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April 5, 2012

Via Electronic Filing and Overnight Mail

Walter Thomas, Secretary
ALABAMA PUBLIC SERVICE COMMISSION
RSA Union Building, Suite 850
100 N. Union Street
Montgomery, AL 36104

**Re: BellSouth Telecommunications, Inc., d/b/a AT&T Alabama or AT&T Southeast vs. LifeConnex Telecom, LLC f/k/a Swiftel, LLC
Docket No. 31317**

BellSouth Telecommunications, Inc., d/b/a AT&T Alabama or AT&T Southeast vs. Tennessee Telephone Service, Inc., d/b/a Freedom Communications, USA, LLC - Docket No. 31318

BellSouth Telecommunications, Inc., d/b/a AT&T Alabama or AT&T Southeast vs. Affordable Phone Services, Inc., d/b/a High Tech Communications - Docket No. 31319

BellSouth Telecommunications, Inc., d/b/a AT&T Alabama or AT&T Southeast vs. Image Access, Inc., d/b/a New Phone - Docket No. 31320

BellSouth Telecommunications, Inc., d/b/a AT&T Alabama or AT&T Southeast vs. BLC Management, LLC d/b/a Angles Communications Solutions – Docket No. 31322

BellSouth Telecommunications, Inc., d/b/a AT&T Alabama or AT&T Southeast vs. dPi Teleconnect, LLC - Docket No. 31323

Dear Mr. Thomas:

AT&T Alabama respectfully submits for the Commission's consideration and as a subsequent development in connection with the above referenced matters, the attached Order of the Public Utility Commission of Texas in Docket 39028, signed today, April 5, 2012.

Sincerely,

Francis B. Semmes
General Attorney – AT&T Alabama

FBS/mhs
Attachment

cc: Honorable John Garner, Chief ALJ
Darrell Baker, Director, Telecommunications Division (via email)
Parties of Record

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

Re: BellSouth Telecommunications, Inc., d/b/a AT&T Alabama or AT&T Southeast vs. LifeConnex Telecom, LLC f/k/a Swiftel, LLC
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AT&T ALABAMA’S NOTICE OF SUBSEQUENT DEVELOPMENT

BellSouth Telecommunications, LLC d/b/a AT&T Alabama (“AT&T Alabama”) respectfully submits the attached document to inform the Alabama Public Service Commission (“Commission”) of recent legal developments in Texas, in which the Public Utility Commission of Texas affirmed that the Commission-established resale discount rate should be applied to the promotional cashback amount.

Attachment A is a copy of an Order of the Public Utility Commission of Texas, signed April 5, 2012, that concludes that “AT&T Texas’ [sic] method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the

terms of the parties' interconnection agreement." *See* Attachment A at 1. In that proceeding, a reseller

asserted that AT&T Texas' [sic] method of calculating cash back promotions for resellers violates state and federal law and the terms of the parties' interconnection agreement (ICA) because AT&T Texas refuses to provide resellers with the same amount of credit that AT&T Texas provides its own retail customers thereby violating the principle that wholesale rates should be less than retail rates. According to [the reseller], AT&T Texas' calculation creates the opposite effect, which are wholesale rates greater than retail rates.

[The reseller] claim[ed] that the wholesale discount percentage of 21.6% (avoided costs) should not be applied to the promotional cash back amount but should only be applied to standard retail prices.

Attachment A at 2. The Texas Commission rejected these arguments, which are the same arguments the Resellers presented in these consolidated dockets, and granted AT&T Texas's Motion for Summary Decision "for the reasons contained in that motion and AT&T Texas' [sic] supporting documentation." *Id.* at 4.

For the foregoing reasons, AT&T Alabama respectfully requests that the Commission consider this subsequent development.

Respectfully submitted on this the 5th day of April, 2012.



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TELECOMMUNICATIONS, INC., d/b/a
AT&T SOUTHEAST d/b/a AT&T ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on all parties of record by placing a copy of same in the United States Mail, properly addressed and postage prepaid on the 6th day of April, 2012.

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Received: 4-5-12
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✓ Cosgrove
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___ Villarreal
So Done

DOCKET NO. 39028

PETITION OF NEXUS COMMUNICATIONS, INC. FOR POST-INTERCONNECTION DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS UNDER FTA RELATING TO RECOVERY OF PROMOTIONAL CREDIT DUE	§ § § § § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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**ORDER NO. 15
GRANTING AT&T'S MOTION FOR SUMMARY DECISION**

**I.
Summary**

The Motion for Summary Decision of Southwestern Bell Telephone Company d/b/a AT&T Texas' ("AT&T Texas") is granted and the Motion for Summary Decision and Petition of Nexus Communications, Inc. ("Nexus") are denied. The arbitrators conclude that AT&T Texas' method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the terms of the parties' interconnection agreement.

**II.
Background**

On December 28, 2010, Nexus filed a petition against AT&T Texas for failing to calculate the credits on cash back promotions correctly.¹ Nexus filed the petition for post-interconnection dispute resolution pursuant to the Public Utility Regulatory Act (PURA), the Federal Telecommunications Act of 1996 (FTA) and P.U.C. PROC. R. 21.1 – 21.129, P.U.C.

