May 22, 2006

BELLSOUTH TELECOMMUNICATIONS, INC.'S ANSWER TO SUPRA'S COMPLAINT REGARDING BELLSOUTH'S FAILURE TO OFFER ITS PROMOTIONAL TARIFF OFFERINGS FOR RESALE AND REQUEST FOR RELIEF

BellSouth Telecommunications, Inc. ("BellSouth") hereby files, pursuant to Rule 25-22.036(2) Florida Administrative Code, its Answer to the Complaint of Supra Telecommunications and Information Services, Inc. ("Supra"), and states the following:

GENERAL RESPONSE

Background

Supra's Complaint represents the latest salvo in its continuing, baseless attack on BellSouth's winback programs. Although this Commission has previously confirmed that winback programs benefit customers and promote competition, Supra simply refuses to accept the judgment of the Commission on this point. Instead, Supra now makes its third attempt to stop BellSouth from conducting winback programs that benefit Florida consumers.

This Commission determined in the matter captioned In re: Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Tariffs, Docket No. 020119-TP, Order No. PSC-03-0726-FOF-TP, June 19, 2003 (Key Customer Order) that winback efforts benefit Florida consumers. (See Key Customer

Order at 40). In support of this finding, the Commission cited to the CPNI Reconsideration Order[1], in which the Federal Communications Commission ("FCC") stated the following:

> Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs.
>
> Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILECs' unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. . . . However, once a customer is no longer obtaining services from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice.
>
> . . . Because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing they are truly predatory.[2]

Nevertheless, Supra filed on April 18, 2003 an Emergency Petition in which it alleged, among other things, that BellSouth's winback program was anti-competitive, and that BellSouth improperly utilized CPNI to retain or regain customers.[3] Supra subsequently dropped the part of its claim in which it asserted that BellSouth's winback program was *per se* anti-competitive. On April 20, 2004, Supra mounted its second

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[1] Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended, CC Docket Nos. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409 ("CPNI Reconsideration Order").

[2] 14 FCC Rcd at 14446-47, ¶¶ 69-71 (emphasis added).

[3] Emergency Petition of Supra For Expedited Review and Cancellation of BellSouth's $75 Cash Back Promotion Tariffs (T-030132) And For Investigation Into BellSouth's Promotional Pricing And Marketing Practices, filed April 18, 2003, Docket No. 030349-TP.

challenge to BellSouth's winback programs, this time claiming that the application of winback incentives effectively reduced the price of BellSouth's services to below cost levels, and thereby violated the applicable provisions of Chapter 364, Florida Statutes.[4] Approximately, one year later, Supra withdrew this claim as well[5].

Supra now launches a third attack upon BellSouth's winback programs, albeit under a somewhat different theory. In its Complaint, Supra identifies five programs that it claims BellSouth offers to new or returning customers, and further claims that the value of these programs to customers constitutes discounts that must be passed on to CLECs purchasing services for resale pursuant to § 251 of the Act. The theory that underlies Supra's claim, however, has been rejected by a Federal District Court.

Supra's Claim Must Be Rejected Because Promotional Incentives
Are Not Discounts Subject to the Resale Provisions of § 251(c)(4)

Section 251(c)(4) of the Act states that wholesale rates charged to CLEC resellers shall be set "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collections and other costs that will be avoided by the local exchange carrier." The term "retail rate" means the regular rate that an ILEC charges its end users, even if that rate includes a discount, as long as the discount is available for more than 90 days (47 C.F.R. § 51.613(2)). Supra advances in its Complaint the unlikely proposition that anything of value BellSouth provides to a new or returning customer—whether cash, coupon or gift certificate—must be treated as if it were a discount, i.e., it must be assigned a value and subtracted from the resale price of the services purchased by a CLEC.

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[4] Petition of Supra to Review and Cancel, or in the Alternative Immediately Suspend or Postpone BellSouth's PreferredPack Plan Tariffs, filed April 20, 2004, Docket No. 040353-TP.

