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November 1, 2012

Via Electronic Filing & Overnight Mail

Walter Thomas, Secretary
Alabama Public Service Commission
100 N. Union Street
Suite 850
Montgomery, Alabama 36104

Re: 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

Dear Mr. Thomas:

Enclosed for electronic filing today is AT&T Alabama's Motion for Partial Summary Decision Finding BLC Management, LLC d/b/a Angles Communications Solutions Liable for Undisputed Unpaid Charges. The original and one (1) paper copy will be forwarded to the Commission today via overnight mail. Please distribute as needed and thank you for your assistance in this matter.

Sincerely,

Francis B. Semmes
General Attorney – Alabama

FBS/mhs
Enclosures

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

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

In the Matter of)	Docket No. 31322
BellSouth Telecommunications, LLC)	
d/b/a AT&T Alabama vs. BLC)	
Management, LLC d/b/a Angles Communications)	
Solutions)	

**MOTION FOR PARTIAL SUMMARY DECISION FINDING
BLC MANAGEMENT, LLC d/b/a ANGLES COMMUNICATIONS SOLUTIONS
LIABLE FOR UNDISPUTED UNPAID CHARGES**

BLC Management, LLC d/b/a Angles Communication Solutions (“BLC”) has fled the state, owing AT&T Alabama nearly \$20 million for services it ordered from BellSouth Telecommunications, LLC, d/b/a AT&T Alabama (“AT&T Alabama”) pursuant to the parties’ interconnection agreement (“ICA”). Nearly \$10 million of that past-due amount is *undisputed*, and AT&T Alabama seeks an Order of the Alabama Public Service Commission (“Commission”) finding that BLC is liable to it for that undisputed, past-due amount. AT&T Alabama intends to use that Order as a basis for an action seeking monetary relief against BLC in the appropriate judicial forum, and as a basis for preempting any “primary jurisdiction” or “failure to exhaust administrative remedy” defenses to that action.¹

I. Background

In January 2010, AT&T Alabama filed its Complaint to resolve all billing disputes between it and BLC and to determine the amount BLC owes under the ICA. At the same time,

¹ AT&T Alabama is contemporaneously filing a similar motion for partial summary decision in the Lifeconnex matter, Docket No. 31317, and a motion to administratively close (in light of the bankruptcy filing of Tennessee Telephone) the Tennessee Telephone matter, Docket No. 31318. AT&T Alabama anticipates that, if and when the requested Orders on those motions become final and non-appealable, AT&T Alabama will move to dismiss, without prejudice, the remaining claims in this Docket and the remaining claims against Lifeconnex in Docket No. 31317, thus rendering it unnecessary for the Commission to render a decision in Consolidated Phase of these dockets.

AT&T Alabama filed separate Complaints seeking similar relief against six other Resellers: (1) Image Access - Docket No. 31320; (2) Affordable Phone - Docket No. 31319; (3) dPi - Docket No. 31323; (4) Budget Prepay - Docket No. 31321; (5) Tennessee Telephone - Docket No. 31318; and (6) Lifeconnex - Docket No. 31317 (collectively, including this docket, the “Alabama Actions”).

The Commission consolidated these dockets for the purpose of resolving three legal issues that were common to each docket (“Threshold Issues”). An evidentiary hearing was held on the Threshold Issues on January 21, 2011, and the Commission has not yet entered an order addressing the Threshold Issues. AT&T, however, has prevailed on one or more of the Threshold Issues before the North Carolina, Kentucky, Louisiana, and Texas Commissions² and in federal district court in North Carolina.³ As a result, AT&T Alabama has entered into global settlement agreements with each of the other Resellers in the Alabama Actions, with the exception of Lifeconnex (which shares common ownership with BLC) and Tennessee Telephone (which filed for bankruptcy protection).

² See *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T North Carolina v. dPi Teleconnect, LLC, et al.*, Docket No. P-836, Sub 5, etc. (North Carolina Utilities Commission) Order Resolving Credit Calculation Dispute dated September 22, 2011, at 5 (“NC Consolidated Phase Order”), attached as **Exhibit 1**; *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. dba AT&T Kentucky*, Docket No. 2009-00127 (Kentucky Public Service Commission), Orders dated January 19, 2012 and March 2, 2012, attached as **Exhibit 2**; *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Louisiana v. Image Access, Inc. dba New Phone, et al.*, Docket No. U-31364-A (Louisiana Public Service Commission) Order dated May 25, 2012, at 17, attached as **Exhibit 3**; *Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company dba AT&T Texas under FTA Relating to Recovery of Promotional Credit Due*, Docket No. 39028 (Texas Public Utility Commission) Order No. 15 Granting AT&T’s Motion for Summary Decision dated April 5, 2012 at 4, attached as **Exhibit 4**, affirmed in Order on Motion for Reconsideration of Order No. 15 dated June 14, 2012, attached as **Exhibit 5**.