¹ *Nexus Communications, Inc.'s Petition for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company d/b/a AT&T Texas under FTA Relating to Recovery of Promotional Credit Due* (December 28, 2010).

PROC. R. 22.1 – 22.284, and P.U.C. SUBST. R. 26.1 – 26.469. AT&T Texas filed its response to Nexus' petition on January 7, 2011.²

On August 10, 2011, the arbitrators issued Order No. 10, *Requesting Briefs on Threshold Legal Issue*. In Order No. 10, the arbitrators determined that the threshold legal issue in this docket is:

Does AT&T Texas' method of calculating cash back promotional offerings available for resale comply with all applicable federal and state law and terms of the parties' interconnection agreement?

Nexus' filed its Motion for Summary Decision on September 16, 2011 and filed its Reply Brief on Threshold Issues/Motion for Summary Decision on October 14, 2011. In its Motion for Summary Decision, Nexus asserted that AT&T Texas' method of calculating cash back promotions for resellers violates state and federal law and the terms of the parties' interconnection agreement (ICA) because AT&T Texas refuses to provide resellers with the same amount of credit that AT&T Texas provides its own retail customers thereby violating the principal that wholesale rates should be less than retail rates.³ According to Nexus, AT&T Texas' calculations create the opposite effect, which are wholesale rates greater than retail rates.

Nexus claims that the wholesale discount percentage of 21.6% (avoided costs) should not be applied to the promotional cash back amount but should only be applied to standard retail prices. Nexus argued that the formula that should be used by AT&T Texas to calculate the wholesale price associated with special sales or promotions is the standard retail price subtracted by the full cash back promotional amount subtracted by the avoided costs (wholesale price = (retail price – promotional cash back) – avoided costs). In Nexus' formula, avoided costs are calculated by multiplying the standard retail prices by the wholesale discount percentage (the promotional discount is not reduced by avoided costs).⁴

On September 16, 2011, AT&T Texas filed its Motion to Dismiss and filed its Response to Nexus' Brief on Threshold Issue/Motion for Summary Decision on October 14, 2011. AT&T Texas avers that the parties' ICA, which incorporates the resale provisions of the Federal Telecommunications Act (FTA), provides that “[f]or promotions of more than 90 days, [AT&T]

² *AT&T Texas' Response to Nexus Communications, Inc.'s Petition for Post-Interconnection Dispute* (January 7, 2011).

³ *Nexus Communication's, Inc.'s Brief on Threshold Issues/Motion for Summary Decision* at 1 (September 16, 2011).

⁴ *Id* at 14-16.

Texas will make the services to [Nexus] available at the avoided cost discount from the promotional rate.”⁵ AT&T Texas asserts that this provision was interpreted in the *Bell South Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 441 (4th Cir. 2007) (*Sanford*) case. AT&T Texas goes on to say that in *Sanford*, the Fourth Circuit held that “the price lowering impact of any ...90-day-plus promotions on the real tariff or retail list price [must] be determined and ...the benefit of such a reduction [must] be passed on to resellers by applying the wholesale discount to the lower actual retail price.” AT&T Texas applies the wholesale discount of 21.6% both to the amount Nexus pays for the underlying service and to the retail value of any cash back credit. The formula used by AT&T Texas to determine the wholesale retail price on a promotional offering over 90 days is: wholesale price = [retail price – (avoided costs X retail price)] – [promotional cash back – avoided costs X promotional cash back)].⁶

AT&T Texas explained that in the FCC’s *Local Competition Order*, the FCC stated that avoided costs for incumbent local exchange carriers’ (ILECs) services should be calculated by taking the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate. AT&T notes that the FCC further stated in this order that when a promotion, like the cash back promotion at issue in this docket, is extended to resellers, the “retail price” by which the discount percentage is to be multiplied is the promotional retail price. The FCC ruled that a promotional offering that lasts longer than 90 days is not short-term “and must therefore be treated as a retail rate.”⁷

AT&T Texas asserts that even though the terms of the parties’ ICA and federal law are unambiguous, Nexus claims that it is entitled to receive the full retail amount of any cash back promotion even though it is not an end user, but a reseller that purchases AT&T Texas’s services at wholesale prices for resale to its own end users.⁸

⁵ *AT&T Texas Motion for Summary Decision* at 4 (September 16, 2011).

⁶ *Id* at 4-5.

⁷ *Id* at 6-7.

⁸ *Id* at 5.

**III.
Ruling**

The Arbitrators find that AT&T Texas' motion should be granted for the reasons contained in that motion and AT&T Texas' supporting documentation. All pending requests for relief of Nexus are hereby denied and this case is dismissed without prejudice.

SIGNED AT AUSTIN, TEXAS the 5th day of April, 2012.

PUBLIC UTILITY COMMISSION OF TEXAS



**LIZ KAYSER
ARBITRATOR**



**SCOTT SMYTH
ARBITRATOR**

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NOTES:

PUC DOCKET NO. 39028, ORDER NO. 15

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