[5] Supra's Notice of Voluntary Withdrawal, Without Prejudice, filed March 25, 2005.

Although Supra cites as nominal support for its claim a variety of Florida Statutes and F.C.C. Rules, none of this legal authority even vaguely supports the notion that winback promotions whereby customers receive, for example, gift certificates or cash back constitute discounts to the prices customers pay to BellSouth for the services they receive. Instead, Supra's only support for its position is a decision by the North Carolina Utilities Commission (NCUC). Although the NCUC's decision is obviously not binding authority, Supra, nevertheless, argues that this Commission should do as the NCUC has done. The problem with Supra's reliance on the decision of the NCUC is two-fold: First, Supra mischaracterizes some aspects of the NCUC's decision and neglects to mention other aspects that undercut its argument. Second, and more importantly, the portions of the NCUC's decision upon which Supra relies were overturned by the U.S. District Court for the Western District of North Carolina in an Order issued May 15, 2006[6].

Under the 1996 Act, an ILEC such as BellSouth is required to sell to CLECs at wholesale rates any "telecommunications service" that the ILEC offers to retail customers so that the CLEC can resell the service to its end users. 47 U.S.C. § 251(c)(4)(a). A fundamental infirmity of Supra's theory resides in the fact that gift cards, checks, coupons, or other incentives offered to induce customers to purchase services from BellSouth are not telecommunications services. Given this, these incentives are not subject to the resale requirements of the Act and cannot be treated as a reduction to the retail price of offerings that do constitute telecommunications services. Supra's Complaint reflects substantial confusion on this fundamental point.

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[6] Order, issued May 15, 2006 in BellSouth v. Sanford, et al., Case 3:05CV345-MV (Western Dist. Of North Carolina). A copy of the Order is attached hereto as Exhibit "A."

Supra states in its Complaint that, "the promotions at issue here have already been addressed by the North Carolina Utilities Commission in Docket No. P-100, Sub 72b, which reached the same conclusions Supra suggests here, that promotions are, in fact, telecommunications services, and are subject to the resale discount in the Act." (Supra Complaint, pp. 10-11). Paradoxically, Supra then goes on to quote language from the NCUC's Clarifying Order[7] in which that Commission made clear that it does not consider these incentive gifts to be telecommunications services:

> The [NCUC's prior] Order does not require that non-telecommunications services, such as gift cards, check coupons, or merchandise, be resold. Such items do, however, have economic value. In recognition of this fact, the Order requires that telecommunications services subject to the resale obligation of Section 251(c)(4) be resold at rates that give resellers the benefit of the change in rate brought by offering one-time incentives for more than 90 days.[8]

Thus, the NCUC did not find that incentive gifts are telecommunications services. Instead, the NCUC found precisely the contrary, but ruled that this fact does not matter because these gifts still function to lower the retail price of services subject to resale. This conclusion, however, was expressly rejected by the United States District for the District of North Carolina in its Order issued on May 15, 2006.

In its challenge to the NCUC Order relied upon by Supra, BellSouth alleged "that the NCUC's conclusions that BellSouth is required to offer CLPs a wholesale discount on marketing incentives (or the value thereof) in addition to the wholesale discount offered on its retail telecommunications services is in violation of the Telecommunications Act" (Order, p. 5). The Federal Court granted Summary Judgment for BellSouth and explained its rationale for doing so as follows:

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[7] Order Clarifying Ruling On Promotions And Denying Motions For Reconsideration and Stay ("Clarifying Order"), June 3, 2005, Docket No. P-100, Sub 72b.

[8] Supra Complaint, p. 11, citing NCUC Clarifying Order (emphasis added).