³ *dPi Teleconnect, LLC v. Finley, et al.*, Docket No. 5:10-CV-466-BO (E.D.N.C.), Order dated February 19, 2012, at 6-7, attached as **Exhibit 6**.

In sharp contrast, BLC has made no payments to AT&T Alabama, and it has not engaged in any settlement discussions with AT&T Alabama. Instead, BLC simply fled the state.⁴ AT&T Alabama, therefore, respectfully seeks the order described herein so that AT&T Alabama can bring an action in an appropriate forum to seek collection of the undisputed amounts it is owed by BLC under the ICA.

II. Argument

BLC continued ordering telecommunication services from AT&T Alabama for resale after AT&T Alabama filed its Complaint, and BLC typically paid less than one percent of the amount it was billed each month.⁵ Initially, BLC submitted monthly “billing disputes” that were greater than the amounts of AT&T Alabama’s monthly bills. Over time, however, BLC submitted fewer “billing disputes,” and as explained below, its total past-due amount now far exceeds the total amount of “billing disputes” it has submitted.

Section 2.2 of Attachment 7 to the ICA, which governs billing disputes, provides in pertinent part (emphasis added) that:

A billing dispute will not include the refusal to pay all or part of a bill or bills when no written documentation is provided to support the dispute, ***nor shall a billing dispute include the refusal to pay other amounts owed by the billed Party until the dispute is resolved.*** Claims by the billed Party for damages of any kind will not be considered a billing dispute for purposes of this Section.

As of March 31, 2012, following issuance of AT&T Alabama’s final bill and the application of all approved credits and security deposits, the total amount BLC has failed to pay AT&T Alabama is \$19,934,131.⁶ Included in that amount is a total of \$3,237,981 in late payment

⁴ See Attachment A (March 26, 2012 Letter from BLC informing the Commission that it “is no longer doing business in the state of Alabama effective 01/01/12”).

⁵ See Affidavit of David J. Egan, **Exhibit 7**, at Attachment A.

⁶ Affidavit of David J. Egan, attached as **Exhibit 7**, at ¶4.

charges, as authorized by the ICA.⁷ Thus, BLC owes AT&T Alabama \$16,696,150, exclusive of those late payment charges. BLC's billing disputes, even if they were all valid, total no more than \$6,537,878 (when reduced by the disputes corresponding to the late payment charges)⁸. While the ICA relieves BLC of its obligation to pay amounts it appropriately disputes pending the resolution of those disputes, it does not relieve BLC of its duty to pay any remaining amounts that it has not disputed.

Accordingly, \$10,158,272 of BLC's unpaid balance is undisputed (i.e., the total unpaid charges for services exceed BLC's total disputes by that amount). Thus, even if all of BLC's disputes were valid and even if all late payment charges were eliminated, BLC still would owe AT&T Alabama at least that amount. At a bare minimum, therefore, the Commission should find that the ICA requires BLC to pay AT&T Alabama \$10,158,272 for resale services.

⁷ *Id.*

⁸ Affidavit of Cynthia A. Clark, attached as **Exhibit 8**, at ¶4.

CONCLUSION

ACCORDINGLY, pursuant to Rule 11 (F) of the Commission's *Rules of Practice*, Ala. R. Civ. P. 56 (a) and 56 (c)(3,) and the attached affidavits, AT&T Alabama respectfully asks this Commission to enter an Order finding that the ICA requires BLC to pay AT&T Alabama the undisputed past-due amount of \$10,158,272.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, LLC
d/b/a AT&T ALABAMA



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion for Partial Summary Judgment Finding BLC Management, LLC d/b/a Angles Communications Solutions Liable for Undisputed Unpaid Charges on all parties of record as reflected below this 1st day of November, 2012.

