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

MAILING ADDRESS

P O BOX 20207
NASHVILLE, TN 37202

MICHAEL E. MOORE
SOLICITOR GENERAL

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

December 30, 2003

Honorable Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re:

TARIFF TO ESTABLISH THE WIRELESS ANSWERS PROMOTION -- TARIFF NUMBER: 20031036, Docket 03-00554

TARIFF TO ESTABLISH CONSUMER WIRELESS COMBINED BILL REWARD OFFER -- Tariff number: 20031379, Docket 03-00624

Dear Chairman Tate:

Enclosed is an original and thirteen copies of the Consumer Advocate and Protection Division's Response to BellSouth's Brief Addressing Federal Resale Requirements in the Context of Combined Offering. Kindly file same in this docket. Copies are being sent to all parties of record. If you have any questions, kindly contact me at (615) 741-8700. Thank you.

Sincerely,

Vance L. Broemel

Vance L. Broemel
Assistant Attorney General
(615) 741-8700

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
BELLSOUTH WIRELESS ANSWERS BUNDLE	)	DOCKET NO. 03-00554
	)	
BELLSOUTH TARIFF TO ESTABLISH CONSUMER WIRELESS COMBINED BILL REWARD OFFER	)	DOCKET NO. 03-00624

CONSUMER ADVOCATE'S RESPONSE TO BELLSOUTH'S BRIEF ADDRESSING FEDERAL RESALE REQUIREMENTS IN THE CONTEXT OF COMBINED OFFERINGS

Comes Paul G. Summers, the Attorney General for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General (hereinafter "Consumer Advocate"), and hereby responds to *BellSouth's Brief Addressing Federal Resale Requirements in the Context of Combined Offerings* filed by BellSouth Telecommunications, Inc. ("BellSouth") on December 19, 2003.

INTRODUCTION

Contrary to its representations to the Tennessee Regulatory Authority ("TRA"), BellSouth has filed a brief that does little more than rehash its arguments made in other dockets involving resale issues, particulary the Sprint-United Tariff 2003-710 to Introduce Safe and Sound II Solution, TRA Docket No. 03-00442. At the TRA Conference of December 15, 2003, BellSouth told this panel that there was something about the so-called "combined" tariffs known as the Wireless Answers Bundle and the Wireless Combined Bill Reward Offer that made these different from the Sprint-United Safe and Sound II tariff. TRA Conference Transcript, December 15, 2003, at page 28.

The TRA panel hearing the Safe and Sound II tariff had already denied that tariff as written on the ground that it did not comply with federal resale law regarding the resale of bundled products:

> DIRECTOR KYLE: Next I have a motion addressing the statutory obligations for resale. The federal Telecom Act requires incumbent local exchange carriers to make telecommunications services that are provided by the carrier at retail available for resale at wholesale rates. The telecommunications services offered as bundled in this tariff are local exchange service and caller ID, and therefore, are retail offerings that must be available for resale.
>
> For this reason, the tariff as it exists today cannot be approved. Therefore, I move that Sprint be given two weeks, until December 29th, 2003, to work with the intervenors on modifying the tariff to comply with the resale requirements of the Act. So move.

TRA Conference Transcript, December 15, 2003, at pages 15-16. This motion was approved. *Id.* at pages 15-17.

Furthermore, the panel hearing the so-called "combined" tariffs had already recognized the need to follow or at least take into account the decision on resale reached by the panel in the Safe and Sound II tariff when ruling on the "combined" tariffs. TRA Conference Transcript, December 15, 2003, at pages 21-22; TRA Conference Transcript, November 24, 2003, at pages 36-37; TRA Conference Transcript, October 6, 2003, at pages 16-20. BellSouth, however, was not content with following normal procedure and insisted on filing a brief which would allegedly show why the "combined" tariffs were somehow different from the Safe and Sound II tariff and, therefore, not subject to the decision reached in that case. With this understanding as to the scope of the brief in mind, the TRA agreed to BellSouth's proposal:

> CHAIRMAN TATE: Well, I find the offer to have a brief helpful, at least in this one. And I think that that's the other thing that I would just ask my fellow directors, that, you know, there may be some of these that are less appropriately lumped together than others. And while I want to obviously be consistent in the decisions here at the TRA, I also am cognizant that sometimes there are differences and reasons that we might treat some things separately or individually or even

differently, if that's the case— if that's the case.

