COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF: **CASE NO.: 2010-00025**

BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTHEAST D/B/A AT&T KENTUCKY

VERSUS

BUDGET PREPAY, INC. D/B/A BUDGET PHONE

BUDGET PHONE'S MOTION TO DISMISS AND/OR STAY AND RESPONSE TO MOTION FOR CONSOLIDATION

Budget Prepay, Inc. d/b/a Budget Phone ("Budget Phone") respectfully requests that the Kentucky Public Service Commission ("the Commission") enter an order dismissing the Formal Complaint (the "Complaint") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky ("AT&T") in the above-referenced matter, or, in the alternative, staying or holding in abeyance these proceedings pending a final order in Federal Communications Commission ("FCC") WC Docket No. 06-129, *In the matter of Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules* (the "FCC Resale Docket").

Further, because the FCC Resale Docket will determine the policy issue that AT&T urges the Commission to consolidate — whether AT&T can apply the resale discount to retail "cash-back" promotions offered by AT&T to resellers — the Commission should deny AT&T's Motion for Consolidation, without prejudice, as premature or moot. The FCC Resale Docket already effectively consolidates the issue, and the FCC's decision will provide guidance to AT&T and resellers on a national basis, rather than subjecting the parties to potentially inconsistent state commission and appellate court decisions.

BACKGROUND

Image Access, Inc. d/b/a NewPhone ("NewPhone") filed a Petition for Declaratory Ruling with the FCC, at FCC WC Docket No. 06-129, asking the FCC to remove uncertainty surrounding the resale of incumbent local exchange carrier ("ILEC") services subject to cash-back promotions, gift cards, coupons, checks, or other similar giveaways.

In response to the FCC's Public Notice requesting comments and reply comments from interested parties,[1] BellSouth Corporation and AT&T Inc.[2] both filed timely comments opposing the relief requested by NewPhone. This matter is currently pending before the FCC.

Thereafter, AT&T filed separate complaints against Budget Phone and three other resellers operating in Kentucky. AT&T also filed substantively identical complaints against Budget Phone in Louisiana, Tennessee, Mississippi and Alabama; in those other jurisdictions, AT&T filed separate complaints against at least three other resellers.

In its Complaint filed against Budget Phone with this Commission, AT&T seeks a decision declaring that (a) Budget Phone has breached its interconnection agreement by wrongfully withholding amounts due and payable, (b) AT&T has been financially harmed, and (c) Budget Phone is liable to AT&T, and (d) Budget Phone is required to pay AT&T all amounts withheld, including late payment charges and interest. See Complaint pp. 3, 5 (¶8), 9 (part VI).

In the Motion to Consolidate, however, AT&T asks that two issues it asserts are "in common" with the other complaints it filed in Kentucky be consolidated across the four proceedings for "expeditious resolution" — apparently in the form of a declaration from the Commission, rather than through the asserted interconnection claims contained in the complaints. Specifically, AT&T suggests the common issues are: (1) whether AT&T can apply the resale discount

[1] Attached as Exhibit A.

[2] AT&T Inc. was the result of a merger of SBC Communications, Inc. and AT&T Corp. The opposition of AT&T Inc. in FCC Docket No. 06-129 included the company's ILEC subsidiaries.

established by the Commission to "cash-back" promotions offered by AT&T to its customers that AT&T makes available for resale, and (2) whether AT&T is required to offer for resale certain customer referral marketing promotions (such as the "word-of-mouth" promotion).

ARGUMENT

As discussed below, the first issue raised by AT&T is already pending for resolution before the FCC. Therefore, AT&T's related claim against Budget Phone should be dismissed without prejudice, or stayed pending the FCC's decision.

The second issue raised by AT&T is not applicable to Budget Phone as it has not sought any credits associated with AT&T's word of mouth promotion. Therefore, AT&T's Complaint fails to even state a claim against Budget Phone, and provides no basis for consolidation.[3]

I. The Commission should dismiss or stay AT&T's Complaint as it relates to the resale issues being decided in the FCC's Resale Docket.

Having chosen to file separate cases against Budget Phone and others before at least five state commissions purportedly to interpret and enforce the separate interconnection agreements it has with each defendant and determine the individual amount that may be owed by each such defendant, AT&T turns around and wants to have a state-by-state "consolidated" determination only about the application of the resale discount to cash back promotions required to be offered to CLEC resellers.[4] Assuming *arguendo* that the Commission has jurisdiction over the issues and that the sought-for prospective declaration is allowable in a complaint proceeding (particu-

[3] Budget Phone has asserted the defense of no cause of action as to AT&T's word-of-mouth claim in its Answer and, to the extent that claim is not dismissed at this time (see part II), will file a dispositive motion about it at an appropriate time later in this proceeding.

[4] At the same time, AT&T's proposed consolidation is not sufficiently respectful of the differences in interconnection agreements, disputes, facts, and positions as between Budget Phone and the other Kentucky defendants. In its Motion (pp.2-3), AT&T asserts that "[t]he facts associated with these common issues do not vary significantly (if at all) from one docket to the next, and few (if any) of those facts are in dispute," but cannot say whether or what portion of a defendant's disputed billings/payments "are subject to one or both of the ... common issues." It does not address whether any "common" interpretation of an issue can be anything more than an abstract, advisory opinion in sorting out the actual billing and payment disputes that have arisen, and it recognizes that individual questions will remain after the requested consolidated proceedings (Motion p.4 & fn.3).

larly one clearly asserting retrospective claims, *see* Complaint p.1 fn.1 & p.2 fn.5), the Commission should dismiss AT&T's Complaint or, alternatively, hold the Complaint in abeyance pending the FCC's decision in its Resale Docket.

Each complaint, including AT&T's Complaint before the Commission, requires interpretation of FCC regulations regarding AT&T resale obligations to make retail promotions available to CLEC resellers; nowhere does AT&T allege violation of a state commission regulation or state statue. Not only would judicial economy and efficiency be best served by allowing the FCC, the governing body charged with promulgating and interpreting the regulations at issue, to provide guidance on the issues presently before the Commission, the FCC is the most appropriate agency to interpret *its own* regulations.

Further, consolidation of a regional issue involving interpretation of federal statutes and regulations, can realize efficiencies only at a federal or national level — not on a state-by-state basis. Furthermore, state-by-state determinations raise the risk of inter-state conflicts and are duplicative of existing proceedings considering the same issues.

In fact, as to the one issue in which Budget Phone has any interest (restrictions on the resale discount), there are already three proceedings in which the issue is pending:

a. Interpretation of the Telecommunications Act of 1996 (the "Act") and FCC regulations relating to AT&T's resale obligations and the prohibition against imposing unreasonable or discriminatory conditions or limitations on resale are issues currently pending in the FCC Resale Docket.

b. Issues of AT&T's resale obligations under the federal statute and regulations are also pending in *CGM, LLC v. BellSouth Telecommunications, Inc.*, Case No. 3:09-cv-00377 (W.D.N.C.). The appellate court for that circuit has already ruled, in *BellSouth Telecommunica-*

tions, Inc. v. Sanford, 494 F.3d 439 (4th Cir. 2007),[5] that the Act and FCC regulations thereunder require AT&T to make the promotional discounts offered to retail customers available to CLEC resellers.

c. A U.S. District Court in Texas enjoined AT&T from engaging in restrictions on resale designed to reduce the amount of promotional discounts offered to CLEC resellers when compared to retail consumers. *Budget PrePay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, Case No. 3:09-cv-1494-P (N.D. Tex. Nov. 30, 2009).[6] AT&T is currently appealing that decision to the United States Fifth Circuit Court of Appeals, Case Nos. 09-11188 and 09-11099.

The efficiencies that AT&T asserts will follow from its proposed, "limited consolidation," can be obtained by abating this proceeding in deference to one or more of the proceedings listed above. Rulings made in those earlier-filed proceedings will clarify or determine AT&T's resale obligations under federal statutes and regulations, and advance the resolution of the particular billing and payment issues in AT&T's complaint against Budget Phone. If, at that point, there are legal arguments or other issues that might efficiently be addressed by consolidating the proceedings in one or more of AT&T's separately-filed complaint cases, a party may request and the Commission may consider consolidation at that time.

AT&T itself has recognized the benefits of abating a related proceeding pending before the Louisiana Public Service Commission, Docket No. U-31202, *In re: BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana, Petition for Review Concerning Resale Promotion Methodology Adjustment*, in light of the case pending before the Fifth Circuit. In a Motion for Abeyance,[7] AT&T urged that the outcome of the appeal to the Fifth Circuit referenced above could

[5] Attached as Exhibit B.
[6] Attached as Exhibit C.
[7] Attached as Exhibit D.

provide guidance to the parties or be dispositive of some or all of the issues in the Louisiana docket and that administrative and judicial economy would be well served and resources appropriately conserved by holding that docket in abeyance. The LPSC granted AT&T's Motion for Abeyance, holding those proceedings in abeyance pending a final decision in *Budget PrePay v. AT&T Inc. f/n/a SBC Communications, Inc.*, 5th Cir. No. 09-11188 c/w 09-11099.[8]

Budget Phone agrees with AT&T and, for the same reasons, urges the Commission to, at a minimum, hold this proceeding in abeyance as well, as described above.

II. AT&T has no claim against Budget Phone for amounts allegedly owed for the Word-of-Mouth Promotion.

In an apparent effort to craft the Complaint against Budget Phone in a manner similar to the complaints being filed by AT&T against other CLEC resellers, AT&T went so far as to assert a claim against Budget Phone that it knows, or should know through basic investigation, has no basis whatsoever. Specifically, AT&T has asserted a claim to hold Budget Phone liable for credits allegedly due associated with its word-of-mouth promotion. Budget Phone has not applied for credits, let alone withheld payments associated with, the word-of-mouth promotion.

AT&T has a basic obligation, prior to filing a complaint against another party, to investigate the claims to be asserted, and not assert frivolous claims that have no factual or evidentiary support. At a minimum, AT&T should immediately amend its Complaint against Budget Phone to remove any claims relating to the word-of-mouth promotion.

In any event, as the claim relates to AT&T's Motion to Consolidate, for the reasons stated above, Budget Phone vehemently opposes the consolidation of the Complaint against it based on a word-of-mouth claim that does not exist. The only claim presenting a case and

[8] See LPSC Docket No. U-31202, Order dated February 18, 2010, attached as Exhibit E.

controversy between AT&T and Budget Phone is that relating to AT&T's calculation of the cash back promotional credits due – the issue already pending before the FCC.

WHEREFORE, as discussed above, Budget Phone requests that the Commission dismiss the Complaint filed by AT&T, or, in the alternative, stay or hold in abeyance the proceeding in this Docket pending the FCC's Resale Docket and/or the referenced court cases. Budget Phone further requests that the Commission deny AT&T's Motion for Consolidation, without prejudice, as premature or moot.

Respectfully submitted this 25th day of February, 2010.

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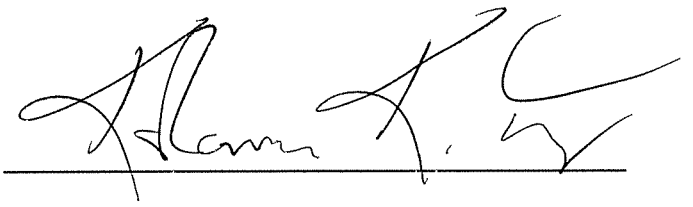
ATTORNEYS FOR BUDGET PREPAY, INC. D/B/A
BUDGET PHONE

CERTIFICATE of FILING and SERVICE

I hereby certify that on this the 25th day of February 2010, the original and ten (10) copies of the foregoing were hand-delivered to the Commission for filing, and a copy was served, by first-class U.S. mail, on:

Mary K. Keyer
AT&T SOUTHEAST
601 W. Chestnut Street, Suite 407
Louisville, KY 40203-2034



Attorney for Budget PrePay, Inc.

PUBLIC NOTICE

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Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 06-1421
Released: July 10, 2006

PETITION OF IMAGE ACCESS, INC. d/b/a NEWPHONE FOR DECLARATORY RULING PLEADING CYCLE ESTABLISHED

WC Docket No. 06-129

COMMENTS: July 31, 2006
REPLY COMMENTS: August 10, 2006

On June 13, 2006, Image Access, Inc. d/b/a NewPhone (NewPhone) filed a petition for declaratory ruling regarding the resale of incumbent local exchange carrier (ILEC) services. Specifically, NewPhone asks the Commission to declare that:

- an ILEC's refusal to make cash-back, non-cash-back, and bundled promotional discounts available for resale at wholesale rates is an unreasonable restriction on resale and is discriminatory in violation of the Act and the Commission's rules and policies;
- for all promotions greater than 90 days, ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion;
- the effective retail rate for a giveaway or discount shall be determined by subtracting the face value of the promotion from the ILEC-tariffed rate for the service that is the subject of the promotion, and the value of the discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months;
- for all ILEC promotions greater than 90 days, ILECs shall make available for resale the telecommunications services contained within mixed-bundle promotions (promotions consisting of both telecommunications and non-telecommunications services) and apply the wholesale avoided cost discount to the effective retail rate of the telecommunications service contained within the mixed bundle;
- the effective retail rate of the telecommunications service component(s) of a mixed-bundle promotion shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the bundle if added together at their retail, unbundled component prices; and
- telecommunications carriers shall be able to resell ILEC promotions greater than 90 days in duration as of the first day the ILEC offers the promotion to retail subscribers.