Mr. Thomas Biddix
BLC Management d/b/a Angles
Communications Solutions
Post Office Box 1358
Melbourne, FL 32902
(Certified Mail and U.S. Mail)

Mr. Thomas Biddix
BLC Management d/b/a Angles
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Mr. Thomas Biddix
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Registered Agent for BLC Management LLC
d/b/a Angles Communications Solutions
National Registered Agents, Inc. 150 South Perry Street
Montgomery, AL 36104
(Certified Mail and U.S. Mail)



FRANCIS B. SEMMES

Exhibits

- Exhibit 1:** *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T North Carolina v. dPi Teleconnect, LLC, et al.*, Docket No. P-836, Sub 5, etc. (North Carolina Utilities Commission) Order Resolving Credit Calculation Dispute dated September 22, 2011, at 5, (“NC Consolidated Phase Order”).
- Exhibit 2:** *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. dba AT&T Kentucky*, Docket No. 2009-00127 (Kentucky Public Service Commission), Orders dated January 19, 2012 and March 2, 2012, (“Kentucky Orders”).
- Exhibit 3:** *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Louisiana v. Image Access, Inc. dba New Phone, et al*, Docket No. U-31364-A (Louisiana Public Service Commission) Order dated May 25, 2012, at 17, (“LA Consolidated Phase Order”).
- Exhibit 4:** *Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company dba AT&T Texas under FTA Relating to Recovery of Promotional Credit Due*, Docket No. 39028 (Texas Public Utility Commission) Order No. 15 Granting AT&T’s Motion for Summary Decision dated April 5, 2012 at 4.
- Exhibit 5:** Affirmed in Order on Motion for Reconsideration of Order No. 15 dated June 14, 2012.
- Exhibit 6:** *dPi Teleconnect, LLC v. Finley, et al*, Docket No. 5:10-CV-466-BO (USDC, EDNC, Western Div.), Order dated February 19, 2012, at 6-7, (“NC Fed Ct Order”).
- Exhibit 7:** The undisputed amounts are described in the Affidavit of David J. Egan.
- Exhibit 8:** The BLC dispute amounts are described in the Affidavit of Cynthia A. Clark.

EXHIBIT 1

STATE OF NORTH CAROLINA UTILITIES COMMISSION RALEIGH

DOCKET NO. P-836, SUB 5
DOCKET NO. P-908, SUB 2
DOCKET NO. P-1272, SUB 1
DOCKET NO. P-1415, SUB 2
DOCKET NO. P-1439, SUB 2

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
BellSouth Telecommunications, Inc., d/b/a)	
AT&T Southeast, d/b/a AT&T North)	
Carolina,)	
Complainant)	
)	
v.)	ORDER RESOLVING CREDIT
)	CALCULATION DISPUTE
dPi Teleconnect, LLC, Image Access, Inc.,)	
d/b/a NewPhone, Affordable Phone)	
Services, Inc., BLC Management, LLC, d/b/a)	
Angles Communications Solutions, and)	
LifeConnex Telecom, Inc., f/k/a Swiftel,)	

Respondents

HEARD IN: Commission Hearing Room 2115, Dobbs, Building, Raleigh, North Carolina, on April 15, 2011

BEFORE: Commissioner William T. Culpepper, III, Presiding; Chairman Edward S. Finley, Jr.; and Commissioners Lorinzo L. Joyner, Bryan E. Beatty, Susan Warren Rabon, and ToNola D. Brown-Bland

APPEARANCES:

For BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina:

Patrick W. Turner, AT&T North Carolina, 1600 Williams Street, Suite 5200, Columbia, South Carolina 29201

Dwight Allen, Allen Law Offices, PLLC, 1514 Glenwood Avenue, Suite 260, Raleigh, North Carolina 27608

For the Using and Consuming Public:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For dPi Teleconnect, LLC, Image Access, Inc., d/b/a NewPhone, Affordable Phone Services, Inc., and BLC Management, LLC d/b/a Angles Communications Services:

Ralph McDonald, Bailey & Dixon, LLP, Post Office Box 1351, Raleigh, North Carolina 27602-1351

For dPi Teleconnect, LLC:

Christopher Malish, Malish & Cowan, PLLC, 1403 West Sixth Street, Austin, Texas 78703

For Image Access, Inc. d/b/a NewPhone:

Paul Guarisco, Phelps Dunbar, LLP, II City Plaza, 400 Convention Street, Suite 1100, Baton Rouge, Louisiana 70821

