STATE OF TENNESSEE

Office of the Attorney General

PAUL G. SUMMERS
ATTORNEY GENERAL AND REPORTER

ANDY D. BENNETT
CHIEF DEPUTY ATTORNEY GENERAL

LUCY HONEY HAYNES
ASSOCIATE CHIEF DEPUTY
ATTORNEY GENERAL

MICHAEL E. MOORE
SOLICITOR GENERAL

MAILING ADDRESS
P O BOX 20207
NASHVILLE, TN 37202

CORDELL HULL AND JOHN SEVIER
STATE OFFICE BUILDINGS

TELEPHONE 615-741-3491
FACSIMILE 615-741-2009

Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
Nashville, TN 37202

October 20, 2003

Chairman Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

RE: SPRINT UNITED TARIFF 2003-710 TO INTRODUCE SAFE AND SOUND II SOLUTION, Docket # 03-00442

Dear Chairman Tate:

Enclosed is an original and thirteen copies of the Office of the Attorney General's Initial Brief in the above matter. We request that these documents be filed with the TRA in this docket. Please be advised that all parties of record have been served copies of these documents. If you have any questions, kindly contact me at (615) 741-8700. Thank you very much.

Sincerely,

Vance L. Broemel

Vance L. Broemel
Assistant Attorney General

Enclosures

68277

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
SPRINT UNITED TARIFF 2003-710 TO INTRODUCE SAFE AND SOUND II SOLUTION	)	**DOCKET NO. 03-00442**

CONSUMER ADVOCATE'S INITIAL BRIEF

Comes now Paul G. Summers, the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate "), pursuant to the directives of the Tennessee Regulatory Authority ("TRA"), and hereby files the *Consumer Advocate's Initial Brief* in the above-styled matter.

INTRODUCTION

United Telephone-Southeast, Inc. ("Sprint-United") has proposed a tariff to introduce the Safe and Sound II Solution retail offering, which bundles local exchange service and caller ID with inside wire and CPE maintenance products. It is undisputed that local exchange service and caller ID are telecommunications services that Sprint-United, in its role as an incumbent LEC, must offer for resale at wholesale rates to competing LECs pursuant to the federal Telecommunications Act of 1996 (the "Act") and related rules and orders of the Federal Communications Commission ("FCC").

Sprint-United contends, however, that it is not required to offer the Safe and Sound II Solution service bundle, or the local exchange service and caller ID portion of the bundle, for resale at wholesale rates because "the bundled offering includes non-regulated services or products". *See Letter from James B. Wright to Darlene Standley* (July 24, 2003). BellSouth Telecommunications,

Inc. ("BellSouth"), another incumbent LEC, intervened in this docket and generally supports the position of Sprint-United.

Sprint-United and BellSouth's argument can be stated as follows: If a telecommunications service that is otherwise subject to the resale requirements of the Act is offered in a "bundle" of other services which are unregulated and, therefore, arguably not subject to resale, then the entire bundle of services, including the telecommunications services portion thereof, is not subject to resale at the fully-discounted wholesale rate generally applicable to resold services. The Consumer Advocate intervened in this case because it disagrees with this position.

The Consumer Advocate opposes the notion that an incumbent LEC can free itself of resale obligations simply by "bundling" services that are subject to resale with those that are not. This has the obvious potential for creating a loophole that could completely undermine the resale requirements of the Act by allowing incumbent LECs to effectively shield their customers from the competitive initiatives of resellers by offering them telecommunications services that are bundled with other retail services or products.[1]

As discussed hereinafter, the resale provisions of the Act and FCC rules do not permit incumbent LECs to side-step their duty to make telecommunications services available for resale merely by bundling such services into a retail service package. Such conduct is also inconsistent with the pro-competitive telecommunications policy of this State.

---

[1] Sprint-United's comments that the Consumer Advocate requests the TRA to find that inside wire and CPE are telecommunications services (*see United Telephone-Southeast, Inc. Response to CAPD's Petition to Intervene* (Sept. 12, 2002)), and BellSouth's comments that the Consumer Advocate invites the TRA to mandate the resale of services that are not telecommunications services (*see Comments of BellSouth Telecommunications, Inc. in Support of Its Petition to Intervene and in Opposition to Position of Consumer Advocate Division* (Sept. 16, 2003)), grossly mischaracterize the Consumer Advocate's position in this case and should be disregarded.