TRA Conference Transcript, December 15, 2003, at pages 42-43.

In the spirit of cooperation, the Consumer Advocate agreed to respond to the proposed BellSouth brief on December 30, 2003, so the briefs would be before this panel well before the January 5, 2004 Conference. BellSouth, however, has completely disregarded what it told this panel and the Consumer Advocate about the scope of this brief. Instead of a brief setting forth the differences between the so-called "combined" tariffs and the Safe and Sound II tariff, what BellSouth has presented is extensive arguments about BellSouth's interpretation of federal resale law, arguments that the panel in the Safe and Sound II case explicitly declined to follow. TRA Conference Transcript, December 15, 2003, at pages 15-16.

The present panel, therefore, should reject the resale arguments put forth by BellSouth and either deny the BellSouth tariffs outright or immediately convene a contested case. The fact that the Consumer Advocate is compelled to engage in extensive briefing on law and facts <u>before</u> it can obtain a contested case puts the Advocate at an enormous disadvantage in trying to present its case. In particular, BellSouth has put forth arguments declaring there is no problem when Tennessee consumers of TRA-regulated services are asked to subsidize non-regulated services. BellSouth Brief at pages 9-10. As the case stands now, there is a danger that the TRA will take these arguments at face value. This practice of cross-subsidization by a regulated entity in support of a non-regulated entity, however, is one that requires a hearing so that the TRA can have the benefit of sworn testimony, not lawyers' briefs, on the reasons behind the amount of the subsidies (facts), as well as the legality of such a practice (law).

Finally, the Consumer Advocate strongly objects to BellSouth's attempt at misdirection, by erroneously insinuating that the Advocate is against the use of bundled products. BellSouth Brief at page 15. Nothing could be further from the truth or the point of this case. The Advocate very much welcomes bundled products and wants to see not only BellSouth but its competitors be able to use them. The question is not about whether bundling is legally permissible in a general sense or whether the Consumer Advocate approves or disapproves of bundling. Rather, the question is whether existing regulations can be skirted by bundling telecommunications services with non-telecommunications services or products.

So if BellSouth really means what it says about its desire to offer bundled products in Tennessee as soon as possible, it should go ahead and do so, but do so in accordance with the law.

ARGUMENT

I. FEDERAL LAW REQUIRES THAT TELECOMMUNICATIONS SERVICES THAT ARE BUNDLED INTO RETAIL PACKAGES MUST BE SOLD AT A DISCOUNT ON THE BUNDLED PROMOTIONAL RATE RATHER THAN ON THE HIGHER GENERAL TARIFF RATE

OVERVIEW

Federal law clearly requires the resale of bundled products at the state-approved discount rate. To determine the resale price that BellSouth must charge its competitors for resold services, you take the bundled price, which by its very nature is lower than the general tariff rate, and apply the 16% state-approved discount rate. Thus, for example, if the bundled package contains four telecommunications services that each cost $10.00, and the bundled price is $36.00, or 10% less than the price for the items priced separately, then the resale price is $36.00 less the state-approved discount of 16% ($36.00 x 16% = $5.76), for a resale price of $30.24.

The key issue in this "combined" tariffs case, as well as in the Sprint-United Safe and Sound

II tariff, is how that resale obligation is applied to bundles of services that include regulated and non-regulated "telecommunications services" as well as non-regulated, non-telecommunications services. The Consumer Advocate maintains that the regulated and non-regulated "telecommunications services" portion of the bundle must be offered for resale at the bundled rate, which by its very nature will be less than the general tariff rate, less the state-approved wholesale discount rate which in Tennessee is 16% for BellSouth. Thus, using the figures from the example given above, if the package contains six services, consisting of four telecommunications services and two non-telecommunications services, at $10.00 each, and there is the same 10% reduction for bundling, the four telecommunications services would still have to be resold at $36.00 ($40.00 less the 10% or $4.00 off for bundling), less the 16% wholesale discount rate. Thus, the mere presence of two non-telecommunications services would not destroy the resale obligation.