> Looking to the language of the Act, Congress' intent is plain. Section 251 (c)(4) requires an ILEC to offer for resale "any telecommunications service" it provides at retail to subscribers who are not telecommunications carriers. There can be no argument that gift cards, checks, coupons for checks, and similar types of marketing incentives are "telecommunications services." Indeed, in its First Resale Order, the NCUC conceded 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 . . .." First Resale Order, p. 11.
>
> As noted above, the FCC has determined that the Act's resale obligations extend to *promotional price discounts* offered on retail communications services . . . Had the FCC wished to include marketing incentives such as Walmart gift cards in the definition of "promotions," it could have easily done so. The marketing incentives at issue here do not give the customer a reduction or discount on the price of the telecommunications service provided by BellSouth. A customer receiving a Walmart gift card in exchange for signing up to receive certain services, for example, will pay the same full tariff price for the service each month as customers who subscribed to the service without the benefit of the gift card. If the marketing incentive came in the form of a bill credit or other direct reduction in the price paid for a particular service, then the incentive would certainly be considered a promotional discount that would trigger BellSouth's resale obligations.
>
> The NCUC's Orders purport to extend the definition of promotional discounts to include anything of economic value. The court believes that this interpretation is contrary to the plain language of the statute and the FCC implementing regulations. (emphasis added)[9]

The same logic that supports the Federal Court's decision mandates the rejection of Supra's Complaint in the instant matter. Supra has alleged that under five different promotions, BellSouth gives a check, coupon or gift certificate to a new or returning customer. None of the subject giveaways involve a bill credit or direct reduction in the price paid for a particular service. Given this, these promotional giveaways cannot be treated as discounts that reduce the retail price of services. The fact that a Federal Court has specifically rejected the fundamental premise upon which Supra's Complaint is based

[9] Order, pp. 6-7.

supplies a persuasive rationale for rejecting Supra's claim in this case. The Commission, thus, can properly find in favor of BellSouth as a matter of law. There are, however, numerous other legal, factual and policy reasons that Supra's Complaint should be rejected.

Supra's Position Must Be Rejected As Contrary
To The Resale Provisions of The Act

Supra's request for relief is untenable as a matter of law, and is fundamentally inconsistent with the Act, for a second reason. Treating the marketing expense occasioned by a promotional giveaway as a discount that must be passed on to CLECs would necessarily have the effect of providing CLECs with a double discount in violation of the Act. As noted previously, Section 252(d)(3) states that the retail discount is to be set by excluding from the retail rate "the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." The cost of incentives provided to customers such as coupons or gift cards are marketing expenses. Thus, the result of sustaining Supra's position would be to provide an unjustified windfall to Supra by making duplicate reductions for these marketing expenses. That is, the wholesale discount necessarily functions to remove BellSouth's marketing expenses from the retail rate so that the CLEC pays a lower rate that does not include these expenses. Mischaracterizing the marketing expenses attributable to winback programs as discounts would result in impermissibly removing these same costs a second time.

Supra's Complaint Must Be Rejected Because It Fails To Allege Facts That, If Proven, Would Demonstrate That BellSouth May Not Reasonably Refuse To Make Winback Promotions Available As Discounts

Supra's claim must also be rejected because it fails to address entirely the question of whether, even if winback promotions are discounts, BellSouth can permissibly decline to make these discounts available to Supra. For the Commission to find in Supra's favor, it would have to make two separate findings. First, the Commission would have to find that the subject winback promotions constitute discounts. Second, the Commission would have to determine that these "discounts" must necessarily be passed on to Supra because it would be unreasonable and discriminatory for BellSouth to refuse to do so[10]. Although Supra requests that the Commission find that BellSouth's alleged past refusal "to provide the identified promotions to Supra is unreasonable and discriminatory . . . ," Supra's Complaint focuses only on the threshold question of whether winback promotions are discounts. The Complaint includes no factual allegations that address the question of what would (or would not) constitute a reasonable, nondiscriminatory refusal to make winback incentives available for resale, even if they were discounts.