ISSUES

The Directors instructed the parties to address the following issues: Do state and/or federal statutes, rules, orders or other provisions require that all or any part of an offering which bundles regulated service and non-regulated services be made available for resale?[2] If so, should the wholesale discount apply? If yes, how should the wholesale discount apply?

ARGUMENT

Notwithstanding the Incumbent LEC's Bundling, Discounted Pricing or Packaging of Services, Section 251(c)(4) Requires Incumbent LECs to Offer for Resale at Wholesale Rates Any Service That Meets the Statutory Definition of Telecommunications Service, If Such Service Is Offered at Retail to End-User Customers.

The resale obligations of incumbent LECs, such as Sprint-United and BellSouth, are governed primarily by section 251(c) of the Act, which states in pertinent part:

> In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:
> * * *
> (4) Resale
> The duty —
> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service . . . .

47 U.S.C.A. § 251(c) (2001).

The FCC has concluded that the incumbent LEC's resale obligations apply to "each retail

---

[2] Although this issue is framed in terms of "regulated" and "non-regulated" services, the Consumer Advocate addresses the issue in terms of "telecommunications services" which are subject to resale under the Act and other "non-telecommunications services" that individually are not subject to resale. The Consumer Advocate takes this approach because, as shown below, federal law discusses the incumbent LEC's resale obligations in terms of "telecommunications services" rather than "regulated services".

service that: (1) meets the statutory definition of a 'telecommunications service;' and (2) is provided at retail to subscribers who are not 'telecommunications carriers'". *Local Competition Order*, FCC 96-325, 1996 WL 452885, ¶ 871 (Aug. 8, 1996).

The Act defines the term "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." 47 U.S.C.A. § 153(46) (2001) (*emphasis added*). The Act in turn defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C.A. § 153(43) (2001).

Accordingly, the incumbent LEC's resale obligation is rather broad and extends to any service that falls within the Act's comprehensive definition of "telecommunications service," provided that the incumbent LEC offers the service to its retail end-users.[3] *See Advanced Services Second Report and Order*, FCC 99-330, 1999 WL 1016337, ¶¶ 13-14 (Nov. 9, 1999) (finding that the ordinary meaning of "at retail" constitutes sales to end-users).

In the *Local Competition Order*, the FCC discussed the broad scope of the Act's resale mandate, including the incumbent LEC's duty to make available for resale services that are bundled and services that are offered at discounted rates. Paragraph 877 makes it clear that the Act requires the resale of bundled service offerings at wholesale rates: "We conclude that the plain language of the 1996 Act requires that the incumbent LEC make available at wholesale rates retail services that are actually composed of other retail services, i.e., bundled service offerings." *Local Competition*

---

[3] Incumbent LECs have no duty to resale at wholesale rates services that are not deemed "telecommunications services" within the meaning of the Act. *See, e.g., MCI Telecomm. Corp. v. Sprint-Florida, Inc.*, 139 F.Supp.2d 1342, 1345-1346 (N.D.Fl. 2001).

Order at ¶ 877 (*emphasis added*).

Additionally, paragraph 948 points out that the Act requires the resale of discounted offerings at wholesale rates:

> Section 251(c)(4) provides that the 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.

Local Competition Order at ¶ 948 (*emphasis added*).[4]

The importance of an open and unfettered system of resale in the development of competitive markets is further recognized in paragraph 939, which declares that, given the probability that resale restrictions and conditions may have anti-competitive results, any such resale restrictions are presumptively unreasonable. *See Local Competition Order* at ¶ 939. Moreover, the burden of rebutting this presumption by showing that imposed restrictions or conditions are reasonable is placed squarely on the incumbent LEC. *See Id., see also* 47 C.F.R. § 51.613(b) (2003) ("[A]n incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory") (*emphasis added*).