BellSouth, on the other hand, maintains that it does not have to offer the telecommunications portion of the bundle at the lower bundled rate but can instead force resellers to take the wholesale discount from the higher general tariff rate. Such a practice, however, would effectively destroy resale as a means of furthering competition in the bundled offering segment of the market, a segment which BellSouth claims is of growing importance to consumers. BellSouth Brief at pages 12-13.

A. BELLSOUTH'S "COMBINED" TARIFFS IN THIS CASE ARE BUNDLED OFFERINGS AND THEREFORE FALL WITHIN THE FEDERAL RESALE REQUIREMENTS

BellSouth attempts to argue that the "combined" tariffs at issue in this case somehow fall outside the federal resale requirements. Thus, BellSouth states that "[i]n the Wireless Answers program, BellSouth's promotion provides a discount on a non-telecommunications service not provided by BellSouth." BellSouth Brief at page 7. Therefore, alleges BellSouth, "[n]o discount is being offered on the BellSouth telecommunications service as a result of this promotion. For this reason, the resale rule is simply inapplicable to this promotion." BellSouth Brief at page 7. BellSouth also states, "Likewise, the Combined Bill promotion, which also provides a discount on Cingular Wireless Service when customers combine their wireless service on the same bill used for their local service from BellSouth. Again, because the discount is provided only on a service that is not a telecommunications service and that is not offered by BellSouth, this promotion also falls outside the scope of the federal resale requirement." BellSouth Brief at page 8.

In reality, however, the Wireless Answers and Combined Bill "promotions" are packages or bundles that include discounts for the purchase of telecommunications services and other non-regulated services. This is so because of a simple, but resounding fact: If the customer does not purchase the telecommunications services portion of the "combined" offering, the customer does not receive the discount. Thus, notwithstanding the choice of words used to label these offerings, the telecommunications services and the discounts offered in these promotions are inextricably linked and, accordingly, could not be any more closely bundled or packaged together in one deal. The FCC specifically recognizes that such situations should be treated as bundling. *See Second Report and Order* released June 3, 1996 in FCC 96-249 at paragraph 248 ("We would also treat as bundling the situation in which an entity offers one service at a discount if the customer purchases another service.")

Additionally, examination of the tariffs in more detail supports the bundling conclusion. For instance, the Wireless Answers promotion offers the customer a \$2, \$5, or \$10 per month discount on its Cingular wireless bill if, and only if, the customer also subscribes to BellSouth's landline telecommunications services. The amount of the discount is even determined by the type of landline telecommunications services that the customer purchases, and the discount will be discontinued if the landline telecommunications services are discontinued. BellSouth also has confirmed that about one-third of the $2, $5, or $10 per month discount would be funded by the regulated operations of BellSouth as opposed to Cingular. *See BellSouth's Response to Staff Data Request Dated September 25, 2003* (Sept. 29, 2003).

Likewise, the Combined Bill promotion offers the customer a discount equal to 10% of its Cingular wireless bill, up to $99.99, if, and only if, the customer also subscribes to BellSouth's landline telecommunications services. BellSouth has confirmed that BellSouth's regulated operations will fund about two-thirds of this 10% discount. *See BellSouth's Response to Staff Data Request Dated December 5, 2003* at Item No. 4, Page 1 of 1 (Dec. 12, 2003). Thus, the Combined Bill tariff could authorize a $9.99 per month discount, provided that the customer subscribes to Cingular wireless and BellSouth landline telecommunications services. Up to $6.66 of the discount would be funded by BellSouth as opposed to Cingular.

Accordingly, BellSouth's attempts to characterize both tariffs as involving mere discounts for non-regulated Cingular wireless services should be rejected. Neither tariff provides straightforward discounts on non-regulated wireless services funded by Cingular. In each case, the customer's discount is tied directly to the customer's mandatory purchase of BellSouth's telecommunications services, and in each case BellSouth's regulated operations would fund a substantial portion of the discount. These tariffs constitute nothing more or less than the bundled service packages that this Authority has already considered in the Sprint-United Safe and Sound II case (Docket No. 03-00442). Pursuant to federal law, the TRA should, at the very least, determine the amount of discount that the total bundle price represents over the price of the items if bought separately; then apply the 16% discount to the telecommunications portion of the bundle.