We invite comments on the NewPhone petition. Interested parties may file comments on or before **July 31, 2006** and reply comments on or before **August 10, 2006**. Comments may be filed using

the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[1] Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of the proceeding, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case, **WC Docket No. 06-129**. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). **Parties are strongly encouraged to file comments electronically using the Commission's ECFS.**

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C. 20002.

- The filing hours at this location are 8:00 a.m. to 7:00 p.m.
- All hand deliveries must be held together with rubber bands or fasteners.
- Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. Parties should also send a copy of their filings to Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A361, 445 12th Street, SW, Washington, D.C. 20554 or by e-mail to lynne.engledow@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

Documents in WC Docket No. 06-129 are available for public inspection and copying during business hours at the FCC Reference Information Center, 445 12th Street, SW, Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com. People with disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files,

[1] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at telephone (202) 418-0530 or TTY (202) 418-0432.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. *See* 47 C.F.R. §§ 1.1200 *et seq.* Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules. *See* 47 C.F.R. § 1.1206(b).

For further information, contact Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, (202) 418-2350.

- FCC -

494 F.3d 439
(Cite as: 494 F.3d 439)

United States Court of Appeals,
Fourth Circuit.
BELLSOUTH TELECOMMUNICATIONS, INCORPORATED, Plaintiff-Appellee,
v.
Jo Anne SANFORD, Chairman; Robert V. Owens, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; Howard N. Lee; William Thomas Culpepper, II; James Y. Kerr, II, Commissioners, in their official capacities as Commissioners of the North Carolina Utilities Commission, Defendants-Appellants,
and
North Carolina Utilities Commission; Robert K. Kroger, Commissioner, Defendants,
Image Access, Incorporated, Intervenor/Defendant.
No. 06-1678.

Argued: March 14, 2007.
Decided: July 25, 2007.

Background: Incumbent telecommunications provider brought action against commissioners of North Carolina Utilities Commission, challenging orders in which Commission determined, pursuant to Telecommunications Act, that value of incumbent provider's incentive offers, when extended to subscribers for more than 90 days, created promotional rate that had to be offered to competing providers in form of reduced wholesale price. The United States District Court for the Western District of North Carolina, Graham C. Mullen, Senior District Judge, 2006 WL 1367379, granted summary judgment for incumbent provider. Commissioners appealed.

Holding: The Court of Appeals, Niemeyer, Circuit Judge, held that value of incentives that are offered to subscribers by incumbent telecommunications providers and extend for more than 90 days must be reflected in retail rate used for computing wholesale rate that is to be charged to competing providers under Act.

Reversed and remanded with instructions.

Williams, Chief Judge, filed a separate opinion concurring in part and in the judgment.

West Headnotes

[1] Telecommunications 372 644

372 Telecommunications
372I In General
372k633 Judicial Review or Intervention in General
372k644 k. Standard and Scope of Review. Most Cited Cases
Actions of state commissions taken under Telecommunications Act are reviewed in federal court de novo to determine whether they conform with statutory requirements. Telecommunications Act of 1996, § 101, 47 U.S.C.A. §§ 251, 252.

[2] Telecommunications 372 644

372 Telecommunications
372I In General
372k633 Judicial Review or Intervention in General
372k644 k. Standard and Scope of Review. Most Cited Cases
Although actions of state commissions taken under Telecommunications Act are reviewed in federal court de novo, order of state commission may deserve measure of respect in view of commission's experience, expertise, and the role that Congress has given it in Act. Telecommunications Act of 1996, § 101, 47 U.S.C.A. §§ 251, 252.

[3] Statutes 361 219(6.1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(6) Particular Federal Statutes
361k219(6.1) k. In General. Most Cited Cases
Although orders of state commissions construing Telecommunications Act fall outside domain of *Chevron* and its mandate of deference to reasonable

agency interpretations of ambiguous statutes, given that Act delegated interpretive authority to Federal Communications Commission (FCC), not state commissions, views of state commissions may nevertheless deserve *Skidmore* respect, which flows from principle that well-reasoned views of agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. Telecommunications Act of 1996, §§ 101, 101(d)(1), 101, 47 U.S.C.A. §§ 251, 251(d)(1), 252.

[4] Telecommunications 372 ⚷910

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k910 k. Standard and Scope of Review. Most Cited Cases
Respect was due to orders of North Carolina Utilities Commission on judicial review of those orders under Telecommunications Act, given that orders, which provided that value of incentive offers made by incumbent telecommunications provider, when extended to subscribers for more than 90 days, created promotional rate that had to be offered to competing providers in form of reduced wholesale price, resulted from deliberative notice and comment process, demonstrated valid and thorough reasoning, including careful reading and harmonizing of relevant authorities and policies, and aligned with decisions of other state commissions. Telecommunications Act of 1996, § 101(c)(4)(A), 47 U.S.C.A. § 251(c)(4)(A); 47 C.F.R. § 51.613(a)(2).

[5] States 360 ⚷4.19

360 States
360I Political Status and Relations
360I(A) In General
360k4.19 k. Cooperation Between State and United States. Most Cited Cases
In a scheme involving cooperative federalism, federal courts should recognize the considered role of state agencies that have accepted Congress's invitation to become crucial partners in administering federal regulatory schemes.

[6] Telecommunications 372 ⚷865

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k865 k. Resale. Most Cited Cases
Promotions and incentives offered to subscribers by incumbent telecommunications provider, in the form of gift cards, coupons, and gifts, were not themselves "telecommunications" for purposes of provision of Telecommunications Act requiring incumbent local exchange carriers (LECs) to offer telecommunications services at wholesale rates for resale by competing providers. Telecommunications Act of 1996, §§ 3(a, c), 101(c)(4), 47 U.S.C.A. §§ 153(43, 46), 251(c)(4).

[7] Telecommunications 372 ⚷865

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k865 k. Resale. Most Cited Cases
As used in provision of Telecommunications Act requiring incumbent local exchange carriers (LECs) to offer telecommunications services at wholesale rates for resale by competing providers, term "telecommunications service" describes both sides of the service contract between an incumbent LEC and consumer: (1) the telecommunications offered by LEC and (2) the fee paid by consumer. Telecommunications Act of 1996, § 101(c)(4), 47 U.S.C.A. § 251(c)(4).

[8] Telecommunications 372 ⚷866

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k866 k. Pricing, Rates and Access Charges. Most Cited Cases
Although incentives offered to subscribers by incumbent local exchange carriers (LECs), such as rebates or gift cards, are not telecommunications, as defined by Telecommunications Act, they do reduce the retail price or fee for telecommunications, and therefore

incentives are part of "the offering of telecommunications" which incumbent LECs must make to would-be competitors under Act. Telecommunications Act of 1996, § 101(c)(4), 47 U.S.C.A. § 251(c)(4).

[9] Telecommunications 372 ⚿866

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k866 k. Pricing, Rates and Access Charges. Most Cited Cases
Salient question in determining whether incentive offered to subscribers by incumbent local exchange carrier (LEC) is part of "the offering of telecommunications" that incumbent LECs must make to would-be competitors under Telecommunications Act is whether the incentive affects the "fee" for telecommunications. Telecommunications Act of 1996, § 101(c)(4), 47 U.S.C.A. § 251(c)(4).

[10] Telecommunications 372 ⚿866

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k866 k. Pricing, Rates and Access Charges. Most Cited Cases
Value of incentives, such as gift cards, checks, coupons for checks, or similar types of marketing incentives that are offered to subscribers by incumbent telecommunications providers and extend for more than 90 days must be reflected in retail rate used for computing wholesale rate that is to be charged to competing providers under Telecommunications Act. Telecommunications Act of 1996, §§ 101(c)(4), 101(d)(3), 47 U.S.C.A. §§ 251(c)(4), 252(d)(3); 47 C.F.R. § 51.613(a)(2).
***441 ARGUED:** Margaret A. Force, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants. Matthew Patrick McGuire, Nelson, Mullins, Riley & Scarborough, L.L.P., Raleigh, North Carolina, for Appellee. **ON BRIEF:** Roy Cooper, North Carolina Attorney General, Raleigh, North Carolina, for Appellants. Frank A. Hirsch, Jr., Nelson, Mullins, Riley & Scarborough, L.L.P., Raleigh, North Carolina, for Appellee.

Before WILLIAMS, Chief Judge, NIEMEYER, Circuit Judge, and T.S. ELLIS, III, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Senior Judge ELLIS joined. Chief Judge WILLIAMS wrote a separate opinion concurring in part and in the judgment.

OPINION

NIEMEYER, Circuit Judge:

With the purpose of creating competition in the provision of local telecommunications services, the Telecommunications Act of 1996 imposed new duties on incumbent providers, who had previously enjoyed monopolies in local markets for those services. Among the new duties was the duty to sell their services at wholesale to would-be competitors for resale to consumers. *See* 47 U.S.C. § 251(c)(4). The wholesale rate for such services was prescribed to be the incumbent provider's retail rate less a wholesale discount determined by the relevant state utility commission. *Id.* § 252(d)(3).

By two orders dated December 22, 2004, and June 3, 2005, the North Carolina Utilities***442** Commission ("NC Commission") determined, under the authority of 47 U.S.C. § 252(d)(3), that the value of an incumbent provider's incentive offers to subscribers, such as gift cards and cash rebates, when extended to subscribers for more than 90 days, created a promotional retail rate that must be offered to would-be competitors, less a wholesale discount.

Challenging the NC Commission's orders, BellSouth Telecommunications, Inc., an incumbent provider of telecommunications services, commenced this action in the district court under 47 U.S.C. § 252(e)(6). The district court declared the NC Commission's orders invalid, holding that an incumbent provider's incentives to retail subscribers, other than direct reductions in price, need not be taken into account in calculating the wholesale rate to be charged would-be competitors.

494 F.3d 439
(Cite as: 494 F.3d 439)

In this appeal, we conclude that the NC Commission correctly ruled that "long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied." *See*47 U.S.C. § 251(c)(4); 47 C.F.R. § 51.613(a), (b). Accordingly, we reverse the judgment of the district court and remand with instructions to enter summary judgment in favor of the Commissioners of the NC Commission.

I

In the spring of 2004, BellSouth Telecommunications, Inc., an incumbent provider of telecommunications services to retail subscribers in North Carolina, made a filing with the NC Commission to introduce an incentive for subscribers which offers "a coupon for a check for $100 as an incentive to subscribe to one or more regular residence lines and two or more features." This "1FR + 2 Cash Back" offer, as it was called, required subscribers to return the coupon to BellSouth within 90 days to receive their checks. The offer was to run for nine months-from June 29, 2004, through March 31, 2005. In its filing, BellSouth indicated that it would not provide the benefit of this special offer to competing providers of telecommunications services under 47 U.S.C. § 251(c)(4).

Concerned that such incentive offers could be used to circumvent the resale requirements of the Telecommunications Act, the Public Staff of the NC Commission [FN1] filed a motion with the NC Commission for a ruling that gift offers, such as BellSouth's "1FR + 2 Cash Back" offer, are "special promotions of telecommunications services under federal law which must be offered to resellers if the special offer runs for more than 90 days."

> FN1. The Public Staff of the NC Commission is an independent arm of the Commission responsible for representing consumers in matters before the Commission. The Public Staff is not supervised by the Commission, but rather by an executive director appointed by the Governor. *See*N.C. Gen.Stat. § 62-15.

After giving public notice and receiving comments, the NC Commission issued an "Order Ruling on Motion Regarding Promotions," dated December 22, 2004.[FN2] In its order, the Commission determined that incentives such as those proposed by BellSouth decreased the retail rate for the purpose of calculating the wholesale rate, because retail customers effectively paid less for their telephone service in the amount of the incentives. As a result, it *443 concluded that BellSouth was required to pass on the value of such incentives as a price reduction when selling its services to resellers, unless it could show that such restrictions on resale were "reasonable and nondiscriminatory." The NC Commission explained:

> FN2.*In re Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"* N.C. Utilities Comm'n, Docket No. P-100, Sub 72b (Dec. 22, 2004) (Order Ruling on Motion Regarding Promotions).

> While these promotional offerings 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, they do result in a savings to the customers who subscribe to the regulated service.... The promotion reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway. 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. Thus, the [incumbent provider] could use the promotion as a *de facto* rate change without changing its tariff pricing.
>
> The Commission concluded that because the incentives reduced the retail rate for consumers, BellSouth had to pass on the value of the incentives to resellers.

With respect to the "1FR + 2 Cash Back" offer that prompted the order, however, the Commission observed generally that some promotions, even if they extended for more than 90 days, might be proven to be reasonable and nondiscriminatory and therefore would not have to be offered to resellers. As a result, it "would be inclined to find that [the 1FR + 2 Cash

Back promotion] is reasonable and nondiscriminatory.... [T]he anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the pro-competitive effects." The Commission was quick to point out, however, that resellers had not complained to the Commission nor asked it to find BellSouth's refusal to resell the promotion unreasonable or harmful to competition and that therefore it was not specifically ruling on that matter.