In 1999, the FCC reaffirmed the Act's open resale mandate when the agency relied on section 251(c)(4) as well as the above-discussed provisions of the *Local Competition Order* to strike down an Arkansas law that would have permitted incumbent LECs to refrain from reselling bundled

---

[4] The Act and this provision of the *Local Competition Order* require incumbent LECs to offer for resale at wholesale rates contract service arrangements, many of which provide bundled service packages to end-user customers.

services and discounted service offerings. *See Memorandum Opinion and Order (Arkansas Preemption Order)*, FCC 99-386, 1999 WL 1244073 (Dec. 23, 1999). The FCC concluded that the resale provisions of the Arkansas law plainly contradicted section 251(c)(4)(B)'s prohibition of unreasonable limitations because it violated FCC rules which require incumbent LECs to apply the wholesale discount to special reduced rates and which require the resale of "all bundled retail service offerings." *Arkansas Preemption Order* at ¶ 47 (*emphasis added*).

In discussing the anti-competitive harm of such resale restrictions, the FCC stated:

> [The Arkansas law's] inconsistency with federal law is not benign. By excluding service packages from the federal resale requirement, and by exempting all of an incumbent LEC's promotional or discount prices - including those lasting longer than 90 days - from the federal wholesale requirement, [the Arkansas law] impedes the complete achievement of Congress' goal of assisting the efforts of new competitors seeking to enter the local telecommunications markets through resale. As the Local Competition Order states, exemptions such as those created by the [Arkansas law] 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."

Arkansas Preemption Order at ¶ 48 (*citations omitted*).

Accordingly, it is clear that federal law does not permit an incumbent LEC to escape its resale obligations merely by creating a retail service package that bundles telecommunications services with other retail services.

With respect to the application of wholesale rates to services available for resale, sections 251(c)(4) and 252(d)(3) require all telecommunications services that are subject to the section 251(c)(4) resale requirement to be made available for resale at established wholesale rates. Section 251(c)(4) specifically provides that incumbent LECs must offer telecommunications services for resale "at wholesale rates". *See* 47 U.S.C.A. § 251(c)(4) (2001). Moreover, state commissions establish these wholesale rates pursuant to section 252(d)(3), which states:

> For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

47 U.S.C.A. § 252(d)(3) (2001) (*emphasis added*).

Accordingly, if an incumbent LEC has a duty to offer a telecommunications service for resale under section 251(c)(4), the service must be offered at wholesale rates established by the state commission pursuant to section 252(d)(3).[5]

Only a few, narrowly-crafted wholesale discount exemptions have been established. The FCC has carefully analyzed and specifically delineated those "telecommunications services" that do not fall within the incumbent LEC's section 251(c)(4) resale obligations. Telecommunications services excluded from the wholesale discount requirement of this section include the following:

1. Exchange access services, on the ground that such services are not provided at retail (*see* 47 C.F.R. § 51.605(b) (2003); *see also Local Competition Order* at ¶ 873);

2. Advanced services provided to Internet Service Providers, on the ground that such services are not provided at retail (*see* 47 C.F.R. § 51.605(c) (2003); *see also, Advanced Services Second Report and Order* at ¶ 19); and

3. Promotional offerings whose rates are in effect for no longer than 90 days, on the grounds that such rates are not retail rates within the meaning of section 251(c)(4) and that the pro-competitive benefits of such short-term promotions will outweigh any potential anti-competitive

[5] The TRA previously has determined the wholesale rates that Sprint-United and BellSouth must charge for resale of such services. *See Final Order (Avoidable Costs Order),* Docket No. 96-01331, p. 10 (Jan. 17, 1997).

effects (*see* 47 C.F.R. § 51.613(a)(2) (2003); *see also Local Competition Order* at ¶¶ 949-950).[6]

Bundled service offerings and discounted rate offerings have not been heretofore excluded from the Act's resale requirements. Indeed, as previously discussed, the FCC has specially addressed these issues and determined that bundled and discounted service offerings fall within the incumbent LEC's section 251(c)(4) resale obligations. Accordingly, such services must be offered for resale at wholesale rates.

Federal Law Requires Telecommunications Services That Are Bundled into Retail Service Packages to Be Resold at the Promotional Rate Rather Than the General Tariff Rate.

