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January 20, 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 as supplemental authority the attached Order the Kentucky Public Service Commission entered on January 19, 2012 in Case No. 2009-00127. This Order finds that when dPi, a reseller, qualifies for a cashback promotion, it is entitled to a bill credit in the amount of the retail cashback amount discounted by the Commission-approved resale discount rate.

Just as the Resellers argued in Alabama, dPi argued in Kentucky that discounting the retail cashback benefit is problematic when, for a single month, it results in what dPi erroneously characterizes as a wholesale price that is higher than the retail price. In fact, dPi's briefs and oral arguments before the Kentucky Commission on this issue were virtually identical to the Resellers' briefs and oral arguments in these proceedings.

The Kentucky Commission correctly rejected these arguments and found that "***[a]ny*** promotional discount must be reduced by the wholesale discount." Order at 15 (emphasis added). See also Id. at 13.

Sincerely,

Francis B. Semmes
General Attorney – AT&T Alabama

FBS/mhs
Attachment

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

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DPI TELECONNECT, L.L.C. COMPLAINANT V. BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T KENTUCKY DEFENDANT _____ DISPUTE OVER INTERPRETATION OF THE PARTIES' INTERCONNECTION AGREEMENT REGARDING AT&T KENTUCKY'S FAILURE TO EXTEND CASH-BACK PROMOTIONS TO DPI	))))))))))))))))))	CASE NO. 2009-00127

ORDER

This case is before the Commission on a billing dispute between dPi Teleconnect, Inc. ("dPi") and BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky"). The parties have filed extensive discovery, testimony and briefs on the issues and the oral argument was held on October 25, 2011. The parties have agreed to submit the matter to the Commission on the record.

Background

DPi is a prepaid provider of local telecommunications service that purchases "wholesale" service from AT&T Kentucky and resells it to its own

customers, who generally would not qualify for traditional phone service. For example, dPi purchases local service from AT&T Kentucky for $13.85 and then sells it, on a prepaid basis, to its customers for approximately $55.00 a month.[1]

Under Federal Communication Commission ("FCC") regulations, if an incumbent, such as AT&T Kentucky, offers a promotion that lasts greater than 90 days, it must discount the wholesale price to a wholesale purchaser (such as dPi) if the wholesale purchaser's customers would have qualified for the promotional discounts had they been AT&T Kentucky customers. 47 C.F.R. § 51.613.

The instant complaint focuses on three separate AT&T Kentucky promotional offerings. The primary component of these promotions involved a cash-back offering that gave qualifying AT&T Kentucky customers the opportunity to receive a check in a designated amount from AT&T Kentucky.[2] Specifically, if the customer purchased certain features, he would receive the cash back in the form of a check or voucher. DPi purchased the promotion at issue from AT&T Kentucky at the standard resale rate for the telecommunications services provided in the promotion.

The issue arises because AT&T Kentucky did not provide any portion of the cash-back promotion to dPi because AT&T Kentucky believed that offering to provide a gift card, check, coupon or other giveaway in return for the purchase of

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[1] Ferguson Direct Testimony at 23, exhibit PLF-10.

[2] The promotions and the amounts in dispute for each of them are: (1) "Cash Back $100 Complete Choice" for $27,200; (2) "Cash Back $100 1FR with Two Paying Features" for $2,600; and, (3) "Cash Back $50 1FR with Two Paying Features" for $9,200.

telecommunications services was not covered by the FCC regulations requiring AT&T Kentucky to extend those promotions to resellers.

1. dPi's Arguments

DPi asserts that relevant FCC regulations and statutes require AT&T Kentucky to extend the cash-back promotional offers that it provides to its customers to resellers such as dPi.[3] DPi relies upon 47 U.S.C. § 251(c)(4) which provides that a carrier like AT&T Kentucky must:

> (A) [O]ffer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.
>
> (B) [N]ot prohibit, nor impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service.

DPi argues that the FCC requirement that AT&T Kentucky extend the same offers it applies to its retail customers applies to its promotions. Specifically, dPi asserts that the FCC has found that resale restrictions are presumptively unreasonable and that AT&T Kentucky can only rebut this presumption if the restrictions are narrowly tailored.[4]

DPi also points to FCC regulations that it argues supports its position.

47 C.F.R. § 51.605 provides, in relevant part, that:

> (a) [A]n incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates . . . .
>
> . . . .

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[3] DPi's Initial Brief at 4-5.

[4] Id.

> (e) [A]n incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

The applicable regulation provides, in relevant part, that, "an incumbent LEC 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. § 51.623(b).

DPi argues that the cash-back promotions apply to it because the promotions affect the rate that AT&T Kentucky charges its customers for the service (the cash-back promotion effectively reduces the retail cost to less than the amount for which AT&T Kentucky sells the service to dPi). DPi argues that allowing AT&T Kentucky to reduce the rate on the back end by offering the rebate is an unfair and unreasonable method for AT&T Kentucky to circumvent the FCC rules regarding extension of promotions to resale customers.