For Affordable Phone Services, Inc., and BLC Management, LLC, d/b/a Angles Communications Solutions:

Henry Walker, Brantley Arant Boulton Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203

BY THE COMMISSION: On January 8, 2010, BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina (AT&T or Complainant) filed in separate dockets complaints and petitions for relief against dPi Teleconnect, LLC (dPi), Image Access, Inc., d/b/a NewPhone (NewPhone), Affordable Phone Services, Inc. (Affordable Phone), and BLC Management, LLC, d/b/a Angles Communications Services (Angles) (collectively Respondents or Resellers), requesting that the Commission resolve outstanding billing disputes that exist between Complainant and Respondents, determine the amount that each Respondent owes Complainant under its respective interconnection agreement with AT&T, and require each Respondent to pay the amount to Complainant.

On February 25, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed defensive pleadings to AT&T's complaints. On April 9, 2010, Complainant filed responses to each of the defensive pleadings. On April 30, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed reply pleadings to Complainant's April 9, 2010, responsive pleadings.

On May 14, 2010, the Respondents and Complainant filed a Joint Motion on Procedural Issues in which the parties requested that the Commission hold all other pending motions in abeyance and convene a consolidated proceeding (Consolidated Phase) to which the Complainants and all Respondents are parties to resolve the following issues: how credits to resellers for the Cashback and Line Connection Charge Waiver (LCCW) promotions should be calculated; and whether the Word-of-Mouth promotion is available for resale and, if so, how the credits to resellers for the Word-of-Mouth promotion should be calculated. This Joint Motion was granted by Commission Order issued May 20, 2010.

On July 23, 2010, Complainant filed stipulations entered into by Complainant and Respondents for the Consolidated Phase. On August 3, 2010, the Commission issued its Order Allowing Intervention by LifeConnex Telecom, LLC, f/k/a Swiftel (LifeConnex), in the Consolidated Proceeding.

On August 27, 2010, Complainant prefiled the direct testimony and exhibits of William E. Taylor, and Respondents prefiled the direct testimonies and exhibits of Joseph Gillan and Christopher C. Klein. On October 1, 2010, Complainant filed the rebuttal testimony of William E. Taylor, and Respondents filed the rebuttal testimonies of Joseph Gillan and Christopher C. Klein.

On February 8, 2011, the Commission issued its Order Scheduling Hearing. On April 11, 2011, dPi filed Objections to and Motion to Strike Portions of Dr. William Taylor's Testimony. On April 13, 2011, Complainant filed a Response to Motion to Strike. The matter came on for hearing as scheduled on April 15, 2011. dPi's motion to strike was denied from the bench by Presiding Commissioner Culpepper.

WHEREUPON, based upon the foregoing and the entire record in this matter, the Commission makes the following

FINDINGS OF FACT

1. This matter is properly before the Commission on the Complaint of AT&T, and the Commission has jurisdiction over the parties in this Consolidated Phase and over the subject matter of the issues raised in this proceeding.

2. Pursuant to federal law, the Commission has previously reviewed avoided cost studies presented to the Commission and found a uniform discount rate of 21.5% to be just and reasonable for the residential services at issue in this Consolidated Phase.

3. AT&T's two-step process for determining credits that a reseller is entitled to receive when a telecommunications service which is subject to a retail cashback promotion is sold appropriately applies the Commission-approved 21.5% discount to the promotional price of the service and is therefore reasonable, in compliance with applicable laws, and otherwise appropriate.

4. The alternative proposals offered by the Respondents in this matter overstate the avoided cost estimate, which distorts the 21.5% discount rate set by the Commission and thus understates the wholesale prices that the Resellers are required to pay.

5. In comparing retail prices to wholesale prices, it is appropriate to consider the prices over a reasonable period of time, which is consistent with how customers subscribe to services.

6. AT&T's process of providing a discounted credit to Resellers for the LCCW results in both the retail customer and the wholesale customer paying a net amount of zero for the line connection charge, which is the appropriate result.