Supra likewise fails to mention in its Complaint that the NCUC decision upon which it relies so heavily considered separately this second point, and expressed an inclination to rule in BellSouth's favor. The NCUC first noted that "although the Commission believes that restrictions on resale obligations must be considered on a promotion-by-promotion basis, some restrictions on resale of some gift card type promotions that run for more than 90 days may be proven to be reasonable and

[10] "With respect to any restrictions on resale not permitted under paragraph a, an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." CFR § 51.613(b).

nondiscriminatory."[11] The Commission then stated that "with regard to BellSouth's 1FR + 2 Cash Back promotion, based on the Commission's current knowledge, the Commission would be inclined to find a restriction on resale is reasonable and nondiscriminatory." The NCUC further noted that "the wholesale discount was, in part, set by deducting ILEC marketing expenses from the ILECs' costs for the regulated service—at least in part a recognition that resellers would have their own marketing expenses. Resellers remain free to offer, at their own expense, promotional inducements to customers who purchase the tariff services from them." Accordingly, the North Carolina Commission concluded that "at least with respect to 1FR + 2 Cash Back, the anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the pro-competitive effects." (Id.).

Thus, the North Carolina Commission concluded that, although the winback promotion at issue should be considered a discount (a conclusion with which BellSouth obviously disagrees), making the "discount" available to CLECs would result in a double discount in the amount of these marketing expenses. Thus, it would be reasonable for BellSouth to decline to provide this discount to CLECs. In other words, the NCUC viewed the double discount problem not as a legal impediment to treating winback incentives as discounts, but rather as a factual basis for BellSouth to reasonably refuse to make the "discount" available for resale. The effect of the NCUC's decision, considered in its entirety, is that BellSouth need not reduce the wholesale price of the service by the value of the particular promotional benefit at issue.

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[11] Order Ruling on Motions Regarding Promotions, issued December 22, 2004; Docket No. P-100, Sub 72b, p. 13.

Although BellSouth disagrees with the NCUC's (now overturned) conclusion as to what constitutes a discount, it is clear that Supra's position in this case could not be sustained even under the approach taken by the NCUC. Supra's Complaint, of course, fails to mention this portion of the North Carolina Commission's decision. The Complaint likewise fails to provide any factual support for the position that, even if the winback incentives are discounts (and as a matter of law they are not), a refusal by BellSouth to make them available for resale would be unreasonable and discriminatory.

Supra Has Failed To State A Sufficient Claim For Relief

Supra's request for relief should also be rejected because it is so vague that it would be virtually impossible to translate it into a ruling that could actually be implemented. Supra claims that "there are no material facts in dispute" and that the Commission can resolve this matter without considering evidence. (Complaint, p. 12). BellSouth agrees with this position in one sense: Supra's claim that promotional incentives are discounts is untenable under the Act as a matter of law, and it can be summarily rejected by the Commission. However, to grant the relief Supra requests would require factual findings on issues that Supra fails to address entirely.

Supra also requests that the Commission "require BellSouth to apply the value of the monetary inducements offered through these promotions to the wholesale rate for the services purchased by Supra for resale and to apply the resale discount to the reduced 'promotional rate' for the wholesale services." (Supra Complaint, p. 12). The Complaint contains no clue, however, as to how this would be accomplished. Supra identifies five different promotions, which it claims are available to customers who purchase CompleteChoice, CompleteChoice with Area Plus, PreferredChoice, any residential local

exchange service, any local exchange service, or any possible combination of these services (Complaint, p. 5). Supra alleges that these various promotions would provide to customers cash in amounts between $50 and $125, gift cards having a value of between $25 and $50, coupons having a value of $25, fee waivers that Supra "estimates" to have a value of $35.88, and one-time credits between $50 and $75. Without providing any hint as to its method of calculation, Supra also makes the conclusory allegation that the aggregate value of these discounts on any given retail service could be as much as $160.00 total. Based on the vague allegations of the Complaint, it is impossible to discern how Supra arrived at any of these figures.

It is equally impossible to determine how the "value" of these promotions could be assessed then applied as a discount to the services that Supra buys for resale purposes. For example, if the promotional benefit that a customer would normally receive is a $25 Walmart gift card, would Supra wish for BellSouth to give it a $25 Walmart gift card, or is it requesting the cash equivalent? If Supra seeks the latter, then does it claim that it should receive the face value of the gift card, or the amount that BellSouth paid Walmart (if anything) for this promotional consideration?