B. FEDERAL LAW MANDATES RESALE OF BUNDLED PRODUCTS AT THE PROMOTIONAL RATE RATHER THAN THE HIGHER GENERAL TARIFF RATE

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 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.[1] *See Advanced Services Second Report and Order*, FCC 99-330, 1999 WL 1016337, ¶¶ 13-14 (Nov. 9, 1999) (finding that

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[1] 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).

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 <u>at wholesale rates</u> retail services that are actually composed of other retail services, i.e., <u>bundled service offerings</u>." *Local Competition 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 <u>at wholesale rates</u> 'any telecommunications service' that the carrier provides at retail to noncarrier subscribers. This language makes <u>no exception for promotional or discounted offerings</u>, 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*).[2]

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

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[2] 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.

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*). This portion of the *Local Competition Order* is reaffirmed by the FCC's rules (*see* 47 C.F.R. §§ 51.605(e) and 51.613), as well as case law (*see, e.g., AT&T Comm. Inc. v. BellSouth Telecomm. Inc.*, 7 F.Supp.2d 661, 670-674 (E.D.N.C. 1998)).

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 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 retail service packages and bundles that contain telecommunications services that otherwise must be resold at fully-discounted wholesale rates.

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 "that the carrier provides at retail" 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).[3]

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

[3] 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).

(*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 effects (*see* 47 C.F.R. § 51.613(a)(2) (2003); *see also Local Competition Order* at ¶¶ 949-950).[4]

Bundled and discounted service 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.

II. BELLSOUTH'S "COMBINED" TARIFF OFFERINGS RAISE SERIOUS ANTI-COMPETITIVE CONCERNS.

A. ANTI-COMPETITIVE SAFEGUARDS MUST BE OBSERVED WHEN INCUMBENT CARRIERS SUCH AS BELLSOUTH OFFER "COMBINED"/BUNDLED SERVICE PACKAGES.

Although BellSouth acknowledges that its regulated telecommunications operations would fund substantial portions of the discounts provided to customers that purchase the "combined" tariff bundles, it nevertheless maintains that the telecommunications services portions of these service packages do not have to be resold to competitors at fully-discounted wholesale rates, notwithstanding

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[4] 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).

the federal law, cited above, which requires incumbents such as BellSouth to offer for resale bundled and discounted telecommunications services. BellSouth Brief at pages 9-10. BellSouth's position, however, fails to recognize that the customer must purchase the telecommunications services portion of the "combined" tariff in order to qualify for the discount. Apparently, BellSouth is of the opinion that it may defeat federal resale requirements as long as it makes an internal choice to deduct the discount from the customer's bill generated by its wireless affiliate, Cingular. The Consumer Advocate does not believe that federal resale requirements can be disregarded so easily.

In its brief, BellSouth extols the customer benefits of bundling (although it claims that its "combined" tariffs are not bundles), and BellSouth forthrightly asserts that all carriers should be encouraged to offer bundles of services in a competitive marketplace. BellSouth Brief at pages 2-3. There is little disagreement with this portion of BellSouth's argument. The Consumer Advocate is a firm believer in consumer choice, including consumer preferences for bundling and one-stop shopping. The Consumer Advocate is also of the opinion that all carriers, including BellSouth as well as resellers, should have a fair opportunity to offer these bundled service packages to consumers in a competitive marketplace. Accordingly, the TRA will find no disagreement between BellSouth and the Consumer Advocate with respect to BellSouth's right to offer bundled service tariffs; its right to combine telecommunications services with non-telecommunications services into one service package; or its right to price these service bundles competitively in order to attract and maintain customers.

The Consumer Advocate's point of disagreement comes when BellSouth claims that it has no obligation to offer the telecommunications services portion of the bundle at fully-discounted wholesale rates, despite overwhelming federal authority that places the duty to do so squarely on the shoulders of this incumbent carrier. The resale provisions of the federal Act and related resale rules of the FCC establish the mechanism by which resellers enter the competitive marketplace. BellSouth's failure to honor this legally-imposed resale obligation is anti-competitive because such failure to comply will likely cause harm to a reseller's ability to enter and compete in this market segment on a fair, non-discriminatory, and competitively-neutral footing.