7. The Word-of-Mouth promotion is a marketing effort that is not required to be made available for resale.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

Federal law provides that prices for resold telecommunications services shall be set on the basis of retail rates charged to subscribers for the service requested, excluding the portion thereof attributable to costs that are avoided when an incumbent local exchange carrier ("ILEC") like AT&T provides a service on a wholesale basis rather than on a retail basis.¹ In 1996, the Commission used cost studies and other evidence presented in a contested proceeding to determine the aggregate amount of "avoided costs" associated with AT&T's retail services. The Commission then divided that aggregate "avoided cost" figure by the aggregate revenue generated by those services to determine the uniform resale discount rate of 21.5% for the residential services at issue in this docket. See Recommended Arbitration Order, *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50 at 43 (December 23, 1996); Order Ruling on Objections, Comments, Unresolved Issues, and Composite Agreement, *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50 (April 11, 1997). The issues in this Consolidated Phase involve: how credits to resellers for the Cashback and LCCW promotions should be calculated; and whether the Word-of-Mouth promotion is available for resale and, if so, how the credits to resellers for the Word-of-Mouth promotion should be calculated.

A. CASHBACK PROMOTIONS

AT&T uses the following two-step process to sell a telecommunications service that is subject to a retail cashback promotion to Resellers at wholesale: (1) a Reseller orders the requested telecommunications service and is billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the

¹ 47 U.S.C. 252(d)(3).

21.5% resale discount rate established by the Commission); and (2) the Reseller requests a cashback promotional credit which, if verified as valid by AT&T, results in the Reseller receiving a bill credit in the amount of the face value of the retail cashback benefit discounted by the 21.5% resale discount rate established by the Commission. (See Stipulations for Consolidated Phase at ¶¶7-9; Taylor Direct, Tr. at 29-30). To illustrate AT&T's method, assume a promotion that provides qualifying retail customers a one-time \$50 cashback benefit when they purchase a service with a monthly price of \$80. The effective price for the service to the retail customer is \$30 (\$80 standard price less \$50 cashback) for the month that the customer receives the promotional cashback benefit. The same service is available for purchase by a Reseller at a monthly price of \$62.80 (\$80 discounted by 21.5%). If the Reseller also qualifies to purchase the promotion for resale, AT&T gives the Reseller a \$39.25 (\$50 discounted by 21.5%) promotional cashback credit. This results in the Reseller paying an effective price of \$23.55 (\$62.80 less \$39.25) for the month that the Reseller receives the cashback credit, which amount is 21.5% less than the \$30 price to the retail customer for the cashback month.

In this proceeding, the Resellers have contended that AT&T's two-step method is impermissible, does not appropriately apply the Commission approved discount and improperly calculates the credit that the Resellers are due to the Resellers' disadvantage. For the reasons explained below, the Commission concludes that AT&T's previously described two-step method complies with applicable law and appropriately applies the Commission-approved 21.5% resale discount percentage to the retail rate of the promotion-qualifying service.

In its *Local Competition Order*,² the FCC anticipated that state commissions would implement the "avoided cost" requirements of Section 252(d)(3) by adopting resale discount percentage rates like the 21.5% rate previously established. The FCC explained that, when avoided costs are determined in this manner, state commissions "may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate." See *Local Competition Order* at ¶ 908. The FCC went on to explain that when a promotional offering is available for more than 90 days (as is the case with the promotions at issue in this Consolidated Phase), the "promotional price ceases to be short-term **and must therefore be treated as a retail rate for an underlying service.**" *Id.* at ¶¶949-50 (emphasis added). As the example illustrated above demonstrates, in AT&T's two step method, AT&T multiplies the retail rate when a reseller qualifies to purchase the promotion by the discount price to determine the wholesale price (i.e., the retail rate minus the avoided costs) that the telecommunications product is made available to Respondents. The Commission therefore concludes that AT&T's two-step method described above is appropriate

² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, (1996)(*Local Competition Order*), *subsequent history omitted*. In this Order, the FCC concluded that it was "especially important to promulgate national rules for use by state commissions in setting wholesale rates" that will "produce results that satisfy the intent of the 1996 Act," and it stated that "[t]he rules we adopt and the determinations we make in this area are crafted to achieve these purposes," *Id.* at ¶907.

because it correctly applies the 21.5% resale discount rate to the retail rate, i.e., the promotional price, for the underlying service.