Even if the value of these promotions could be determined, there is still the difficulty of determining how to convert them into true discounts so that they can be applied. Again, the Federal Court found that because these incentives do not function to directly reduce the price a retail customer pays, they are not discounts. This same fact underlies the conundrum of how to convert, for example, a Walmart gift card into a discount that would be a direct reduction to the service price Supra pays. Is Supra claiming that it should receive the "value" of the gift card as a lump sum or should the

value be deducted by some method from the monthly recurring rate for the service? Again, Supra's Complaint contains no indication of what it ultimately seeks.

The absurdity of Supra's position is evident when one considers that, despite these many unanswered questions, Supra also claims that its Complaint can be sustained as a matter of law, i.e., without factual determinations by the Commission. If we indulge in the assumption that Supra is correct, then sustaining Supra's position would result in the Commission making a largely theoretical pronouncement that BellSouth must pass these "discounts" on to Supra, without making any factual determination as to how the amount of these "discounts" would be determined or applied. Presumably, Supra has no idea how this could be accomplished either, because, if it did, it surely would have made its Complaint more specific on this point, and thereby provided the Commission with some explanation of how its vague argument could be turned into a ruling specific enough to allow implementation.

Supra's Claims Should Also Be Rejected For Policy Reasons

Even if Supra's position were legally viable and factually supported (which obviously it is not), this position should still be rejected as a matter of policy. If Supra is granted the relief that it seeks, it would be under no obligation whatsoever to pass on to its customers this "discount." Supra (or any affected CLEC) would have every incentive to keep this windfall over and above the wholesale discount it already receives. In this scenario, a CLEC would also have an opportunity to convert to resale customers that it is serving by other means for the specific purpose of obtaining this windfall. Further, a CLEC might even be able to switch its customers back and forth a number of times to obtain this wind fall more than once. The Commission should not, as a matter of policy,

adopt an interpretation of the Act that creates the potential for gamesmanship and anti-competitive conduct by CLECs. The result Supra seeks would unquestionably create such an opportunity.

Finally, Supra's position also directly contravenes the Commission's previously stated policy position on winback programs. Again, the Commission has specifically found that winback programs benefit customers. The likely result of granting Supra's request would be to increase the cost of marketing incentives associated with winback programs to such an extent that BellSouth would be forced to discontinue these programs. This is, of course, precisely the result that Supra wants, and has attempted to achieve in its multiple, frivolous attacks on these programs. It is no coincidence that Supra's Complaint was preceded by two earlier Petitions in which it ignored the Commission's rulings on winback promotions and requested that the Commission prevent BellSouth from providing these promotional benefits to customers. It is likewise more than happenstance that, after setting forth in its Complaint an exceedingly vague plea for relief, Supra requests in the alternative that the Commission "require BellSouth to discontinue providing these promotional offerings to its own end users." (Supra Complaint, p. 12). The Commission should not allow Supra to make an end run around the Commission's previous rulings; nor should it allow Supra to achieve the fundamentally anti-competitive goal of eviscerating winback programs in contravention of the Commission's previous approval of these programs.

SPECIFIC RESPONSE TO THE ALLEGATIONS OF THE COMPLAINT

1. As to the allegations of paragraph 1 of the Complaint, BellSouth is without knowledge as to the allegations of this paragraph. Accordingly, they are deemed to be denied.

2. As to the allegations of paragraph 2 of the Complaint, BellSouth is without knowledge as to the allegations of this paragraph. Accordingly, they are deemed to be denied.

3. As to the allegations of paragraph 3 of the Complaint, BellSouth admits these allegations.

4. As to the allegations of paragraph 4 of the Complaint, BellSouth admits that this Commission has jurisdiction over the matters raised in the Complaint.