An incumbent LEC's offer to make available for resale the telecommunications services contained in the bundle at the wholesale discount off the general tariff rate fails to cure the anti-competitive effects created by the restriction on resale of bundled services. This can be illustrated by considering pertinent data filed by BellSouth in support of its BellSouth Integrated Solutions ("BIS") tariff filed in Docket No. 03-00512.[7]

The BIS tariff offers bundled service packages consisting of telecommunications services and other non-regulated services. One of the bundled packages, the BIS-PRI bundle, is offered to BellSouth's end-user customers at a total promotional rate of $759. This amount consists of a promotional rate of $488 for the telecommunications services portion of the bundle, and a

---

[6] Although there is no requirement to apply the wholesale discount to promotional offerings whose rates are in effect for no longer than 90 days, such offerings still must be made available for resale. *See, e.g., U.S. West Comm., Inc. v. Hix,* 183 F.Supp.2d 1249, 1260 (D.Co. 2000); *MCI Telecomm. Corp. v. BellSouth Telecomm. Inc.,* 7 F.Supp.2d 674, 682 (E.D.N.C. 1998).

[7] BellSouth's BIS tariff involves essentially the same issues as those presented in this case and, accordingly, the Consumer Advocate has filed its *Complaint and Petition to Intervene* in that docket. Because data requests have not been propounded in the instant docket, the Consumer Advocate does not have the necessary information to present any analysis regarding Sprint-United's Safe and Sound II Solution tariff.

promotional rate of $271 for the non-regulated services portion of the bundle ($488 + $271 = $759). *See BellSouth's Response to Staff Data Request Dated September 16, 2003* at Item No. 2, Page 1 of 1 (Sept. 23, 2003). The monthly recurring general tariff rate for the telecommunications services portion of the bundle is $749.

If the restriction on resale of bundled service offerings is applied in this situation, the competitor would have to purchase the telecommunications services portion of the bundle from the general tariff at the wholesale rate of $629 ($749 x (100% - 16%)).[8] In order to match BellSouth's retail price for the service bundle without losing any money, the competitor faces the daunting task of providing $271 worth of non-regulated services, a promotional price that is apparently already reduced, for the wholesale cost of $130 ($759 - $629). Assuming that the competitor is somehow successful in its endeavor to provide $271 worth of non-regulated services for the wholesale cost of $130, the gross profit that the competitor would realize for this effort is zero dollars ($759 - ($629 + $130)). In other words, the competitor still has not made a single dollar on its sale of the bundled service package to end-user customers and, accordingly, has no incentive to compete for the telecommunications business of customers purchasing this bundle of services.

To restrain this type of anti-competitive activity, the Act and FCC rules, as discussed above, require incumbent LECs to make available for resale at wholesale rates services that are bundled and discounted. This requirement is necessary to prevent incumbent LECs from side-stepping their resale obligations under the Act, thereby giving competitors a realistic chance, via resale, to compete with incumbent LECs for the business of customers purchasing such service packages.

Based on the foregoing, it is clear that federal law requires Sprint-United, and all other

---

[8] The general wholesale discount for BellSouth is 16% off the tariffed rate, and the general wholesale discount for Sprint-United is 12.7%. *See Avoidable Costs Order* at p. 10.

incumbent LECs, to resell at wholesale rates any telecommunications service that is provided at retail to end-user customers, including those telecommunications services that are bundled into retail service packages, whether entirely regulated or not, and offered to customers at special discounted rates. As the FCC has pointed out, incumbent LECs could circumvent their federal resale obligations if these "non-standard offerings" were not subject to the resale provisions of the Act. This is so because incumbent LECs easily could defeat the efforts of competitors to enter the market through resale simply by transitioning their own customers to such bundled service offerings. Allowing an incumbent LEC to escape its resale obligations in this fashion would run counter to Congress' goal of creating competition in local telecommunications markets.[9]

How the Wholesale Discount Should be Applied to the Resale of Telecommunications Services Included in a Bundled Service Package May Depend on the Particular Circumstances of Each Tariff and, in this Case, Should Be Determined After Discovery and an Evidentiary Hearing.