BellSouth finds many of the "teachings" on bundles in the FCC's *Bundling Order.* BellSouth Brief at pages 2-3 (*quoting Bundling Report and Order*, released March 30, 2001 in CC Docket Nos. 96-91 and 98-183.) While the *Bundling Order*, as BellSouth notes, concludes that all carriers, including incumbents, should be allowed to bundle products and services, the *Order* further cautions that incumbents such as BellSouth must abide by certain safeguards that currently exist to protect against anti-competitive behavior that could arise from an incumbent's bundling of services. *Order* at paragraph 33. The *Order* specifically states that these anti-competitive safeguards include the incumbent carrier's federal resale obligations:

> In conjunction with the benefits [of bundling], we recognize risks associated with incumbent LEC bundling of CPE with local exchange service . . . . We must now take into account, however, that the 1996 Act changed dramatically the telecommunications landscape by, among other things, removing entry barriers in the local market . . . . Incumbent LECs must also offer for resale at wholesale rates any retail telecommunications service. Section 253 of the Act also mandates that states may not enact any requirement that prohibits or has the effect of prohibiting any entity from providing interstate or intrastate telecommunications services . . . .

Order at paragraph 36 (*emphasis added*).

Accordingly, the FCC's *Bundling Order,* relied on so heavily by BellSouth, provides that an incumbent carrier's bundling of its telecommunications services into retail service packages cannot be accomplished without certain anti-competitive safeguards, including the federal Act's open resale mandate. The *Bundling Order* therefore recognizes what BellSouth refuses to recognize — that an incumbent carrier may offer bundles of services as long as it observes anti-competitive safeguards, including the incumbent's duty to offer bundled and discounted services for resale at fully-discounted wholesale rates.

In addition, the *Bundling Order* recognizes that states may protect against other anti-competitive behavior that could be result from an incumbent carrier's bundling of services. Specifically, the issue of cross-subsidization is addressed:

> To protect against cross-subsidy of enhanced services by intrastate ratepayers, which is an important issue if BOCs can bundle interstate enhanced services with local exchange service, a state need only use its normal regulatory mechanisms to ensure that intrastate rates are not too high in light of that assignment.

Order at paragraph 45.

BellSouth freely admits that the costs of its "combined" tariffs are shared between the regulated operations of BellSouth and its nonregulated affiliate, Cingular. BellSouth Brief at page 9. Despite this sharing of specific, identifiable costs between BellSouth and Cingular, BellSouth nonetheless maintains that the rates for the intrastate telecommunications services portion of the bundle should not be discounted or offered to competitors for resale at promotional rates. This situation raises serious concerns about cross-subsidization and preferences to competitive services or affiliated entities, which are contrary to state law. *See* Tenn. Code Ann. § 65-5-208(c) ("The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.")

Accordingly, before any decision is made to approve BellSouth's "combined" tariff offerings, the TRA should consider the potential anti-competitive harm of such offerings if they are allowed to go into effect without observing appropriate federal and state anti-competitive safeguards.

B. COMPETITIVE REALITIES REQUIRE 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.[5]

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 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%)).[6] 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

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[5] 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 dockets, the Consumer Advocate does not have the necessary information to present a comparable analysis regarding BellSouth's "combined" tariffs.

[6] The general wholesale discount for BellSouth is 16% off the tariffed rate. *See Avoidable Costs Order* at p. 10.

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.

CONCLUSION

Based on the foregoing, it is clear that federal law requires BellSouth, and all other 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 or combined into retail service packages that are 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.[7]

[7] 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

RESPECTFULLY SUBMITTED,

Vance L. Broemel

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

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile on December 30, 2003, upon:

Joelle Phillips, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300

Henry Walker, Esq.
Boult, Cummings, Conners & Berry
414 Union Street, Suite 1600
Nashville, Tennessee 37219

Vance L. Broemel

VANCE L. BROEMEL
Assistant Attorney General

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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 BellSouth's "combined" tariffs could also run afoul of the General Assembly's goal of creating competition in Tennessee's local telecommunications markets.