DPi also argues that the restriction in the cash-back promotions is invalid because it never sought prior Commission approval of the restriction as required by 47 C.F.R. § 51.623(b).

DPi asserts, contra AT&T Kentucky, that the interconnection agreements that govern the relationship between AT&T Kentucky and dPi place a six-year window to challenge a denial of a promotion and not a 12-month time restriction as AT&T Kentucky argues.[5] The first interconnection agreement governing the relationship was in effect from 2003 until 2007, the period of time over which the majority of the disputes arose. DPi argues that the interconnection agreement invokes federal law to control the offering of resale services as well as disputes

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[5] Id. at 5-6.

arising out of those services. To the extent that federal law does not apply, Georgia state law governs, which provides for a six-year window in which to bring a dispute. DPi argues that the newer interconnection agreement, which has a 12-month window in which to file a dispute, does not apply retroactively and does not govern this dispute.[6]

DPi also asserts that AT&T Kentucky has issued several "cash-back" promotions over the last decade and that these cash-back promotions are essentially rebates. The effect, then, is to reduce the overall rate that AT&T Kentucky's customers are charged.[7]

DPi asserts that AT&T Kentucky's billing system automatically overcharges every reseller for every service that the reseller orders that is subject to a promotional discount. It is then up to the reseller to apply for the credits if it understands that it qualifies for the promotional discounts. DPi argues that AT&T Kentucky makes this process as difficult as possible by requiring resellers to meticulously document the credit with the proper data and fill out AT&T Kentucky's online forms and that AT&T Kentucky provides no reason for rejecting promotional credits.[8]

DPi claims that, although it met the criteria for the cash-back promotions, AT&T Kentucky did not inform dPi that it did, or did not, qualify for the discount until after June 2007. (After June 2007, AT&T Kentucky began offering the

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[6] Id. at 6-7.

[7] Id. at 8.

[8] Id. at 9.

discount to dPi). When AT&T Kentucky started to grant the discount in June 2007, dPi sought credit for the previous cash-back promotions but was rebuffed, leading to this complaint.[9]

DPi also argues that it should receive the full value of the cash-back promotion and that the value of the promotion should not be reduced by the wholesale discount rate applied to resale of regular services. For example, if AT&T Kentucky offers retail service to its customers at $20.00, it must sell it to dPi at a Commission-mandated discount of 16.79%. Therefore, dPi is able to purchase the service at $16.64. DPi argues, however, that if AT&T Kentucky offers a promotion for a certain monetary value, the discount rate does not apply to the promotional price. For example, if AT&T Kentucky offers a cash-back promotion of $50.00, it must offer dPi a credit for the whole $50.00 and not reduce that $50.00 by the wholesale discount.[10]

2. AT&T Kentucky's Argument

AT&T Kentucky argues that the obligation to provide promotional credits to resale applies only to "telecommunications services" and, because the promotion is not a "telecommunications service," it does not need to be extended to resellers like dPi.

AT&T Kentucky asserts that 47 U.S.C. § 156(46) defines "telecommunications services" as, "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available

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[9] Id. at 10-11.

[10] Id. at 20-32.

directly to the public . . . ." and that 47 U.S.C. § 153(43) 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."

AT&T Kentucky argues that, based upon these statutory definitions, coupons that can be redeemed as checks are not telecommunications services. AT&T Kentucky asserts that they are merely marketing incentives designed to attract customers and that it has no obligation to resell such marketing incentives. AT&T Kentucky explains that it began offering the cash-back promotion for resale once it merged with AT&T because AT&T had been providing the cash-back promotion before the merger.[11]

AT&T Kentucky acknowledged that the Fourth Circuit Court of Appeals had recently determined that any promotion that involves a retail customer receiving something of value (such as a check) must be made available for resale.[12]

AT&T Kentucky acknowledges that any restrictions on retail have to be nondiscriminatory, and that the FCC has established a presumption that all restrictions are unreasonable and discriminatory. AT&T Kentucky, however, argues that the presumption is rebuttable, and only has to be rebutted once the

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[11] AT&T Kentucky's Initial Brief at 9-10.