As discussed above, federal law does not permit an incumbent LEC to evade the Act's resale requirements simply by bundling telecommunications services into a retail service package. Different approaches could be used to effectuate the Act's resale mandate when incumbent LECs offer telecommunications services to their end-user customers as part of a service bundle. One approach would be to require the resale of the entire bundle of services. Another option would be to require the telecommunications services portion of the bundle to be segregated and resold to

[9] The system of resale created by the Act, including the resale obligations placed on incumbent LECs, is consistent with Tennessee's pro-competitive telecommunications policy. *See* Tenn. Code Ann. § 65-4-123 (Supp. 2003). Additionally, telecommunications companies operating in this State are prohibited from engaging in anti-competitive practices. *See* Tenn. Code Ann. § 65-5-208(c) (Supp. 2003). Accordingly, the anti-competitive effects resulting from operation of Sprint-United's tariff could also run afoul of the General Assembly's goal of creating competition in Tennessee's local telecommunications markets.

competitors at the wholesale discount off the promotional rate.[10]

There may be some situations where the entire bundle of services should be deemed telecommunications services for purposes of resale. Such situations could arise, for instance, where the bundled service package is composed predominately of telecommunications services or where the telecommunications services portion of the bundled offering is either indiscrete or, for whatever reason, inseparable from other bundled services.

At the very least, however, the Act and related FCC rules are very clear and specific about the incumbent LECs' obligation to resale at wholesale rates bundled and discounted services. The Consumer Advocate therefore submits that the law imposes upon incumbent LECs a minimum duty to resell the telecommunications services portion of bundled service packages at the wholesale discount off the promotional rate of such services.

Without having conducted any discovery in this matter, it is difficult to form an opinion about the approach that should be used for resale of Sprint-United's Safe and Sound II Solution tariff. The particularities of the resale of this tariff may well depend on the provisioning, pricing, and cost information related to the various elements of this bundle of services. The Consumer Advocate would be in a much better position to offer specific recommendations regarding resale of Sprint-United's tariff after the discovery phase of this docket has been completed.

CONCLUSION

Based on the foregoing, the Consumer Advocate submits that Sprint-United's Safe and Sound II Solution tariff violates the Act and FCC rules, and is inconsistent with state law, because the local

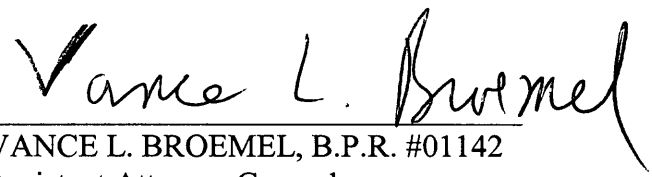
---

[10] In the case of BellSouth's BIS-PRI bundle discussed above, for example, the telecommunications services portion of the bundle would be resold at the wholesale discount off the promotional rate of $488 rather than the general tariff rate.

exchange and caller ID services contained therein are not made available for resale at the fully-discounted wholesale rate. The TRA therefore should not approve Sprint-United's tariff unless and until its terms and conditions regarding resale of telecommunications services are brought into compliance with federal and state law.

RESPECTFULLY SUBMITTED,

PAUL G. SUMMERS, B.P.R. #6285
Attorney General and Reporter



VANCE L. BROEMEL, B.P.R. #01142
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-8733

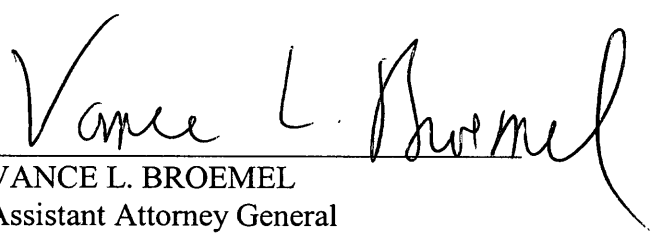
Dated: October 20, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. mail, postage prepaid, or facsimile on October 20, 2003, upon:

James B. Wright, Esq.
Senior Attorney
Sprint-United
14111 Capital Boulevard
Wake Forest, North Carolina 27587-5900

Guy M. Hicks, Esq.
General Counsel
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300



VANCE L. BROEMEL
Assistant Attorney General

69807