On BellSouth's motion for reconsideration, the NC Commission issued an order dated June 3, 2005, clarifying its December 22 order.[FN3] It noted that while the value of a promotion must be factored into the retail rate for the purposes of determining a wholesale rate for would-be competitors, the promotion *itself* need not be provided to would-be competitors. The NC Commission stated:

> FN3. *In re Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"* N.C. Utilities Comm'n, Docket No. P-100, Sub 72b (June 5, 2005) (Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay).

> The [December 22] *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 about by offering one-time incentives for more than 90 days. The *Order* does not require [incumbent providers] to provide [would-be competitors] with toasters, phones, knife sets, hotel accommodations, gift cards, *etc.* that they might provide to their customers as an incentive to purchase services. The *Order* does require that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit ***444** of such a reduction be passed on to resellers by applying the wholesale discount to the lower actual retail price.
>
> The NC Commission thus clarified that incentives function as retail price reductions which must be passed on to resellers. The June 3 order also clarified that even though incentives resulted in a reduced retail rate for purposes of calculating the wholesale price, BellSouth could still attempt, on a promotion-by-promotion basis, to justify any given restriction on resale as reasonable and nondiscriminatory and thereby avoid having to pass the incentive along to a would-be competitor.

BellSouth commenced this action against the NC Commission and the individual Commissioners (generally collectively, the "NC Commission") under 47 U.S.C. § 252(e)(6), requesting the district court to enter declaratory and injunctive relief against the NC Commission's orders.[FN4] Specifically, BellSouth challenged, as violating federal law, the NC Commission's determination that the value of one-time marketing incentives lasting more than 90 days must be accounted for as a reduction of the retail rate.

> FN4. While BellSouth originally named the North Carolina Utilities Commission as a defendant, along with the Commissioners, it subsequently dismissed the Commission and elected to proceed only against the Commissioners under the theory of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

On cross-motions for summary judgment, the district court declared the NC Commission's orders invalid and granted summary judgment for BellSouth. It held that because incentives such as gift cards were not "telecommunications services" under 47 U.S.C. § 251(c)(4), they were not the subject of an incumbent provider's resale duty. It also concluded that the incentives were not "price discounts" under the regulations requiring incumbent providers to pass on discounts and promotions to competing providers. Thus, the court concluded that BellSouth had no obligation to give the value of the incentives to competing providers when selling them telecommunications services.

From the district court's judgment, the NC Commission filed this appeal.

II

In enacting the Telecommunications Act of 1996,

Congress intended to create competition in local telecommunications markets. Specifically, the Telecommunications Act was intended to force incumbent providers of local telecommunications services-"incumbent local exchange carriers" or "incumbent LECs"-which had regional monopolies over the local telephone infrastructure, to open their markets to competition. *See* Peter W. Huber et al., *Federal Telecommunications Law* § 1.9, at 54 (2d ed.1999). Because the local telephone monopolies controlled the physical networks necessary to provide telecommunications service, the Telecommunications Act created a series of compulsory licenses from the incumbent LECs to would-be competitors or "competitive LECs." Among other duties imposed by the Telecommunications Act, the incumbent LEC must "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)(A). This provision allows a competitive LEC to establish a market presence by reselling the incumbent's telecommunications services without building its own physical infrastructure. In selling telecommunications services to a competitive LEC, an incumbent LEC has a duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or ***445** limitations on, the resale of such telecommunications service." *Id.* § 251(c)(4)(B). The incumbent LEC must charge the competitive LEC a *wholesale rate* for the telecommunications service. "For purposes of section 251(c)(4), a *State commission* shall determine whole-sale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." [FN5] *Id.* § 252(d)(3) (emphasis added). Thus, the wholesale rate consists of the retail rate, less whatever costs the incumbent LEC will save by selling the services in bulk to the competitive LEC. Because the wholesale rate is calculated on the basis of the retail rate, a proper determination of the retail rate is essential to creating competition through the Telecommunication Act's resale provisions.

> FN5. For purposes of calculating the wholesale rate for BellSouth to charge, the NC Commission has adopted a uniform discount rate of 21.5% from BellSouth's retail price for residential services, and 17.6% from its retail price for business services.

The Federal Communications Commission ("FCC") has promulgated regulations refining the resale obligations imposed by the Telecommunications Act. Thus, when an incumbent LEC offers telecommunications services to a competitive LEC at a wholesale rate, *see* 47 C.F.R. § 51.605(a), it does so subject to *id.* § 51.605(e), which provides that the "incumbent LEC shall not impose *restrictions* on the resale by [a competitive LEC] of telecommunication services offered by the incumbent LEC" (emphasis added). Section 51.613, however, provides three exceptions to the rule prohibiting restrictions. *First,* the incumbent LEC can prohibit cross-class selling-i.e. it can prevent the competitive LEC from buying *business* services and reselling them to *residential* customers. 47 C.F.R. § 51.613(a)(1). *Second,* the incumbent LEC can restrict the resale of services offered at promotional rates, but only if those rates are in effect for less than 90 days. *Id.* § 51.613(a)(2)(i) ("An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if such promotions involve rates that will be in effect for no more than 90 days"). If promotions are offered for longer than 90 days, the incumbent LEC must offer the promotional rates to its competitors. *Third,* the incumbent LEC can impose any restrictions that it can "prove[e] to the state commission" are "reasonable and nondiscriminatory." *Id.* § 51.613(b).

Finally, the FCC adopted rules to implement the resale requirements of the Telecommunications Act and the regulations promulgated under it, issuing a "First Report and Order" in August 1996. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15,499 (1996) (First Report and Order) (hereinafter "Local Competition Order"). In its Local Competition Order, the FCC stated that "[t]he rules that [it] establishes in this Report and Order are minimum requirements upon which the states may build." *Id.* ¶ 24.

Before adopting the Local Competition Order, the FCC considered numerous comments from interested parties, including contentions by incumbent LECs that "promotions and discounts are only devices for marketing underlying 'telecommunication services' " and that the promotions were not themselves telecommunications services required to be resold under

47 U.S.C. § 251(c)(4). *See* Local Competition Order ¶ 941. These incumbent providers ***446** argued also that promotions and discounts were simply means "by which incumbent LECs differentiate their services from resellers' offerings." *Id.* ¶ 942. After considering these and other similar comments, the FCC concluded:

> Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.

Id. ¶ 948. Nonetheless, the FCC observed that *short term* promotions serve "pro-competitive ends through enhanced marketing." Thus, it tempered its Order to exclude short-term promotions:

> There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate;" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve pro-competitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their pro-competitive effects will outweigh any potential anti-competitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

Local Competition Order ¶ 949. In addition to its ruling that promotional and discount prices generally were to be treated as "retail rates" which incumbent LECs must offer to their would-be competitors, the FCC observed that short-term promotions can be pro-competitive marketing tools. It therefore "establish[ed] a *presumption* that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A)." Local Competition Order ¶ 950; *see also* 47 C.F.R. § 51.613(a)(2).

Applying these provisions of the Telecommunications Act, the regulations under it, and the FCC's Local Competition Order to the question of whether gift card type promotions must be taken into account in calculating the retail rate, the NC Commission concluded in its order of December 22, 2004:

> Despite the [incumbent LECs'] argument that gift card type promotions are incentives and/or marketing tools used to distinguish their services in the marketplace, these promotions are in fact promotional offerings subject to the FCC's rules on promotions. While these promotional offerings 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, they do result in a savings to the customers who subscribe to the regulated***447** service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the "real" retail rate available in the marketplace.

The NC Commission therefore ruled that incumbent providers' offers of incentives to subscribers in the form of "gift cards, checks, coupons for checks or similar types of benefits," offered for more than 90 days, must be made available to resellers in the form of a reduced wholesale price.

In declaring the NC Commission's orders invalid, the district court advanced two reasons why the orders were inconsistent with the Telecommunications Act. *First,* the district court relied on the following syllogism: (1) 47 U.S.C. § 251(c)(4) requires an incumbent LEC to resell "any telecommunications service" that it provides; (2) gift cards, checks, coupons and similar types of incentives are not "telecommunications services"; therefore (3) the incumbent LEC does not have to provide the benefit of gift cards, checks,

coupons and similar types of incentives to competitive LECs. *Second,* the district court recognized that the FCC "has determined [in its Local Competition Order] that the Act's resale obligations extend to *promotional price discounts* offered in retail on retail communications services." Reading a *price discount* not to include "marketing incentives," the court held that marketing incentives "such as Walmart [sic] gift cards" are therefore excluded from the FCC's Local Competition Order requiring that incumbent LECs pass on price discounts to competitive LECs. The court explained:

> A customer receiving a Walmart [sic] 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 bill.

The question presented on appeal, then, is whether the district court erred as a matter of law in concluding that the NC Commission's Order was inconsistent with the Telecommunications Act, the regulations promulgated under it, and the FCC's Local Competition Order.

III

[1] Actions of state commissions taken under 47 U.S.C. §§ 251 and 252 are reviewed in federal court *de novo* to determine whether they conform with the requirements of those sections. *See GTE South, Inc. v. Morrison,* 199 F.3d 733, 745 (4th Cir.1999); *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania,* 271 F.3d 491, 515-17 (3d Cir.2001).

[2][3] But even with our *de novo* standard of review, an order of a state commission may deserve a measure of respect in view of the commission's experience, expertise, and the role that Congress has given it in the Telecommunications Act. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 139-40, 65 S.Ct. 161, 89 L.Ed. 124 (1944). To be sure, state commissions' orders construing the Telecommunications Act fall outside *Chevron*'s domain and its mandate of deference to reasonable interpretations of ambiguous statutes, because the Telecommunications Act, 47 U.S.C. § 251(d)(1), delegated interpretive authority to the FCC, not to the state commissions.[FN6] *See United States v. Mead,* 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); ***448** *MCI Telecomm.,* 271 F.3d at 516. Yet the views of state commissions may nevertheless deserve respect under *Skidmore*-the respect that flows from the long-standing principle that "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Mead,* 533 U.S. at 227, 121 S.Ct. 2164 (*quoting Skidmore,* 323 U.S. at 139-40, 65 S.Ct. 161). In any given case, the amount of respect afforded to a state commission will vary in accordance with "the degree of the agency's care, its consistency, formality, and relative expertness," as well as "the persuasiveness of the agency's position." *Mead,* 533 U.S. at 228, 121 S.Ct. 2164.

> FN6. Of course, the Telecommunications Act did delegate other responsibilities to the state commissions, such as, for example, certain rate-setting authority. *See* 47 U.S.C. § 252(d).

The NC Commission's expertise and experience in applying communications law are considerable and even predate the enactment of the Telecommunications Act of 1996, as the Commission functioned under the Communications Act of 1934, and the Telecommunications Act of 1996 called upon this expertise and experience. *See* Local Competition Order ¶ 2 ("The 1996 Act forges a new partnership between state and federal regulators.... As this Order demonstrates, we have benefited enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions"). Given the NC Commission's accumulation of knowledge and experience in telecommunications law and policy, its orders should not be taken lightly. *See* Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform,* 52 Vand. L.Rev. 1, 24-30 (1999) (arguing for considerable deference to state commission decisions under the Telecommunications Act).

[4] Additionally, respect is due the orders of the NC Commission because the NC Commission has applied its expertise and experience in formulating them. The NC Commission's orders resulted from a deliberative notice and comment process; they demonstrate valid and thorough reasoning, including careful reading and harmonizing of relevant authori-

ties and policies; and they align with the decisions of other state commissions.[FN7] *See Skidmore*, 323 U.S. at 139-40, 65 S.Ct. 161; *Mead*, 533 U.S. at 227-28, 121 S.Ct. 2164.

> FN7. In addition to the North Carolina Utilities Commission, other state commissions have read the Telecommunications Act and regulations in this fashion. *See, e.g., In re Tariff Filing of U.S. West Communications, Inc. to "Winback" Residential Customers Who Have Changed Their Telephone Service to Another Provider*, Wyo. Pub. Serv. Comm'n, No. 70,000-TT-98-379, Rcd. No. 3992, at 29-30 (Jan. 8, 1999); *In re Petitions by AT & T Communications of the Southern States, Inc.*, Fla. Pub. Serv. Comm'n, No. PSC-96-1579-FOF-TP, at 69-71 (Dec. 31, 1996).

[5] Additionally, in a scheme involving cooperative federalism, federal courts should recognize the considered role of state agencies that have accepted Congress' invitation to become crucial partners in administering federal regulatory schemes. State commissions are granted authority under the Telecommunications Act, and, to the extent they voluntarily accept that authority, they become an important part of the entire regulatory scheme. *See Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 371 (4th Cir.2004) (Niemeyer, J., concurring in part and dissenting in part) ("even while pursuing these federal purposes, Congress left in place many of the traditional functions of State public utility commissions"); *see, e.g.*, 47 U.S.C. § 252(d) (giving state commissions rate-setting authority); *id.* § 252(e)(3) (leaving States authority to establish and enforce state law relating to ***449** agreements between carriers, so long as consistent with the Act); *id.* § 252(f)(2) (permitting States to apply state law to incumbent LEC agreements); *id.* § 253(b) (preserving state authority to protect and advance universal service); *id.* § 254(f) (similar); *id.* § 261(b) (preserving state regulations not inconsistent with the Act); *id.* § 261(c) (residual authority for States to pass regulations not inconsistent with the Act).