[12] VR at 2:06:30.

restriction becomes an issue of complaint, not when the restriction is first proposed.[13]

Citing to the Sanford[14] case out of the Fourth Circuit, AT&T Kentucky asserts that the "touchstone factor" in determining whether a restriction is unreasonable is whether it stifles or unduly harms competition. AT&T Kentucky argues that its restriction on cash-back promotions does not stifle or unduly harm competition.[15]

AT&T Kentucky asserts that it does not compete with dPi. DPi pays AT&T Kentucky $13.85 for basic service; AT&T Kentucky charges its customers $16.55. DPi charges its customers, including taxes and fees, $51.00 for the first month of service; $66.28 for the second month of service; and $56.28 for each month thereafter. Based on these prices, AT&T Kentucky asserts that dPi and it are not competing for the same customers and, therefore, any restriction on the cash-back promotions can have no impact on competition.[16]

AT&T Kentucky argues that, if it must make some sort of refund to dPi, the refund is less than dPi asserts it should be. AT&T Kentucky asserts that the refund should be adjusted by the following factors: (1) the amount of the claims must be reduced by the amount that dPi did not dispute in a timely matter

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[13] AT&T Kentucky's Initial Brief at 10-12.

[14] BellSouth Telecom, Inc. v. Sanford, 494 F.3d 439 (4th Cir. 2007).

[15] AT&T Kentucky's Initial Brief at 13-14.

[16] Id. at 14-15.

pursuant to the 2007 interconnection agreement; and (2) any amounts sought by dPi must be reduced by the 16.79 percent residential resale discount rate.

Regarding the first factor, AT&T Kentucky argues that the 2007 interconnection agreement superseded the previous interconnection agreement and that the new agreement requires the filing of disputes within 12 months of a dispute arising. AT&T Kentucky claims that this applies to $7,350.00 of the cash-back promotions for which dPi asks.[17]

Regarding the second factor, AT&T Kentucky argues that, to the extent dPi is entitled to any cash-back promotions not limited by the 12-month time restriction, the amount should be reduced by the 16.79 percent residential resale discount rate that the Commission has previously established. AT&T Kentucky argues that dPi should be entitled to no more credit for the cash-back component than it would be entitled to if AT&T Kentucky had simply reduced the retail price of the affected service by the same amount.[18]

The wholesale discount serves to set the rate that AT&T Kentucky charges a reseller for service, meaning that, if AT&T Kentucky charges its customers $16.00 for retail service, it must sell the service to dPi at $13.31. AT&T Kentucky argues that this discount applies to promotions that it applies to resellers. Therefore, if a reseller qualifies for a $50.00 promotion, it will actually receive $41.60 of the promotion, the $50.00 promotion minus the 16.79 percent discount.

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[17] Id. at 18-19.

[18] Id. at 22-26.

AT&T Kentucky also asserts that, when processing dPi's claims for promotional credits, AT&T Kentucky discovered that 27 percent of the claims were submitted in error. Thus, AT&T Kentucky argues, any award made to dPi should presume a similar error rate and be reduced by a similar amount.[19]

Discussion

In order to reach a decision on this case, the Commission makes the following determinations:

Although AT&T Kentucky originally argued that the cash-back promotion at issue did not have to be provided for resale because they are not "telecommunications services," AT&T Kentucky did not present this argument at oral argument. As discussed above, AT&T Kentucky concedes that the Fourth Circuit Court of Appeals found that if something of value is provided for a promotion, whether it is a telecommunications service or not, it has to be provided for resale; otherwise, it puts competitors at a competitive disadvantage.

The Commission agrees with the analysis of the Fourth Circuit and finds that the cash-back promotion has to be provided for resale. To find otherwise would provide an unreasonable advantage to AT&T Kentucky versus resellers as AT&T Kentucky could effectively reduce the retail rate by providing a cash-back promotion; a discount that the resellers could not extend to their own customers.

The first interconnection agreement governing the relationship was in effect from 2003 until 2007, the period of time over which the majority of the disputes arose. DPi argues that the interconnection agreement invokes federal

[19] Id. at 29.

law to control the offering of resale services as well as disputes arising out of those services. To the extent that federal law does not apply, Georgia state law governs and provides for a six-year window in which to bring a dispute.

AT&T Kentucky argues that the 2007 interconnection agreement superseded the previous interconnection agreement and that the new agreement requires the filing of disputes within 12 months of a dispute arising. AT&T Kentucky claims that this applies to $7,350.00 of the cash-back promotions for which dPi asks.

It appears that dPi made timely dispute for the claims arising out of the first interconnection agreement. The Commission finds that dPi made timely dispute of those charges and that the 2007 interconnection dispute does not apply retroactively to those disputes.

It also appears that dPi did not make timely disputes for some of the claims that arose after the 2007 interconnection agreement became effective. The 2007 agreement provides for only a 12-month window in which to dispute the denial of a promotional credit. To the extent that dPi did not make timely disputes under the 2007 agreement, the Commission finds for AT&T Kentucky and reduces any credit owed to dPi by $7,350.00.

As discussed above, the Commission finds that the promotional discount must be made available for resale because, if not made available, it would put resellers at a competitive disadvantage. Therefore, the Commission finds that restricting the cash-back promotion from resale is unreasonable.