The Fourth Circuit's decision in *BellSouth Telecom, Inc. v Sanford*, 494 F.3d 439 (4th Cir.) 2007, supports the Commission's decision. In *Sanford*, the Fourth Circuit concluded that the Commission "correctly ruled that 'long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied.'"³ Noting the FCC's finding that a promotion or discount offered for more than 90 days became part of a retail rate that had to be offered to competing LECs, the Fourth Circuit affirmed the conclusion "that when such incentives [like cashback or gift cards] are offered, the nominal tariff (the charge that appears on the subscriber's bill) is not the 'retail rate charged to subscribers' under §252(d)(3) because the nominal tariff does not reflect the value of the incentives."⁴ The Fourth Circuit then provided the following example to explain its decision:

Suppose BellSouth offers its subscribers residential telephone service for \$20 per month. Assuming a 20% discount for avoided costs, BellSouth must resell this service to competitive LECs for \$16 per month, enabling the competitive LEC to compete with BellSouth's \$20 retail fee. Now suppose that BellSouth offers its subscribers telephone service for \$120 per month, but sends the customer a coupon for a monthly rebate check for \$100. According to the NC Commission's orders, the appropriate wholesale rate is still \$16, because that is the net price paid by the retail customer (\$20), less the wholesale discount (20%).⁵

This \$16 wholesale price that the Fourth Circuit affirmed is exactly the price that results when AT&T's method is applied to this scenario. (Taylor Rebuttal, Tr. at 68-69).

Finally, the decision rendered in Docket P-55, Sub 1744 (*dPi Recommended Order*) also is supportive of the credit calculation methodology proposed by AT&T in this case. In that docket, the Commission adopted a discount promotion credit calculation methodology advanced by AT&T that was based upon the example set forth in the *Sanford* decision. In that docket, the Commission held that AT&T should calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion. Finding of Fact 26, *dPi Recommended Order*. The methodology proposed in this proceeding is mathematically identical to the formula advanced by AT&T and adopted by this Commission in that docket.

In addition to being consistent with applicable law, AT&T's method also is consistent with economic reality. The Resellers' witnesses testified that a \$50 one-time

³ *Id.* at 442.

⁴ *Id.* at 450.

⁵ *Id.* at 450.

cashback benefit reduces the effective retail price of a resold telecommunications service by \$50. (Gillan Cross, Tr. at 244; Klein Evid. Hrg. Exh. No. 1 at 44). As a result of the “avoided cost” pricing standard in Section 252(d)(3), however, changes in the retail price of a telecommunications service do not flow through to a reseller on a dollar-for-dollar basis. For example, if the standard retail price of a service is increased by \$50 (from \$30 to \$80, for example), the wholesale price for the service does not increase by \$50. Instead, it increases by only \$39.25:

	Retail	Wholesale
New Price	\$80	\$62.80 (\$80 discounted by 21.5%)
Initial Price	\$30	\$23.55 (\$30 discounted by 21.5%)
Difference	\$50	\$39.25 (\$50 retail difference discounted by 21.5%)

The Resellers’ witnesses testified that, conversely, a \$50 reduction in the standard retail price of a service does not result in a \$50 reduction in the wholesale price of the service, but instead results in a \$39.25 reduction in the wholesale price of the service. (Gillan Cross, Tr. at 235; Gillan Cross Exam. Exh. No. 1; Klein Cross, Tr. at 307-08).⁶ In the Commission’s view, it is appropriate that AT&T provides the Resellers the same \$39.25 wholesale price reduction when the retail price reduction takes the form of a cashback benefit as the resellers would receive if it took the form of a \$50 reduction to the “standard price.” (See Taylor Direct, Tr. at 30-31). Further, this conclusion is consistent with the Commission’s prior determination that a reseller is only entitled to the price lowering impact of the promotion and not the face value. See *dPi Recommended Order*, p. 22.

The Commission has reviewed and rejects each of the various alternative methods the Resellers proposed to use in applying the 21.5% resale discount to cashback offerings. Our review reveals that each method is inconsistent with the *Local Competition Order*, the *Sanford* decision, and the *dPi Recommended Order*. The Commission is persuaded that each of the Resellers’ alternative proposals overstates the avoided cost estimate, which in turn distorts the established 21.5% resale discount rate and understates the wholesale price Resellers are required to pay for the services they order from AT&T.