Thus, States' continuing exercise of authority over telecommunications issues forms part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment and have the freedom to do so. *See generally* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L.Rev. 1692, 1732 (2001) ("where the FCC does not mandate a national approach to interpreting and applying the Telecom Act, state agencies are left with considerable flexibility to do so, albeit subject to federal court review").

Thus, even though we review the NC Commission's orders for compliance with 47 U.S.C. §§ 251 and 252 *de novo*, we nonetheless approach the task with a respect for the Commission's special role in the regulatory scheme, its freedom to maneuver in that role, its expertise and experience, and the care it has taken in the particular task of forming its orders.

IV

[6] Addressing the district court's first reason for reversing the NC Commission, we note that the district court assumed that the NC Commission concluded that gift cards, checks, coupons for checks, and similar types of incentives are *themselves* "telecommunications services" that incumbent LECs were required to offer competitive LECs for resale. It relied on that assumption to conclude that "there can be no argument that [such incentives] are 'telecommunication services,' " and accordingly found the NC Commission in error.

[7][8] We agree with the district court's observations that promotions and incentives in the form of gift cards, coupons, and even gifts are not themselves "telecommunications" as addressed in 47 U.S.C. § 251(c)(4). The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." *Id.* § 153(43). But this observation fails to address accurately the scope of the resale duty imposed by § 251(c)(4). That section requires an incumbent LEC to resell its "telecommunications service" at wholesale to competing LECs, and "telecommunications service" is defined to be "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications service" thus describes *both* sides of the service contract between an incumbent LEC and a consumer: (1)

the "telecommunications" offered by the provider; *and* (2) the "fee" paid by the consumer. While an incentive, such as a rebate or a gift card, is obviously not "telecommunications," it does reduce the retail price or "fee" for telecommunications. As such, an incentive is part of "the offering of telecommunications" which incumbent LECs must make to would-be competitors.

[9] The district court pursued a red herring in focusing on the fact that a gift card, check, coupon for a check, or other similar type of incentive is not a telecommunication. The salient question is whether the incentive affects the "fee" for telecommunications.***450** The NC Commission never held that the marketing incentives under discussion were "telecommunications." It noted, to the contrary, that "gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunication services [were] not themselves services (regulated or nonregulated) offered by a public utility." Its order "does not require that non-telecommunications services, such as gift cards, check coupons, or merchandise, be resold." Rather, the NC Commission held that the incentives had "economic value" which effectively reduced the relevant *"fee," see*47 U.S.C. § 153(46)-the retail rate charged for telecommunications. Accordingly, the NC Commission concluded that telecommunications (the underlying telephony) must be resold to competing LECs "*at rates* that give resellers the benefit of the *change in rate* brought about by offering one-time incentives for more than 90 days." (Emphasis added).

Even though we agree with the district court's conclusion that such incentives are not themselves "telecommunications" that must be resold under § 251(c)(4), we agree with the NC Commission that incentives may nonetheless implicate the *fee* for telecommunications-the retail rate or consideration given by the consumer in exchange for telecommunications-and thereby affect the incumbent LECs' resale duty.

V

[10] This brings us to the core issue-whether the NC Commission correctly determined that the value of incentives such as gift cards, checks, coupons for checks, or similar types of marketing incentives extending for more than 90 days must be reflected in the retail rate used for computing the wholesale rate that is to be charged to competitive LECs under 47 U.S.C. § 252(d)(3).

The NC Commission concluded that when such incentives are offered, the nominal tariff (the charge that appears on the subscriber's bill) is not the "retail rate charged to subscribers" under § 252(d)(3) because the nominal tariff does not reflect the value of the incentives. Retail subscribers are, in fact, charged *less* than the tariff rate because they receive the added value of the incentives. BellSouth insists, however, that "a give-away such as a gift card is not a price reduction, promotional or otherwise," but rather a marketing expense incurred by it to compete in the marketplace for subscribers.

The parties agree, as we also observe, that because the term "retail rate" is not defined in the Telecommunications Act, nor in the regulations promulgated under it, the question of whether incentives implicate the retail rate must be resolved in light of the pro-competition policies of the Act. *See* Local Competition Order ¶ 949. The following hypothetical demonstrates how the NC Commission viewed the question in light of these policies.

Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, *see* Local Competition Order ¶¶ 931-33, BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to compete with BellSouth's $20 retail fee. Now suppose that BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100. According to the NC Commission's orders, the appropriate wholesale rate is still $16, because that is the *net* price paid by the retail customer ($20), less the wholesale discount (20%). According to BellSouth's position, however, the appropriate wholesale rate would be $96 (the nominal retail rate of $120, less the 20% discount for ***451** avoided costs). Because its position would not account for the promotional rebate check, BellSouth's position would obviously impede competition. The competitive LEC would have to pay BellSouth a wholesale rate of $96 for the telephone service for which BellSouth's retail customers would pay only $20. Thus, as the NC Commission observed, by structuring its offerings with incentives, BellSouth

would be able to price its competitors out of the market. Indeed, competitive LECs have alleged just such a price squeeze in proceedings currently before the FCC. *See In re Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale,* Joint Comments of ABC Telecom, et al., FCC Docket No. 06-129 (filed July 31, 2006), at 5-10.

While the anticompetitive effect of a smaller incentive would not be as severe as in the hypothetical-indeed at some point an incentive undoubtedly promotes competition-the line between an incentive that is anticompetitive and one that serves as a pro-competitive marketing tool is just the type of line that the FCC is authorized and qualified to draw. Incumbent LECs have strong, indeed natural, incentives to win in the marketplace, and the FCC recognized in its Local Competition Order the real possibility that promotional offerings could be used to circumvent the pro-competitive resale requirements of the Telecommunications Act. Local Competition Order ¶ 948 ("no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs"). As the FCC ruled in its Local Competition Order, "We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we ... *presume* resale restrictions and conditions to be ... in violation of section 251(c)(4)." Local Competition Order ¶ 939 (emphasis added).

That the FCC may have drawn the line-between an anticompetitive incentive and a pro-competitive promotion-at the right place is, to some degree, indicated by the fact that both incumbent and competitive LECs have complained about its location. As one commentator has observed, "The [incumbent LECs] regard the pricing scheme as confiscatory and the arguments made on the scheme's behalf as an elaborate procedural smokescreen. The [competitive LECs] regard the question of price as settled, and treat noncooperation as a deviation from the required legislative standard." Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired,* 22 Yale J. on Reg. 315, 339-40 (2005) (discussing unbundling requirements).

BellSouth contends that the "core issue before this Court" is the "meaning of the term 'promotion' in the context of the Act and the FCC's First Report and Order." It argues at some length that when the FCC stated that it was "only referring to ... temporary price discounts," the FCC was referring to tariff rate discounts (discounts appearing on the subscriber's bill for services). BellSouth asserts that the Local Competition Order does not address promotional offerings that do not result in a change in the tariff rate.

The NC Commission, however, exercising its statutory authority under 47 U.S.C. § 252(d)(3), determined what comprised a "retail rate" within the general parameters given by the FCC in its Local Competition Order. The NC Commission concluded in its December 22, 2004 order that while gift card type promotions were

> ***452** 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, they do result in a savings to the customers who subscribe to the regulated service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the 'real' retail rate available in the marketplace.

The question is not, as BellSouth seems to suggest, whether the NC Commission's determination was compelled by the Local Competition Order, but rather whether it was authorized by it. Given the latitude afforded state commissions on this issue, we conclude that the NC Commission properly read the FCC's Local Competition Order to require incumbent LECs to do more than pass on to resellers only monetary discounts from the tariff rate. This is based on the Local Competition Order's contextual language; on the comments that the FCC had received in the course of crafting the order-comments which addressed not only discounts from the tariff rate, but also incentive-based promotions; and above all, on the Telecommunications Act's overarching pro-competition purpose.

It is true that the FCC did not state explicitly what it was referring to when it discussed "promotions and discounts" in its 1996 Local Competition Order. But it made amply clear that it was referring to any pro-

motion or discount by which incumbent LECs could "avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." Local Competition Order ¶ 948. Recognizing that promotions and discounts could amount to "retail rates" and noting that Congress did not define "retail rate," the FCC concluded that " 'retail rate' should be interpreted in light of the pro-competitive policies underlying the 1996 Act." *Id.* ¶ 949. Thus, it presumed that a promotion or discount offered a subscriber for 90 days or less was pro-competitive, whereas a promotion or discount offered for more than 90 days became part of a retail rate that had to be offered to competing LECs. *Id.* ¶ 950; *see also*47 C.F.R. § 51.613(a)(2).

Both the FCC and the NC Commission thus understood that incentives can sometimes be more than "marketing expenses"; they can be devices used to create an uneven playing field. The NC Commission's orders addressed that concern well within the parameters set out by the FCC in its Local Competition Order.

BellSouth argues that the NC Commission's orders stack the deck against it, denying it the opportunity to compete by using marketing incentives unless it pays for those incentives twice-once in paying for the incentives and again in reducing its retail rate for its competitors. The competing LECs would respond in a like manner that, without the orders, they would have to pay for the incentives twice in order to compete-once when they pay for the service at a wholesale rate that was not adjusted for the incentives and again when they pay for similar marketing incentives to offer their own customers.

The NC Commission reached a sensible middle ground, in harmony with the FCC's judgment. The NC Commission observed, "[i]f a promotion is offered for an indefinite extended period of time, *at some point* it starts to become or look more like a standard retail offering that should be subject to the duty to resell at the wholesale rate." (Emphasis added). The NC Commission then concluded that that point would be 90 days, the same period specified by the FCC in its regulations and in ***453** its Local Competition Order. *See*47 C.F.R. § 51.613(a)(2); Local Competition Order ¶ 950 ("We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to § 251(c)(4)(A)"). In so ruling, the NC Commission did not decide how to treat any particular incentive or promotion. Rather, it established guidelines similar to those given by the FCC in its Local Competition Order. Indeed, with respect to the only specific promotion discussed, the "1FR + 2 Cash Back" offer, the NC Commission indicated that it was inclined to allow the incentive, even though it amounted to a restriction on resale and lasted more than 90 days, because it was pro-competitive. *See*47 C.F.R. § 51.613(b) (the incumbent LEC can impose any restrictions that it can "prove[ ] to the State commission" are "reasonable and nondiscriminatory").

We therefore conclude that the district court erred in concluding that the NC Commission's orders violated the Telecommunications Act, the regulations promulgated under it, and the FCC's Local Competition Order. In reversing the district court and restoring the NC Commission's orders, we emphasize that the NC Commission has invited BellSouth to show that any particular restriction on resale is pro-competitive, reasonable, and not discriminatory.[FN8]

> FN8. The tenor of the NC Commission's orders suggests, for instance, that the benefit of de minimus incentives such as merchandise or low-value gift cards need not be passed on to resellers.

BellSouth argues further that as an accounting matter, the NC Commission's orders would unreasonably double-count its costs of incentives. It claims that it accounts for incentives as "marketing expenses" under the mandatory government accounting scheme. Such marketing expenses are presumptively subtracted from the retail rate as "avoided costs." *See*47 U.S.C. § 252(d)(3) ("excluding ... costs that will be avoided by the local exchange carrier"); 47 C.F.R. § 51.609. And with the NC Commission's order, BellSouth must again account for the expense as a discount to the retail rate when selling its services to competing LECs.

BellSouth's argument, however, suggests a greater problem than actually exists. If the costs of incentives were accounted as avoided costs at the time the uni-

form wholesale discount was set, BellSouth could seek approval to reduce the wholesale discount by an appropriate amount. *See*47 C.F.R. §§ 51.609-51.611. Moreover, the fact that BellSouth currently chooses to put the cost of incentives in the marketing account does not necessarily mean that it will do so in the future. Conceivably, BellSouth could account for its incentive costs as reductions in revenue in its revenue accounts, as the placement of items in accounts is more art than science. *See*47 C.F.R. § 32.5000 *et seq.* Indeed, BellSouth demonstrates its own understanding of this flexibility by adopting a litigating position that appears to be inconsistent with its tax position on these expenses. BellSouth has stated in public filings that "marketing incentives, including cash coupons, packaging discounts and free service are recognized as *revenue reduction* and are accrued in the period the service is provided." Bell-South Corp., Annual Report (Form 10-K), at 61 (Feb. 24, 2004) (emphasis added). This flexibility that BellSouth has shown regarding these expenses will surely help it find the ***454** optimal accounting treatment in light of the NC Commission's orders.

BellSouth also argues that it would not be able to establish a value for some of the incentives for purposes of determining an effective retail rate. It points out that the value to a customer of a rebate check is less than the face value of the check because of the effort required to redeem it. Similarly, a $100 gift card is also worth less than $100 cash, because a customer can only use the gift card for certain purposes and must exert time and effort in spending it. Moreover, when a promotion is given on a one-time basis in connection with an initial offering of service, its value must be distributed over the customer's expected future tenure with the carrier and discounted to present value. The degree of difficulty in valuing incentives might, in some circumstances, support a claim that resale restrictions are reasonable and nondiscriminatory. But such issues can be negotiated between BellSouth and competitive LECs or, failing success in negotiations, resolved by the NC Commission.

BellSouth's arguments are essentially arguments of impracticality or difficulty, not arguments about what the law commands. Such impracticalities and difficulties cannot, at least at the level identified by BellSouth, determine its obligations under the Telecommunications Act, which often requires Herculean efforts on the part of incumbent LECs to accommodate their competitors. We conclude that the NC Commission's ruling on BellSouth's obligations under the Telecommunications Act is supported by applicable law.