AT&T Kentucky argues that any credit order to be provided to dPi should be reduced by a 27 percent error rate. AT&T Kentucky alleges that approximately 27 percent of dPi's requests for promotional discounts are made in error (in general, not just applied to the cash-back promotion). Therefore, AT&T Kentucky asserts that any credit awarded to dPi should be reduced by the error rate. The Commission finds that AT&T Kentucky shall not adjust any credit awarded to dPi by the proposed 27 percent error rate. The evidence in the record does not support or prove that the 27 percent error rate was accurate.

The Commission must also resolve whether the credit due dPi has to be reduced by the 16.79 percent wholesale discount. This issue carries greater significance than just this complaint case. Whether or not AT&T Kentucky may reduce any promotional discount by the wholesale discount is currently in litigation in 22 states and involves claims in excess of $100,000,000.[20]

DPi argues that wholesale prices always have to be lower than retail prices; therefore, it does not want the wholesale discount to apply to the promotional credit. For the sake of illustration, the Commission will assume the following facts, as presented by AT&T Kentucky at the hearing:

Wholesale Discount: 20%
Monthly Retail Service rate: $120
Cashback promotion: $100
Result: Monthly Promotional Price of $20

DPi would calculate the resale cost in one of the following ways:

$20 (promotional price)
-$24 (20% of $120 Standard Price)
(-$4) (AT&T pays to dPi $4/month)

[20] VR at 1:19:00.

or

$96 ($120 Retail Price discounted by 20%)
-$100 (Cashback Amount)
(-4) (AT&T pays to dPi $4/month)

In both of the scenarios, AT&T Kentucky must pay dPi for service that dPi orders from AT&T Kentucky. The promotion does not merely reduce the price of the retail service, it forces AT&T Kentucky to give $4.00 to dPi for service that dPi would normally pay AT&T Kentucky for.

AT&T Kentucky and the Fourth Circuit Court of Appeals calculate the resale cost in either of the following ways:

$20 (promotional price)
-$4 (20% of $20 Promotional Price)
-$16 (dPi pays AT&T $16/month)

or

$96 ($120 Retail Price discounted by 20%)
-$80 (Cashback Amount discounted by 20%)
-$16 (dPi pays AT&T $16/month)

Under AT&T Kentucky's calculations, dPi would pay a steeply discounted rate to AT&T Kentucky for the discounted service. The promotional price that AT&T Kentucky provides to its customers is $20.00 a month, whereas dPi would pay $16.00 ($20.00 discounted by 20 percent) for the service.

The Commission finds that any promotional discounts should be adjusted by the wholesale discount. To adopt dPi's position would be to put AT&T Kentucky in the position of paying its competitors to "purchase" AT&T Kentucky's service. Such a result is absurd and leads to an anti-competitive environment. AT&T Kentucky's position still results in dPi receiving a discount on service that

places the price below the promotional price that AT&T Kentucky provides its retail customers.

DPi argues that FCC regulations require any incumbent local exchange carrier ("ILEC") to first seek state Commission approval before placing any restrictions on resale. AT&T Kentucky argues that, although the FCC has concluded that any restrictions on resale are presumed to be unreasonable, it is a rebuttable presumption that only arises when the restriction is challenged. It is only upon a complaint to a state commission that the state commission needs to approve or deny any resale restriction.

The Commission finds that a telecommunications carrier does not have to seek preapproval for a restriction on resale. As a practical matter, it would be unduly burdensome to the Commission to have to review and approve all promotions that incumbents offer. Telecommunication carriers often have dozens of promotions running at the same time. The Commission has not reviewed promotions or any restrictions on resale since the enactment of the 1996 Telecommunications Act.

Moreover, requiring incumbent carriers to seek prior approval before offering a promotion or restriction on resale would harm customers by reducing the number of promotions offered. If an ILEC had to seek preapproval for any promotion that might be restricted from resale, it would constantly be before the Commission seeking such approval. The cost and time involved would remove any financial incentive for ILECs to provide promotional discounts and would remove downward pressure on retail prices for customers.

Based on the above, IT IS HEREBY ORDERED that:

1. The cash-back promotions at issue must be made available for resale.

2. DPi may recover for the credit disputes it brought under and during the 2003-2006 interconnection agreement.

3. DPi may not recover for credit disputes brought under the 2007 interconnection agreement.

4. The credits due dPi shall not be discounted by AT&T Kentucky's proposed 27 percent error rate.

5. Any promotional discount must be reduced by the wholesale discount.

6. An incumbent carrier does not need to seek preapproval from the Commission before placing a restriction on resale.

7. This is a final and appealable order.

By the Commission

ENTERED

JAN 19 2012

KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:

Executive Director

Case No. 2009-00127

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Notice of Supplemental Authority* on all parties of record by placing a copy of same in the United States Mail, properly addressed and postage prepaid on the **20th** day of **January**, 2012.

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