5. As to the allegations of paragraphs 5 through 13 of the Complaint, which Supra labels as "Factual Allegations," BellSouth admits that it maintains certain promotions that are offered to its customers under certain circumstances, including cash back promotions, gift card promotions, coupon promotions, fee waiver promotions, and service credit/discount promotions. BellSouth specifically denies the allegation that these promotions constitute "discounts" to telecommunications services. All other allegations of these paragraphs are (as described in greater detail above) so vague and conclusory that BellSouth is unable to frame a response. Accordingly, these allegations are deemed to be denied.

6. As to the allegations of paragraphs 14-20, these are designated by Supra, not as factual allegations, but rather as "Legal Argument" or "Additional Support." As such, no response is required pursuant to the Florida Rules of Civil Procedure.

Nevertheless, BellSouth would note that woven into Supra's argument are a number of factual assumptions and implications that purport to support Supra's claim. BellSouth denies all factual allegations of this sort in paragraphs 14-20.

7. All factual allegations not specifically admitted herein are denied.

AFFIRMATIVE DEFENSES

1. Supra's Complaint fails to state a cause of action upon which relief can be granted.

2. Even if there were a legal basis to conclude that the winback incentive programs at issue are discounts subject to the resale requirements of 47 C.F.R. § 51.613, it is, nevertheless, reasonable and nondiscriminatory for BellSouth to restrict the resale availability of these incentives.

WHEREFORE, BellSouth respectfully requests that the Commission summarily dismiss Supra's Complaint with prejudice because it is insufficient as a matter of law. In the alternative, BellSouth requests that the Commission hold a hearing to consider the factual issues that are necessarily implicit in Supra's request for relief, and upon conclusion of this hearing, find in favor of BellSouth.

Respectfully submitted this 22nd day of May 2006.

BELLSOUTH TELECOMMUNICATIONS, INC.

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631410

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:05CV345-MU

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Plaintiff,	)	
vs.	)	
	)	ORDER
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.	)	

This matter is before the court upon cross-motions for summary judgment filed by Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") and the Defendant Commissioners of the North Carolina Utilities Commission (the "Commissioners"). It appears to the court that there are no genuine issues of material fact, and this matter is now ripe for disposition.

BACKGROUND

BellSouth is an incumbent local exchange carrier ("ILEC"). Under the Telecommunications Act of 1996 (the "Act"), BellSouth, as an ILEC, is required to offer its telecommunications services to competing local providers ("CLPs") for resale at wholesale rates established by the North Carolina Utilities Commission (the "NCUC"). Specifically, the Act

Exhibit A

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." 47 U.S.C. § 251(c)(4). Wholesale rates are determined by State commissions "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[1] 47 U.S.C. § 252(d)(3).

The Federal Communications Commission ("FCC") has determined that the Act's resale obligations extend to promotional price discounts offered on retail communications services. However, the FCC has expressly limited the scope of the term "promotions" to "price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts." *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), ¶ 948 ("First Report and Order"). The FCC further 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 not subject to the wholesale rate obligation." Id. at ¶¶ 949 & 950. Thus, promotional prices offered 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 rate.

BellSouth uses certain marketing incentives in all nine states in which it operates. These incentives include gift cards or other one-time giveaways that encourage customers to subscribe

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[1]The NCUC has established that CLPs may purchase BellSouth's retail telecommunications services in North Carolina at a 21.5% wholesale discount less the retail price for business services and for 17.6% less than the retail price for residential services.

to BellSouth's telecommunications services. CLPs that compete with BellSouth regularly employ similar marketing practices. These marketing incentives are redeemable only for unaffiliated, that is, non-BellSouth, goods or services. Because these types of marketing incentives originate from unaffiliated companies, BellSouth is unable to track their usage or redemption rates.

In June of 2004, the Public Staff of the NCUC filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. One of the issues on 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?" The Public Staff took the position that marketing incentives such as gift cards, checks, etc. "effectively" constitutes a discount on telecommunications services and are subject to resale obligations. On December 22, 2004, the NCUC issued its Order Ruling on Motion Regarding Promotions (the "First Resale Order"), holding that marketing incentives "are in fact promotional offers subject to the FCC's rules on promotion," and 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." While acknowledging 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," the NCUC nevertheless concluded 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." First Resale Order, p. 11. Thus, the NCUC stated, "The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the 'real' retail rate." Id.