Accordingly, we reverse the judgment of the district court and remand this case to that court with instructions to enter summary judgment in favor of the Commissioners of the NC Commission.

REVERSED AND REMANDED

WILLIAMS, Chief Judge, concurring in part and in the judgment:

The majority interprets the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (the "Telecommunications Act")'s definition of "telecommunications service" to mean that special offers featuring gift incentives form part of the "offering of telecommunications" that incumbent local exchange carriers (LECs) must make available for resale to would-be competitors. I agree. For the reasons that follow, however, I respectfully disagree with the portion of the majority opinion suggesting that the NCUC did not resolve whether the special offers at issue in this case are "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2) (2006) but rather independently "established guidelines similar to those given by the FCC in its Local Competition Order," *ante* at 453.

I.

A.

Like the majority, I believe that although we review de novo the NCUC's interpretations of the Telecommunications Act and the regulations and rulings of the FCC, the orders of the state commissions nevertheless reflect "a body of experience and informed judgment to which courts ... may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944). It is important to note, however, that this is an area in which the FCC has previously disagreed with the state commissions, including the NCUC. *See In the Matter of Am. Commc'ns Servs., Inc.*, 14 F.C.C.R. 21579, 21605 n. 124 (1999) (citing favorably to *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 7 F.Supp.2d 674 (E.D.N.C.1998), which invalidated a section of an ***455** NCUC order setting out the terms of an inter-

connection agreement providing that "[s]hort-term promotions shall not be available for resale"); *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.*, 40 F.Supp.2d 416, 426 n. 9 (E.D.Ky.1999) (noting that BellSouth had withdrawn its argument that it was not required to resell contract service arrangements (CSAs) at the wholesale rate after "the FCC made clear that it disagreed with the PSC and other state commissions on th[e] issue" and "informed BellSouth that it would not grant Bell-South the authority to provide long distance service originating in any state in which it provides local service if such CSA restrictions exist in that state"); *In the Matter of Application of BellSouth Corp.*, 13 F.C.C.R. 539 (1997) (FCC order requiring BellSouth to offer CSAs for resale at the wholesale rate).

B.

FCC regulations require incumbent LECs to offer their telecommunications services for resale to competing local providers (CLPs) "subject to the same conditions" on which retail subscribers receive them. 47 C.F.R. § 51.603 (2006). An incumbent LEC seeking to impose a restriction on resale ordinarily must prove to the state commission that the restriction is reasonable and nondiscriminatory. 47 C.F.R. § 51.613(b) (2003). There exist two exceptions, however, to this requirement. Pursuant to 47 C.F.R. § 51.613(a), incumbent LECs may prohibit resellers from engaging in "cross-class selling" and may offer "short-term promotions" without applying the wholesale discount to the promotional rate. 47 C.F.R. § 51.613(a)(1), (2). This case requires us to resolve whether the NCUC correctly concluded that special offers featuring gift benefits are "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2).[FN1]

> FN1. I agree with the majority that the NCUC's orders did not conclusively determine how to treat BellSouth's "1FR + 2Cashback" offer or any other specific offer. Rather, the NCUC sought to provide guidance on how these types of special offers should be treated under the Telecommunications Act and its implementing regulations. I do not believe, however, that the NCUC sought to independently establish guidelines similar to the FCC's. The NCUC's orders sought to provide guidance on whether gift offers are subject to the resale requirements set forth in the Telecommunications Act and the FCC regulations by determining whether such offers (1) form part of an offering of telecommunications, and (2) constitute "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2). In its initial order, the NCUC agreed with commenters and the Public Staff that "gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunication services ... are promotional discounts." (J.A. at 25.) The NCUC's Clarifying Order emphasizes that the initial order "should not be read as a change of law or policy," and that "[i]f the Commission is called upon to determine whether a promotion offered for more than 90 days must be offered to resellers at the promotional rate minus the wholesale discount, the Commission will follow the law as stated in 47 U.S.C. 251(c)(4) and 47 C.F.R. 51.613(a)(2) and (b)." (J.A. at 43.) Thus, this case requires us to resolve whether the NCUC's interpretation of "the law as stated in ... 47 C.F.R. 51.613(a)(2)," (J.A. at 43),-that special offers featuring gift benefits are "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2)-was correct. I therefore disagree with the majority opinion to the extent that it suggests that the NCUC's orders sought to independently "establish [ ] guidelines similar to those given by the FCC in its Local Competition Order." *Ante* at 453.

I agree with the district court that the FCC's Local Competition Order [FN2] limits ***456** the scope of the term "promotions" and therefore forecloses the interpretation adopted by NCUC. In its Local Competition Order, the FCC stated that, in discussing promotions, it was "only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.,* temporary price discounts." Local Competition Order, para. 948. This statement makes clear that the FCC intended the term "promotion" to refer only to temporary price discounts. This interpretation is bolstered by the language of the regulation itself, which provides that,

> FN2. *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Report and Order*, 11 F.C.C.R.

> 15499 (1996), *aff'd in relevant part and remanded on other grounds, Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 819 (8th Cir.1997), *aff'd in part and remanded on other grounds, AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a *special promotional rate* only if:

(I) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

47 C.F.R. § 51.613(a)(2) (emphasis added). Thus, the regulation specifically contemplates a "special promotional rate" brought about by the "temporary price discount" referenced in the Local Competition Order.

The NCUC conceded that special offers featuring gift benefits 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," but reasoned that they "do provide a savings and therefore a type of discount to subscribers for the regulated services provided." (J.A. at 33, 34.) [FN3] The NCUC thus reasoned that because anything of economic value given to a customer represents a benefit to the customer that may offset the cost of service, "anything of economic value paid, given, or offered to a customer to promote or induce purchase of a ... service offering ... is a promotional discount." (J.A. at 25.) Section 51.613(a)(2) and the Local Competition Order, however, do not broadly encompass "anything of economic value," (J.A. at 25), but instead contemplate only "temporary price discounts" giving rise to "special promotional rates," 47 C.F.R. § 51.613(a)(2); Local Competition Order, para. 948. Both legal and non-legal dictionaries define a "discount" as "[a] reduction from the full amount or value of something, esp [ecially] a price." *Black's Law Dictionary* 498 (8th ed.2004); *see also Merriam-Webster's Collegiate Dictionary* 357 (11th ed.2004) (defining "discount" as "a reduction made from the gross amount or value of something: as a(1): a reduction made from a regular or list price....").

> FN3. Citations to the "J.A." refer to the contents of the joint appendix filed by the parties to this appeal.

In addition to recognizing that gift offers are not discount service offerings *per se*, the NCUC recognized that gift offers have different anti-competitive effects than do direct price discounts. It determined that gift offers "do not have the same degree of anti-competitive effect that a direct discounting of the retail price would have on a reseller market." (J.A. at 34.) The conclusion that gift offers do not have the same degree of anti-competitive effect as price discounts undermines the NCUC's finding that gift offers are "promotional discounts."

***457** The FCC's determination that promotional rates "cease to be 'short-term' and must therefore be treated as a retail rate for an underlying service" if they are greater than 90 days in duration was the result of a careful balancing of the pro- and anti-competitive effects promotional prices. Local Competition Order, paras. 946-50; *see also* 47 C.F.R. § 51.613(a)(2). Accordingly, I believe we should not expand 47 C.F.R. § 51.613(a)(2)'s exemption for short-term promotions to one-time gift offers, which have a lesser anti-competitive effect than do direct price discounts and to which the FCC did not anticipate that the exemption would apply.[FN4]

> FN4. Notably, in arguing for a broad construction of the term "promotions," the NCUC commissioners stress that "[t]he statement in ¶ 948 was written in 1996, long before the type of promotional offering at issue in this case began to appear." (J.A. at 30.)

C.

The majority opinion does not address the NCUC's belief that gift offers have lesser anti-competitive effects than price discounts. Instead, it emphasizes that incentives to subscription may be "used to create an uneven playing field," *ante* at 452, and seeks to demonstrate potential anti-competitive effects by way of a hypothetical. The hypothetical involves an incumbent LEC that sends its customers a *monthly* rebate check. *See Ante* at 450-51. The NCUC's orders,

however, focused on *one-time* gifts offered as an inducement to subscription. The NCUC issued its first order in response to the Public Staff's request for guidance on the applicability of the Telecommunications Act's resale obligations to such offers. The Public Staff argued that "bill credits, gift cards, checks or coupons offered to customers by a company's regulated business ... to encourage subscription to a regulated service are promotions featuring price discounts." (J.A. at 24.) In its first order, the NCUC agreed with the Public Staff that "gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunications services ... are promotional discounts." (J.A. at 25.) In its Clarifying Order, the NCUC described its initial order as an "Order regarding resale obligations applicable to *one-time* gift promotions." (J.A. at 47 (emphasis added).) The Clarifying Order explains that the NCUC's Order of December 22, 2004 "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 about by offering *one-time* incentives for more than 90 days." (J.A. at 46 (emphasis added).)

Consideration of the one-time gift offers addressed by the NCUC's orders reveals an important distinction between such offers and price discounts. A customer must continue to subscribe to an incumbent LEC's services to receive a discounted rate for those services. Customers receiving one-time gifts with no corresponding obligation to commit to a particular term of service, in contrast, may attempt to take advantage of the special offer by signing up for the gift benefit and cancelling their service soon or shortly thereafter. Moreover, the time period during which the incumbent LEC makes a one-time gift offer available does not affect the value of the gift. With a direct price discount (or a recurring gift benefit), the longer the discount is offered, the more savings a customer receives. With a one-time gift offer, in contrast, the customer receives the same gift regardless of the duration of the offer. Thus, whether the offer extends for more than 90 days would have a minimal impact***458** on the anti-competitive effects of the special offer.

Concluding that the gift offers at issue are not "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2) would not prevent the NCUC from exercising oversight over gift offers or allow incumbent LECs to use this type of special offer to create an uneven playing field. To the contrary, it would impose a greater burden on incumbent LECs. Section 51.613(a)(2) allows restrictions on the resale of short-term promotions as a narrow exemption to the general rule that incumbent LECs "may impose a restriction [on resale] only if it proves to the state commission that the restriction is reasonable and non-discriminatory." 47 C.F.R. § 51.613(b). Accordingly, concluding that gift-offers are not "promotions" would require incumbent LECs to prove to the state commission that restrictions on the resale of *all* offers including gift incentives (and not merely those lasting for more than 90 days) were reasonable and nondiscriminatory. Such a case-by-case analysis would allow the NCUC to apply its expertise in assessing the pro- and anti-competitive effects of this particular type of special offer. This assessment by the NCUC would better serve the goals of the statute and the FCC regulations than applying an ill-fitting exemption designed to address a different type of special offer with admittedly different anti-competitive effects.

II.

In sum, I concur in the majority's interpretation of the Telecommunications Act and ultimate conclusion that special offers featuring gift benefits offered for more than 90 days must be made available to resellers in the form of a reduced wholesale price. I believe, however, that one-time gift offers are not price discounts within the meaning of the FCC's Local Competition Order and therefore do not constitute "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2).

C.A.4 (N.C.),2007.
BellSouth Telecommunications, Inc. v. Sanford
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BUDGET PREPAY, INC. et al.,	§	
	§	
Plaintiffs	§	
	§	
v.	§	**No. 3:09-CV-1494-P**
	§	
AT&T INC. F/K/A SBC COMMUNICATIONS, INC. et al.,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is

1. Defendants'[1] Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) filed on August 24, 2009.
2. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) filed on August 24, 2009.
3. Defendants Motion to Dismiss for Failure to State a Claim Upon which Relief may be Granted pursuant to Fed. R. Civ. P. 12(b)(6) filed on August 24, 2009.

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[1] AT&T, Inc., f/k/a SBC Communications, Inc. and its subsidiaries, including AT&T Operations, Inc., f/ka SBC Operations, Inc., Illinois Bell Telephone Company d/b/a AT&T Illinois, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Indiana Bell Telephone Company d/b/a AT&T Indiana, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc., which is in turn wholly owned by AT&T Inc.; Michigan Bell Telephone Company d/b/a AT&T Michigan, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Wisconsin Bell Telephone Company d/b/a AT&T Wisconsin, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Southwestern Bell Telephone L.P. d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas; and AT&T Southeast Inc. f/k/a BellSouth Telecommunications, Inc. d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, A&T South Carolina, and AT&T Tennessee (collectively, "AT&T" or "Defendants").

4. Plaintiffs'[2] Application and Motion for a Preliminary Injunction filed on August 12, 2009.

5. Defendants' Motion to Increase Bond filed on October 16, 2009.

After careful consideration of the law and the parties arguments for the reasons stated below Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED; Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED; Defendants' Motion to Dismiss for Failure to State a Claim is DENIED; Plaintiffs' Motion for a Preliminary Injunction is GRANTED; Defendants' Motion to Increase Bond is GRANTED; Defendants' Motion to Dismiss Plaintiffs' anti-trust and fraud claims is GRANTED, but Plaintiffs are GRANTED leave to amend their complaint to re-plead these claims; and Defendants' Motion to Dismiss Plaintiffs state law claims is DENIED.

I. Background

Plaintiff are Competitive Local Exchange Carriers ("CLECs"). A CLEC is a small telephone company that buys telephone service from Incumbent Local Exchange Carriers ("ILECs") large telephone companies with existing telecommunications infrastructure. ILECs sell telephone service to CLECs for the retail rate minus a wholesale discount. CLECs then re-sell that telephone service to individual consumers

These type of arrangements are made possible by the Federal Telecommunications Act of 1996 (FTCA). Under the FTCA, ILECs are required to enter into an Interconnection Agreement ("ICA") which must then be approved by a state commission. In this case, there is an approved ICA between the parties in each individual state. Additionally, Plaintiffs fully acknowledge that prior to this dispute Defendants have always complied with the ICA, laws, and regulations.

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[2] Budget Prepay, Inc., Global Connection Inc. of America, Mextel Corporation LLC d/b/a Liftel, Nexus Communications, Inc., and Terracom, Inc. (collectively "Plaintiffs").

About July 1, 2009, AT&T alerted CLECs that as of September 1, 2009, they would no longer be eligible for promotional discounts such as the "Win-back Cash Promotion."[3] Instead CLECs would only be entitled to a small fraction of the $50 cash-back that retail customers are entitled to receive. The amount that CLECs are entitled to receive back varies from $3.73 - $5.54 depending on the location. AT&T has imposed this new method of calculating the amount CLECs can receive under the promotion in an attempt to make the resale rate reflect consumers' failure to properly submit their rebate coupon. AT&T's reasoning for placing this restriction on resale is that only 33.33% of customers actually take the steps necessary- i.e. submitting the coupon - to receive the $50 cash back.

Though 47 C.F.R. 51.613(b) requires ILECs to obtain state approval before imposing restrictions like this on resale, Defendants began implementing this resale restriction on September 1, 2009 without the approval of any state commissions. Plaintiffs have brought claims for Defendants' failure to obtain state approval. Plaintiffs also claim that the new methodology used by AT&T to calculate credits available to CLECs under the Win-back Cash Back promotion (hereinafter "new calculation method") violates the ICA, and the Act. Further, Plaintiffs have sought an injunction claiming that without one they will lose customers, market share, and good will as a result of not being able to compete with AT&T's offer. The end result - according to Plaintiffs - is that each and every one of them will go out of business within a short period.

II. Request for Declaratory Judgment

Plaintiffs first cause of action is for Declaratory Judgment pursuant to 28 U.S.C. § 2201. Specifically, Plaintiffs ask the Court to issue a judgment declaring that the new calculation

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[3] The Win-back Cash Promotion seeks to attract new customers away from another carrier or wireless provider by offering no connection fees and $50 cash back.

method is a restriction on resale that is unreasonable and discriminatory in violation of 47 U.S.C. § 251(c)(4), 47 C.F.R. § 51.605(a), 47 C.F.R. § 51.613(b), and the ICA. (Pls.' Am. Compl. ¶ 44.) Defendants have sought to dismiss this claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), lack of personal jurisdiction pursuant to Rule 12(b)(2), and failure to state a claim pursuant to rule 12(b)(6).

A. Subject Matter Jurisdiction

Whether the Court has subject matter jurisdiction over Plaintiffs' claims is the first issue that the Court must address. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."). Rule 12(b)(1) provides that an action must be dismissed when the court does not possess subject matter jurisdiction over the plaintiff's claims. Fed. R. Civ. P. 12(b)(1). A court may decide a Rule 12(b)(1) motion to dismiss "on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990). A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Ramming*, 281 F.3d at 161.

Defendants argue that this Court lacks subject matter jurisdiction because Plaintiffs must bring their claims to a state commission before bringing those claims in district court. It appears that Defendants rely on two separate but overlapping arguments for why this claim must be heard by a state commission in the first instance. The first argument Defendants make is that

Plaintiffs have failed to exhaust administrative remedies. The Court can easily dispense with this argument because failure to exhaust administrative remedies is not required by the FTCA.

A case may only be dismissed for lack of subject matter jurisdiction based on a Plaintiffs failure to exhaust administrative remedies when exhaustion is required by statute. *Premiere Network Servs., Inc.* v. *SBC Commc 'ns, Inc.*, 440 F.3d 683, 687 n. 5 (5th Cir. 2006) ("'Whenever the Congress statutorily mandates that a claimant exhaust administrative remedies the exhaustion requirement is jurisdictional.'") (quoting *Taylor v. United States Treasury Dep't*, 127 F.3d 470, 475 (5th Cir. 1997)). "But where a statute does not textually require exhaustion, only the jurisprudential doctrine of exhaustion controls [subjecting a claim to dismissal under Rule 12(b)(6)], which is not jurisdictional in nature." *Id.* Nothing in the FTCA textually requires exhaustion. *Id.* Plaintiffs failure to exhaust administrative remedies therefore has no bearing on whether the Court has subject matter jurisdiction over Plaintiffs' FTCA claims.

Defendants' however, also argue that the Court lacks subject matter jurisdiction because section 252(e)(6) only gives district courts the power to review "determinations" made by a state commission. Section 252(e)(6) states:

> In any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). It is true that section 252(e)(6) explicitly gives district courts the power to review state commission determinations. But section 252(e)(6)'s grant of jurisdiction to review state commission determinations plays no role in determining whether the Court has subject matter jurisdiction in this case.

Section 252(e)(6) does not play a role in determining whether the Court has subject matter jurisdiction in this case because the Court has jurisdiction under 28 U.S.C. § 1331- or

what is more commonly known as federal question jurisdiction. District courts have federal question jurisdiction "if 'the right of the [plaintiff] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 643 (2002) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). Though a statute may divest a district court of federal question jurisdiction, neither section 252(e)(6) nor any other part of the Act has divested district courts of this jurisdiction. *Verizon Md.*, 535 U.S. at 643-44 ("Nothing in 47 U.S.C. § 252(e)(6) purports to strip [federal question jurisdiction]. . . .Indeed, it does not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action."). The Supreme Court's holding in *Verizon Md.* has consistently been interpreted to mean that district courts need not look any further than 28 U.S.C. § 1331 to determine whether the court has subject matter jurisdiction over FTCA claims.[4]

Here, the Court has federal question jurisdiction because Plaintiffs' right to recover is based almost exclusively on the interpretation of federal law. Specifically, Plaintiff has asked this Court to declare that Defendants have violated 47 U.S.C. § 251(c)(4), 47 C.F.R. § 51.605(a), and 47 C.F.R. § 51.613(b). Accordingly, the Court finds it has federal question jurisdiction over

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[4] *Verizon Md. Inc. v. Global Naps, Inc.*, 377 F.3d 355, 362-63 (4th Cir. 2004), *on remand by* 535 U.S. 83 (2002) (addressing subject matter jurisdiction over FTCA claims the court only looked to whether the plaintiffs claims were substantially based on federal law); *Mich. Bell Tel. Co. v. MCIMetro Access Transm.Servs., Inc.*, 323 F.3d 348, 355 (6th Cir. 2003) ("[F]ederal courts have jurisdiction to review state commission orders for compliance with federal law, because provisions of the Act do not preclude jurisdiction under 28 U.S.C. § 1331."); *Core Commc'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007) (to determine whether federal question jurisdiction over an ICA dispute existed the court examined the complaint to determine whether the claims were substantially based on federal law); *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008) (We conclude that . . . whatever finality or exhaustion requirement § 256(e)(6) might impose does not affect the subject matter jurisdiction of the district court in this case. Rather, the district court has general federal question jurisdiction under 28 U.S.C. § 1331 . . . .."); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 317 F3d 1270 (11th Cir.2003) (where plaintiffs challenged the state commissions interpretation of an ICA the district court had jurisdiction over the case pursuant to 28 U.S.C. § 1331).

Plaintiffs' cause of action for declaratory judgment and now turns to Defendants argument that the case should be dismissed pursuant to Rule 12(b)(2).

B. Personal Jurisdiction

The plaintiff bears the burden of establishing a district court's personal jurisdiction over a nonresident defendant. *See Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). The Court must accept as true all uncontroverted allegations in the complaint, and all factual conflicts presented by the parties must be resolved in favor of the plaintiff. *See id.* To exercise personal jurisdiction over a nonresident defendant, the Court must determine that due process standards are satisfied by engaging in a two-pronged analysis. First, the Court determines whether the defendant has purposefully established "minimum contacts" in the state. If so, the Court must then assess whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-75, 476 (1985); *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990).

Sufficient minimum contacts can be established through a showing of the existence of general or specific jurisdiction. *See Freudensprung v. Offshore Technical Serv. Inc.*, 379 F.3d 327, 343 (5th Cir. 2003). "A court may exercise specific jurisdiction over a nonresident defendant if the lawsuit arises from or relates to the defendant's contact with the forum state." *Icee Distribs. Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 591 (5th Cir. 2003). Specific jurisdiction exists where a defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475. The "purposeful availment" necessary for specific jurisdiction protects a defendant from being brought into a jurisdiction based solely on "random," "fortuitous," or "attenuated" contacts. *Id.* A single act may form a sufficient basis for personal jurisdiction if the

claim arises from that single act, and the defendant can reasonably foresee being brought into court in the forum state. *See Icee Distribs.*, 325 F.3d at 591.

Defendants argue that Plaintiff has failed to show that the Non-Resident ILEC Defendants (hereinafter "Non-Resident Defendants") have sufficient minimum contacts with Texas to establish personal jurisdiction. But Defendants arguments have all but ignored the pervasive contacts relating to the ICAs and the new calculation method. Instead, the Non-Resident Defendants would like the Court to look at all of the contacts the Non-Resident Defendants do not have with Texas. But in making this argument Defendants have essentially asked this Court to "pay no attention to the man behind the curtain." AT&T is the proverbial man behind the ICAs- the proverbial curtain. More importantly, AT&T is behind the new calculation method which is at the center of this dispute. Defendants do not deny these facts which in themselves assure the Court that personal jurisdiction exists over the Non-Resident Defendants. The Court finds that by completely relying on AT&T for the execution of ICAs, as well as support and advice relating to ICAs that the Non-Resident Defendants have purposefully availed themselves of Texas law. Both through the Acts of their agent, AT&T, and through their own actions.

C. Rule 12(b)(6) - Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint when a defendant shows that the plaintiff has failed to state a claim for which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Iqbal v. Ashcroft*, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual matter contained in the complaint must allege actual facts not legal conclusions

masquerading as facts. *Id.* at 1949-50 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Twombly*, 550 U.S. at 555). Additionally, the factual allegations of the complaint must state a plausible claim for relief. *Id.* A complaint states a "plausible claim for relief" when the factual allegations contained therein infer actual misconduct on the part of the defendant, not a "mere possibility of misconduct." *Id.*; *see also Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986). Determining whether a complaint states a plausible claim for relief necessarily requires looking to the elements a plaintiff must plead to state a claim implicated by the complaint. *Iqbal*, 129 S. Ct. at 1947 (citing *Twombly*, 550 U.S. at 553-557).

Plaintiffs claim that they are entitled to a declaration that Defendants breached the ICA and that Defendants have violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605, and 47 C.F.R. 51.613(b). Defendants argue that Plaintiffs have failed to state a claim for relief based on the jurisprudential doctrine of exhaustion. As discussed above, where exhaustion is not required by statute failure to exhaust administrative remedies may subject a claim to dismissal under Rule 12(b)(6). *Premiere Network Servs., Inc.*, 440 F.3d at 687 n. 5 (citing *Taylor*, 127 F.3d at 475). When a plaintiff is required to exhaust administrative remedies under the jurisprudential exhaustion doctrine the plaintiff is not entitled to judicial relief. *Taylor*, 127 F.3d at 476 (" '[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' ") (quoting *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). Accordingly, dismissal pursuant to Rule 12(b)(6) is appropriate when the jurisprudential exhaustion doctrine is applied.

Sections 251 and 252 of the Act provide many requirements and procedures for ICAs. Generally, section 251 provides the obligations of local exchange carriers under the Act. *See generally* 47 U.S.C. § 251. In conjunction with the obligations of section 251, Section 252 provides the procedures for negotiation, arbitration, and approval of ICAs. *See generally* 47 U.S.C. § 252. The procedures of section 252 relate to the initial formation of an ICA. *See id.* But nothing in sections 251 or 252 of the Act statutorily grants state commissions the authority to resolve disputes between parties after the parties have entered into an ICA. *Core Commc 'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007) ("Beyond [the state commissions role in approving an ICA] there is no real indication of what role the state commissions are to play, and the Act is simply silent as to the procedure for post-formation disputes."); *see also W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1184-99 (9th Cir. 2008) (discussing the absence of procedural requirements once an ICA has been formed). Noting the absence of any post-ICA formation dispute resolution procedures the Fifth Circuit, along with the other circuit courts, has interpreted the Act as whole to grant state commissions jurisdiction "to decide intermediation and enforcement disputes that arise after the approval procedures are complete." *Sw. Bell Tel. Co.* v. *Pub. Utils. Comm 'n*, 208 F.3d 475, 476 (5th Cir. 2000) (hereinafter "*SWBT*"); *see also Illinois Bell Tel. Co. v. Global NAPS Illinois, Inc.*, 551 F.3d 587, 593-94 (7th 2008) ("[T]he Telecommunications Act does not expressly authorize a state commission, after it approves an interconnection agreement, to resolve disputes arising under it. . . . But such authority is a sensible corollary to the allocation of state and federal responsibilities made by the Act.").