On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, for Clarification, and for a Stay of the Commission's December 22, 2004 Order. On June 3, 2005, the NCUC issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (the "Second Resale Order"). In this Order, the NCUC held that marketing incentives have the effect of lowering "the actual, 'real' retail rate." Second Resale Order, p. 5. The NCUC further required BellSouth to 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." Id. at p. 6.

BellSouth filed this action on August 2, 2005 seeking declaratory and injunctive relief with respect to the two Orders of the NCUC, alleging that the Orders violate the Act. BellSouth also filed a Motion for Preliminary Injunction seeking to enjoin enforcement of those provisions of the Orders requiring ILECs to take into consideration the value of gift cards and other giveaways in the same manner that rate discounts which last longer than ninety days are considered when arriving at the wholesale rate for telecommunications services for CLPs. After a hearing on August 11, 2005, this court granted BellSouth's Motion for Preliminary Injunction. The parties have now filed their cross-motions for summary judgment.

DISCUSSION

BellSouth alleges that the NCUC's conclusions that BellSouth is required to offer CLPs a wholesale discount on marketing incentives (or the value thereof) in addition to the wholesale discount offered on its retail telecommunications services is in violation of the Telecommunications Act. The court reviews the NCUC's interpretations of the Act *de novo*. GTE South , Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999). However, "[a] 'state agency's interpretation of federal statutes is not entitled to the deference afforded a federal agency's interpretation of its own statutes . . .'" Id. (quoting Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495-96 (9th Cir. 1997). The court has carefully reviewed the two Orders of the NCUC, the arguments of counsel, and the pertinent law, and concludes that the Orders of the NCUC are contrary to and in violation of the Act.

The first rule of statutory construction is that a court must look to the language of the statute. When examining the language of a statute, the court "must presume that a legislature says in a statute what it means and means in a statute what it says there." Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The court may look beyond the express language of the statute only when the language of the statute is ambiguous or where a literal interpretation would thwart the purpose of the overall statutory scheme. U.S. v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978).

Looking to the language of the Act, Congress' intent is plain. Section 251 (c)(4) requires an ILEC to offer for resale "any telecommunications service" it provides at retail to subscribers who are not telecommunications carriers. There can be no argument that gift cards, checks, coupons for checks, and similar types of marketing incentives are "telecommunications services." Indeed, in its First Resale Order, the NCUC conceded 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 . . .." First Resale Order, p. 11.

As noted above, the FCC has determined that the Act's resale obligations extend to *promotional price discounts* offered on retail communications services. In its First Report and Order, the FCC stated in unambiguous terms that "promotions" refers only to "*price discounts* from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts." First Report and Order, ¶ 948. Had the FCC wished to include marketing incentives such as Walmart gift cards in the definition of "promotions," it could have easily done so. The marketing incentives at issue here do not give the customer a reduction or discount on the price of the telecommunications service provided by BellSouth. A customer receiving a Walmart gift card in exchange for signing up to receive certain services, for example, will pay the same full tariff price for the service each month as customers who subscribed to the service without the benefit of the gift card. Moreover, a customer cannot use a Walmart gift card or coupon to pay her phone bill. If the marketing incentive came in the form of a bill credit or other direct reduction in the price paid for a particular service, then the incentive would certainly be considered a promotional discount that would trigger BellSouth's resale obligations.

The NCUC's Orders purport to extend the definition of promotional discounts to include anything of economic value. The court believes that this interpretation is contrary to the plain language of the statute and the FCC implementing regulations. Accordingly,

IT IS THEREFORE ORDERED that BellSouth's Motion for Summary Judgment is hereby GRANTED, and the Commissioners' Motion for Summary Judgment is hereby DENIED.

Signed: May 15, 2006

Graham C. Mullen
United States District Judge