SWBT did not, however, address whether the state commission had exclusive jurisdiction over disputes between parties that are bound by a previously formed ICA. Rather, *SWBT* addressed the narrow question of whether the state commission may intermediate and resolve

disputes between parties to an already existing ICA. Defendants argue that because *SWBT* holds state commissions have authority to intermediate and resolve disputes between parties to an already existing ICA in the first instance that state commissions have exclusive jurisdiction over such disputes. Further, Defendants argue that the FCC has spoken directly to this issue.

Defendants rely on *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 (2000) for this proposition. The relevant part of *In re Starpower* states:

> [A]t least two federal courts [*SWBT* and *Ill. Bell Tele. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566 (7th Cir. 1999)] of appeal have held that inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements. These court opinions implicitly recognize that, due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements. Thus, we conclude that a state commission's failure to "act to carry out its responsibility" under section 252 *can in some circumstances* include the failure to interpret and enforce existing interconnection agreements.

In re Starpower, 15 F.C.C.R. at 11279-80 (emphasis added). Like Defendants, the Third Circuit has taken this part of *In re Starpower* to stand for the proposition that state commissions have exclusive jurisdiction over disputes that arise between parties to an already existing ICA.

In *Core Commc 'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007), the Court of Appeals for the Third Circuit upheld a district court's dismissal of the plaintiff's claims for breach of an ICA and violations of the FTCA because the plaintiff had not taken the claims to the state commission in the first instance. On appeal, the court interpreted *In re Starpower* to mean that state commissions have exclusive jurisdiction over disputes between parties to an existing ICA. *Core Commc 'ns*, 493 F.3d at 344 ("Pursuant to FCC guidance, we hold that interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission."). In reaching this conclusion, the court noted that *In re Starpower* could be read to mean more than

one thing. *Id.* at 342. Nonetheless, the court determined that FCC's *In re Starpower* decision, as interpreted by the court, was entitled to *Chevron* deference.

This Court declines to read *In re Starpower* in this manner. *In re Starpower* does not give any indication that state commissions are the exclusive forum for resolving disputes over already existing ICAs. *See generally, In re Starpower, 15 F.C.C.R. at 11278-79.* As the *Core Communications* court recognized, *In re Starpower* can be read to mean more than one thing. More simply stated: *In re Starpower* is ambiguous. And an ambiguous agency decision is not the type of decision that is meant to fill gaps in a statute under *Cheveron.* Second, *In re Starpower* explicitly indicates that there are circumstances in which a state commission would not be shirking its responsibilities by failing to interpret and enforce existing ICAs. Based on this statement, the Court finds that if *In re Starpower* unambiguously stands for anything, it is that there are circumstances in which parties to an existing ICA need not bring their claims to a state commission in the first instance.

The facts and claims in this case provide exactly the type of circumstances in which a plaintiff should not be compelled to take their claims to a state commission in the first instance. Here, the Court is not being asked to interpret the ICA. Rather, the Court is being asked to interpret federal law. The Court recognizes that without the ICA Plaintiffs would not have standing to challenge Defendants actions. But the fact that the ICA gives Plaintiffs standing does not in itself mean that the Court must interpret the ICA to grant relief to Plaintiffs. Nor does the ability of an ICA to negate the requirements and responsibilities imposed by the Act mean that the Court must 'interpret' the ICA to grant relief to Plaintiffs.[5] Where an ICA adopts federal law

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[5] *See* 47 U.S.C. § 252(a)(1) ("An incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.") 47 U.S.C. § 252(a)(1); *see also* 47 C.F.R. § 51.3 ("To the extent provided in

as controlling the parties contractual resale obligations for resale the Court need not interpret the ICA to determine whether the plaintiff is entitled to relief.[6] Rather, the Court must interpret federal law to determine if the plaintiff is entitled to relief.

Here, the ICA requires resale restrictions to be "consistent with regulations prescribed by the Commission under Section 251(c)(4) of the Act." (Defs' App. 57.) Additionally, the ICA provides that "[a]ll federal rules and regulations . . . also apply." (Id.) When a court is being asked to interpret federal law the policy of allowing the state commission to interpret the agreement it approved because it knows the interpretation it intended when approving the agreement does not apply.

Conversely, it would be bad policy to require Plaintiffs in this specific case to exhaust administrative remedies because it would allow Defendants to shift to Plaintiffs the duties imposed upon ILECs by the Act. The Act imposes on ILECs a duty to obtain state commission approval before placing restrictions on resale. 47 C.F.R. § 51.613(b). When an ILEC imposes a restriction on resale that is not permitted under 47 C.F.R. § 51.613(a), subsection (b) requires an ILEC "to prove to the state commission that the restriction is reasonable and nondiscriminatory" before imposing the restriction. Despite the regulation placing the duty of going to the state commission on ILECs, Defendants have asked the Court to require the Plaintiffs, CLECs, to go to the state commission before bringing a claim in federal court. Were the Court to oblige Defendants request it would allow them to contravene the requirements and

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section 252(e)(2)(A) of the Act, a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.").

[6] Though one could argue that merely determining federal law controls resale restrictions constitutes "interpreting' the ICA, this is not the type of interpretation that courts finding that exhaustion is required have been called upon to interpret. *See e.g. Express Tel. Servs., Inc.* v. *Sw. Bell Tel. Co.*, No. 3:02-CV-1082-M, 2002 U.S. Dist. Lexis 19645 (N.D. Tex. Oct. 16,2002).

intent of the Act. The facts of this case demonstrate how the requirements and intent of the Act would be contravened by forcing Plaintiffs to go to the state commission first when Plaintiffs' claims are predicated on Defendants failure to go to the state commission.

As previously discussed, Congress passed the FTCA with the intent of "opening previously monopolistic local telephone markets to competition." *SWBT*, 208 F.3d at 477. Congress entrusted the FCC with the duty of promulgating regulations that would ensure the Act's purpose would be met, including regulations that prevented ILECs from placing restrictions on resale that are unreasonable or discriminatory. 47 U.S.C. § 251(c)(4)(B). To that end, 47 C.F.R. § 51.613(b) requires ILECs to prove that restrictions on resale are reasonable and nondiscriminatory before imposing such restrictions. Requiring ILECs to obtain state commission approval prior to placing restrictions on resale demonstrates a recognition that resale restrictions can have a devastating effect on a CLEC's ability to remain competitive. More importantly, it clearly places the duty to gain state commission approval on ILECs – not CLECs.

Defendants did not gain state commission approval before implementing the new calculation methodology. Instead, Defendants notified Plaintiffs that the new methodology would go into effect on September 1, 2009. Plaintiffs, fearful that this restriction on resale would devastate their companies, sought refuge in federal court. Defendants ignored their own duty to gain state commission approval before placing restrictions on resale. Then after being hailed into court Defendants vehemently argue that Plaintiffs should be required to go to seventeen different state commissions before bringing any claims to one federal court. Where the jurisprudential exhaustion doctrine is policy motivated, the Court cannot allow Defendants to invoke the doctrine in this instance.

Finding that the jurisprudential doctrine of exhaustion is inapplicable to this case, the Court turns to the factual allegations of Plaintiffs' Complaint to determine if they have stated a claim for relief.

Plaintiffs have alleged factual allegations that, taken as true, infer actual misconduct on the part of Defendants. For example, Plaintiffs have alleged that they were notified by Defendants of a new method that would be used to calculate the rates at which telecommunication services would be resold to Plaintiffs under certain promotional plans. This new method provided retail customers who switched to Defendants telephone company from a different telephone company with fifty dollars cash-back and a waiver of all nonrecurring charges associated with adding service. Plaintiffs that resold service to customers switching companies however, would not be entitled to offer the same fifty dollars cash-back or a waiver of nonrecurring charges to its customers. Though the complaint provides more factual allegations, these allegations alone indicate that Defendants may have violated the requirements of 47 U.S.C. § 251(c)(4) and 47 C.F.R. § 51.605. Moreover, as previously discussed, Plaintiffs allege that Defendants failed to obtain state commission approval before implementing the new calculation method in violation of 47 C.F.R. § 51.613(b).

Accordingly, the Court finds that Plaintiffs have stated a claim for relief and Defendants Rule 12(b)(6) motion is denied. Defendants however, have argued that another jurisprudential doctrine, the primary jurisdiction doctrine, warrants dismissal of Plaintiffs claims. Because the primary jurisdiction doctrine would only warrant staying these proceedings the Court addresses this argument separately from Defendants' Rule 12(b)(6) motion.

D. Primary Jurisdiction

"[P]rimary jurisdiction 'comes into play whenever enforcement of the claim requires the resolution of issues [which, under a regulatory scheme, have been placed] within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Penny v. Sw. Bell Tele. Co.*, 906 F.2d 183, 187 (5th Cir. 1990) (quoting *Sw. Bell Tel. v. P.U.C.*, 735 S.W. 2d 663, 669 (Tex. App. – Austin 1987, no writ); *see also ASAP Paging, Inc. v. CenturyTel of San Marcos Inc., 137 Fed. Appx. 694, 697 (5th Cir. 2005)*("The doctrine of primary jurisdiction applies . . . when a court having jurisdiction wishes to defer to an agency's superior expertise.") (citing *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001)). Since '[n]o fixed formula exists for applying the doctrine of primary jurisdiction,' each case must be examined individually to determine whether it would be aided by the doctrine's application." *Penny*, 906 F.2d at 187 (quoting *Sw. Bell v. P.U.C.*, 735 S.W. 2d at 670).

Courts faced with the task of determining whether primary jurisdiction applies when a dispute arises between parties to an already existing ICA have noted that the statutory scheme complicates the issue. The statutory scheme complicates the issue because the appropriate agency to which the court would refer the issue is not one agency entrusted with carrying out this regulatory scheme, but multiple state commissions. *See W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1200 (9th Cir. 2008) ("The doctrine of primary jurisdiction . . . is . . . not a perfect fit for the statute before us. For one thing, the agency with 'regulatory authority' in this context, in the sense of having the authority to promulgate regulations, is the F.C.C., not the state commissions.") Additionally, the statutory scheme does not provide a procedural mechanism for referring issues to a state commission. *See Illinois Bell Tel. Co. v. Global NAPS Illinois, Inc.*,

551 F.3d 587 (7th 2008) ("The Act [does not] expressly authorize a federal court to refer such a dispute, if the dispute arises in a suit in federal court, to the state commission . . .."). Despite these complications, courts have routinely determined that issues may be referred to state commissions when appropriate. *Id.* (finding that a federal court's authority to refer issues to the state commission "is a sensible corollary to the allocation of state and federal responsibilities"); *see also Penny*, 906 F.2d at 187-88 (referral to state commission was procedurally proper where the state commission and district court had concurrent jurisdiction to determine whether rates where discriminatory under the FTCA).

Plaintiffs' FTCA claims bring forth two distinct issues. First, whether Defendants were required to obtain state commission approval before implementing the new calculation method. This issue is one that does not require agency expertise and therefore the Court need not refer it to the state commissions.

The second issue is whether the resale restriction is reasonable and nondiscriminatory. Determining whether a resale restriction is reasonable and nondiscriminatory is an issue routinely addressed by state commissions. Therefore, this issue is one that is appropriate for referral to the state commissions. The regulatory scheme bolsters this conclusion as it requires Defendants to prove to the state commission that a restriction on resale is reasonable and nondiscriminatory. Moreover, Defendants have indicated that they are now seeking approval of the new calculation method from state commissions. The Court can find no reason to thwart Defendants attempts to obtain the approval that should have been obtained before implementing the plan. Accordingly, the Court finds that it is appropriate to stay Plaintiffs' claims pending a resolution of this issue by each of the appropriate state commissions.

E. Preliminary Injunction

A preliminary injunction may only be granted if a plaintiff establishes four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs any damage that the injunction might cause defendants, and (4) that the injunction will not disserve the public interest. *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999). A preliminary injunction is an extraordinary remedy which should only be granted when the plaintiff has clearly carried his burden of proof as to all four elements, *see Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1462 (5th Cir. 1990), and the decision is to be treated as the exception rather than the rule. *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

Here, Plaintiffs have clearly carried the burden of establishing all four elements making the entry of a preliminary injunction appropriate. Plaintiffs have established, and Defendants have admitted in open court, that state commission approval was not obtained prior to Defendants implementing the new calculation method which is a restriction on resale. As previously discussed, 47 C.F.R. § 51.613(b) requires ILECs to obtain state commission approval before implementing a resale restriction. Plaintiffs therefore, have established a strong likelihood of success on their claim that Defendants violated 47 C.F.R. § 51.613(b).[7]

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[7] Communications by Defendants to the Court further evidence that Plaintiffs' have a strong likelihood of success on their claim that Defendants violated 47 C.F.R. § 51.613(b). On the On October 5, 2009, Defendants informed the Court and Plaintiffs that they had received a letter from the Louisiana Public Service Commission concerning the new calculation method. The letter – a copy of which Defendants provided to the Court – indicates the Louisiana Public Service Commission's decision to suspend the effectiveness of the new calculation method. This decision was based on an initial finding that the new calculation method imposes a restriction on resale and AT&T's failure to take the proper steps to have the Commission find that the new calculation method is reasonable and non-discriminatory. Though the letter does not specifically state that the new calculation method is unreasonable and discriminatory, the Louisiana Public Service Commission's decision indicates a strong likelihood of such a finding.

Plaintiffs have also established that if Defendants were permitted to implement the new calculation method that they would suffer irreparable injury if the injunction is denied. The new calculation method would significantly impair Plaintiffs ability to compete with Defendants for new customers. There would be no ability to compete because Defendants would be able to entice new customers by offering $50 cash-back and a waiver of connection fees. Meanwhile, Plaintiffs would not be able to make the same offer because they would be purchasing service from AT&T at the normal retail price without $50 cash-back or waiver of connection fees.[8] In the absence of an injunction, Plaintiffs would be forced to pay more for service than they would have to pay without the resale restriction that has not been approved by any of the state commissions. Plaintiffs would have to make these payments while simultaneously losing money because of their inability to compete with Defendants. These circumstances would devastate Plaintiffs' business. In today's economy, this type of devastation could ultimately force Plaintiffs' out of business or at the least push them to the brink of being out of business-something from which they would be unlikely to recover.

Plaintiffs have also demonstrated the threatened injury to them outweighs any damage that the injunction might cause Defendants. It is of considerable importance to comparing the possible injuries that it is likely that if Plaintiffs were forced to pay millions of dollars at this time that it would be into an escrow account. Accordingly, Defendants would not actually be deprived of any income during the period in which this case is pending because the money would remain in an escrow account. Conversely, Plaintiffs would be forced to pay money that they do

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[8] At most, Plaintiffs could offer new customers the $3-$7 cash-back that Defendants are willing to give Plaintiffs under the new calculation method. As a result, the Plaintiffs sales pitch would be something to the effect of "No, we can't offer you $50 cash-back like AT&T. But AT&T has assured us that there is only a 33% chance that you will take the necessary steps to receive that $50 cash-back. So why not sign-up with us and we will knock $3.47 off your initial month of service." This certainly, is not the type of sales pitch that would allow Plaintiffs to remain competitive with Defendants.

not have into an escrow thereby depriving of them of that money immediately. Therefore, the Court finds that the irreparable injury that would be caused to Plaintiffs in the absence of an injunction would outweigh any damage that the injunction might cause Defendants.

Finally, Plaintiffs have demonstrated that the injunction will not disserve the public interest. An injunction in this case will promote competitiveness by ensuring that the statutes and regulations of the FTCA are met. Enjoining Defendants from implementing the new method of calculation without obtaining state commission approval will serve the public interest by providing enforcement of the regulations promulgated by the FCC. Were this Court to simply refer this case to the many appropriate state commissions without issuing a preliminary injunction then Defendants could go back to implementing the new calculation method prior to obtain approval from the state commission. In so doing, Defendants may be able to force Plaintiffs completely out of business before ever obtaining that approval. Forcing Plaintiffs out of business would leave Defendants as one of the few providers of telephone service in the relevant market. With far fewer telephone providers there will be far less competition. During these hard economic times this Country needs more competition not less competition. Accordingly, the Court finds that *not* issuing an injunction would disserve the public interest.

F. Bond

Though Defendants' Motion to Increase Bond was made in reference to the bond ordered by the Court when issuing the T.R.O., the motion can also be read as requesting that bond be increased upon the entry of a preliminary injunction. Accordingly, the Court addresses Defendants' motion now.

Rule 65(c) states:

> The Court may issue a preliminary injunction . . . only if the movant gives security in an amount *that the court considers proper* to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c) (emphasis added). The italicized language indicates that determining the proper amount of bond is within the discretion of the district court. *Id.*; *see also Petro Franchise Sys., LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, 801 (W.D. Tex. 2009) ("[d]istrict courts have discretion over the amount of the security"). As discussed above, the Court finds that it is substantially likely that Plaintiff will succeed in demonstrating that Defendants failed to obtain state approval prior to implementing the new calculation method. In large part, this conclusion is based on Defendants own admissions in open court. Accordingly, the Court finds that it is highly unlikely that Defendants are being wrongfully restrained from implementing the new method of calculation prior to obtaining approval from the appropriate state commissions. The unlikelihood that Defendants are being wrongfully restrained, coupled with the fact that Plaintiffs otherwise valid claim would be obviated by being forced to post an inordinately large bond amount, leads this Court to conclude that the $1,000,000 bond Defendants request would be improper.

Nonetheless, the Court does find that the amount of the bond posted should be increased to more properly reflect the guidance given by Rule 65(c). Using this guidance, the Court herby increases the bond from $5,000 to $50,000. Accordingly, Defendants' Motion to Increase Bond is granted.

III. Plaintiffs' Anti-Trust and Fraud Claims

Defendants argue that Plaintiffs' anti-trust and fraud claims should be dismissed pursuant to Rule 12(b)(6). Plaintiffs have essentially admitted that the Amended Complaint does not state

a claim for relief for anti-trust violations or fraud. Plaintiffs have requested leave to amend to correct these errors. Though the Court believes that Defendants may be correct in their assertion that leave to amend would be futile in light of *Verizon Commc'ns Inc. v. Trinko,* 540 U.S. 398, 407 (2004), the Court is not prepared to reject Plaintiffs' contention that it can plead facts that will state an anti-trust claim for relief. Accordingly, the Court believes that Plaintiffs should be granted leave to amend the complaint. In so doing, the Court directs Plaintiffs to be mindful of *Trinko* when pleading their anti-trust claims and to be mindful of the heightened pleading standards of Fed. R. Civ. P. 9 when pleading their fraud claims.

IV. Plaintiffs State Law Claims

Defendants only argument for dismissal of Plaintiffs' state law claims is that if this Court dismisses Plaintiffs' federal claims it will not have jurisdiction over Plaintiffs' state law claims. The Court however, has not dismissed Plaintiffs' federal claims. Supplemental jurisdiction over Plaintiffs' state law claims is therefore proper.

V. Conclusion

For the above stated reasons, the Court Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED; Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED; Defendants' Motion to Dismiss for Failure to State a Claim is DENIED; Plaintiffs' Motion for a Preliminary Injunction is GRANTED; Defendants' Motion to Increase Bond is GRANTED; Defendants' Motion to Dismiss Plaintiffs' anti-trust and fraud claims is GRANTED, but Plaintiffs are GRANTED leave to amend their complaint to re-plead these claims; and Defendants' Motion to Dismiss Plaintiffs state law claims is DENIED.

The Court ORDERS Defendants to desist and restrain from:

1. Discriminating against Plaintiffs as resellers by proceeding to use the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048)[9] to calculate credits available to Competitive Local Exchange Carriers (CLECs) under the Win-back Cash Back promotion.
2. Implementing or further implementing any plans to impose restrictions on the resale of the cash back or other promotional offers lasting longer than 90 days to Plaintiffs where such plans calculate the credits available to CLECs using the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048) without first obtain approval from the appropriate state commission.
3. Pursuing collection activities against Plaintiffs in connection with amounts related to the dispute over the calculation of credits using the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048). This includes a prohibition against Defendants from demanding payment of charges in excess of the promotional rate reduced by the wholesale discount, withholding preferential pricing discounts to Plaintiffs, requiring additional security or amounts placed in escrow, or suspending or disconnecting service to Plaintiffs, for amounts connected to this dispute.

IT IS FURTHER ORDERED that:

4. Plaintiffs post bond in the amount of $50,000.
5. Defendants submit their plans to implement the new calculation method to the appropriate state commissions.

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[9] (Pls.' Am. Compl. Ex. 3)

These proceedings will be stayed until each state commission has reached a decision determining whether Defendants' new calculation method is reasonable and nondiscriminatory. Plaintiffs shall file their Amended Complaint, if any, once the stay has been lifted. Though the proceedings will be stayed, the preliminary injunction will continue in effect until the stay has been lifted or until it is otherwise altered by a written and signed order of the Court.[10]

IT IS SO ORDERED.

SIGNED this 30th day of November, 2009.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

[10] The Court will consider appropriate alterations of the preliminary injunction should Defendants obtain approval to implement the new calculation method from a state commission prior to the stay being lifted.

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February 5, 2010

VIA OVERNIGHT MAIL

Ms. Terri Lemoine
Louisiana Public Service Commission
The Galvez Building, 12th Floor
602 North 5th Street
Baton Rouge, LA 70125

Re: Docket U-31202
In Re: BellSouth Telecommunications, Inc.
d/b/a AT&T Louisiana, Petition for Review
Concerning Resale Promotion Methodology
Adjustment

Dear Terri:

In accordance with Rule 3 of the LPSC Rules regarding filing via facsimile, enclosed are the original and two copies of AT&T Louisiana's Motion for Abeyance supporting our filing today via facsimile. The facsimile transmission fee of $25.00 is also included. I am enclosing an additional copy of this filing which I request that you please date stamp and return to me in the envelope provided.

Thank you for your assistance in this matter.

Sincerely,

Carmen S. Ditta

CSD/tbd
Enclosures
cc: Official Service List (w/enclosure) (via email)

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

BellSouth Telecommunications, Inc. d/b/a	*	
AT&T Louisiana, Petition for Review	*	
Concerning Resale Promotion	*	
Methodology Adjustment	*	**DOCKET NO. U-31202**
	*	
**********	*	

MOTION FOR ABEYANCE

BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana ("AT&T Louisiana") respectfully requests the Louisiana Public Service Commission ("the Commission") hold these proceedings in abeyance pending a final decision in *Budget Prepay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.* No. 09-11188 c/w 09-11099 (5th Cir.), and as support for this Motion asserts the following:

1. On November 17, 2009, AT&T Louisiana initiated this proceeding through the filing of its Petition for Review. In this Petition, AT&T Louisiana raises various issues including whether AT&T Louisiana's Resale Promotion Methodology Adjustment ("RPMA"), as described in AT&T Accessible Letters CLECSE09-100 and CLECSE09-108, is a restriction on resale and, if so, whether advance state commission approval was required.
2. On November 27, 2009, this Petition was published in the Commission's Official Bulletin No. 946. Three parties filed timely notices of intervention and protest.
3. On February 2, 2010, this Commission issued a Procedural Schedule and Request for Comments, setting deadlines of March 8, 2010 for AT&T to file additional

information and testimony in support of its request; April 8, 2010 for the Intervenors to file responsive comments and testimony; and April 23, 2010 for AT&T to file rebuttal testimony and reply comments.

4. On March 1, 2010, the United States Court of Appeals for the Fifth Circuit will hear oral argument concerning several substantially similar issues to those presented in this docket in an appeal from a mandatory preliminary injunction issued by a Texas federal district court. *See Budget Prepay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, No. 09-11188 c/w 09-11099 (5th Cir.). To be sure, in the appeal, the Fifth Circuit is presented with the issues of whether AT&T's RPMA is a restriction on resale and, if so, whether advance state commission approval is necessary. These two issues are also presented in this docket.
5. Accordingly, the outcome of the Fifth Circuit appeal may provide guidance to the parties to this docket and could even be dispositive of some or all of the issues associated with the instant docket. For this reason, AT&T Louisiana believes that administrative and judicial economy are well served and resources appropriately conserved by holding the instant proceeding in abeyance.
6. No intervenor in this proceeding will be harmed by holding this proceeding in abeyance. During this abeyance, AT&T Louisiana agrees to continue to adhere to the terms set forth in its letter of October 12, 2009, attached to AT&T Louisiana's Petition for Review as Exhibit D.

Wherefore, AT&T Louisiana, as the petitioning party in this proceeding, requests that this Commission hold this proceeding in abeyance pending a final decision in *Budget*

Prepay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc. No. 09-11188 c/w 09-11099 (5th Cir.).

Respectfully submitted this, the 5th day of February, 2010.

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ATTORNEY FOR BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T LOUISIANA

779233

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been sent to all parties of record, via email and U.S. Mail, this 5th day of February, 2010.

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

BellSouth Telecommunications, Inc. d/b/a	*	
AT&T Louisiana, Petition for Review	*	
Concerning Resale Promotion	*	
Methodology Adjustment	*	**DOCKET NO. U-31202**
	*	
**********	*	

ORDER

CONSIDERING this Motion for Abeyance;

IT IS ORDERED that the Motion for Abeyance be and is hereby GRANTED, holding these proceedings in abeyance pending a final decision in *Budget Prepay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.* No. 09-11188 c/w 09-11099 (5th Cir.).

Baton Rouge, Louisiana, this _____ day of February, 2010.

_____

Brandon Frey
Deputy General Counsel

BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

BellSouth Telecommunications, Inc. d/b/a	*	
AT&T Louisiana, Petition for Review	*	
Concerning Resale Promotion	*	
Methodology Adjustment	*	**DOCKET NO. U-31202**
	*	
**********	*	

ORDER

CONSIDERING this Motion for Abeyance;

IT IS ORDERED that the Motion for Abeyance be and is hereby GRANTED, holding these proceedings in abeyance pending a final decision in *Budget Prepay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.* No. 09-11188 c/w 09-11099 (5th Cir.).

Baton Rouge, Louisiana, this 18th day of February, 2010.

Brandon Frey
Deputy General Counsel

Service List
Docket No. U-31202

All Commissioners
Brandon Frey - LPSC Supervising Attorney
Pam Meades - LPSC Utilities Division

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