In reaching this decision, the Commission notes that the Resellers have spent considerable time and resources in this proceeding arguing that AT&T’s credit calculation method produces wholesale prices that are higher than retail prices. The evidence presented in this proceeding clearly indicates that the vast majority of the promotions that are the subject of this hearing have one-time cashback promotional benefits that exceed the monthly retail price of the service. In those situations, the Respondents have clearly demonstrated that resellers receive less money from AT&T for keeping the service for only a month or two than a retail customer would receive

⁶ To simplify the math, Gillan Cross Exam. Exh. No. 1 assumed a 20% wholesale discount, which resulted in a \$40 reduction in the wholesale price. When the actual 21.5% wholesale discount rate is used, the reduction is \$39.25.

from AT&T for keeping the service only a month or two. (See Gillan Cross Exam. Exh. No. 8; Attachments P and Q to AT&T's Brief).

Although the Commission accepts that the result produced by this calculation shows that the Resellers receive less money from AT&T for keeping the service for only a month or two than a retail customer would receive, the Commission is not persuaded that this fact demonstrates that AT&T's method causes the Resellers' wholesale purchase price to exceed the retail price that AT&T offers to its retail customers. To reach such a conclusion, the Commission would be required to accept the fundamental assumption embraced by Respondents that the pricing practices in this case, i.e., the wholesale price determination and/or the credit calculation should be based upon "that single month when the promotion is processed." Post Hearing Brief of the Respondents, p. 5. This, the Commission cannot do for the following reasons.

First, the Commission cannot accept this assumption because the wholesale discount is an average for all of AT&T's retail services. As such, it was never intended to represent the avoided costs for a particular service for an individual month. Second, and more importantly, the Commission cannot accept this assumption because the evidence presented in this hearing shows that, on average, both AT&T's customers and the Resellers' customers keep service more than a month or two. AT&T's witness Dr. Taylor testified that on average, AT&T's retail customers who take cashback promotions stay "much, much longer" than one or two months, (Taylor Redirect, Tr. at 184), and relying on the sworn testimony of dPi's CEO, Dr. Taylor testified that on average, Resellers' end users keep service from between three and ten months. (*Id.*, Tr. at 184-85). Resellers' witness Dr. Klein, for instance, testified that in considering whether pricing practices are below cost or predatory, "you would have to look at more than only one month of service." (Klein Cross, Tr. at 306; See *also* Klein Depo., Klein Evid. Hrg. Exh. No. 1. at 57-58).

Because of this evidence, it is not reasonable to consider a single month's financial data to determine the price of a product when the customer who purchases that product is reasonably expected to remain a customer of the seller of that product for enough months to make the promotion profitable. Taylor Direct, Tr. at 41. Instead, in these circumstances, it is appropriate for Cashbacks to be considered over a reasonable period of time in order to determine the ultimate price of the promotion based product. Such an approach is consistent with the Commission's historic practice which has allowed companies to recover their "up front" costs over a reasonable period of time instead of requiring that all such costs be recovered in the first month of service. The *Sanford* Court also looked favorably upon a similar approach.⁷

When considered in this manner, a reseller that keeps the service for more than a month or two always pays a net amount that is not only less than what the retail customer pays, but that is less by the 21.5% resale discount rate that the Commission

⁷ See *Sanford*, 494 F.3d at p. 454 where the Court stated: "[W]hen a promotion is given on a one-time basis in connection with an initial offering of service, its value must be distributed over the customer's expected future tenure with the carrier and discounted to present value.

established. (See Gillan Cross Exam. Exh. No. 8; Attachments P and Q to AT&T's Brief). Based on this evidence, the Commission concludes that over a reasonable period of time, the wholesale price of the cashback product is less than the retail price that the retail customer pays. That is, the Resellers appropriately pay 21.5% less than retail customers pay under AT&T's method over time. Thus, there is no merit to the Resellers argument the credit calculation proposed by AT&T and accepted by this Commission results in the wholesale price of the telecommunications service being higher than the retail price.

In conclusion, the Commission notes that while the Commission has considered the issue of the proper methodology for calculation of the amount to be credited to resellers for promotions in greater detail in this proceeding than in prior dockets, the Commission's decisions in Docket No. P-100, Sub 72(b) (*Restriction on Resale Orders I and II*), and in the *dPi Recommended Order* respectively make clear that the face value of a promotion is not required to be passed through to a reseller. Rather, only the benefit of such a reduction must be passed on to resellers by subtracting the properly determined wholesale discount from the lower actual retail price. Consistent with these decisions, the Commission, therefore, finds and concludes that AT&T's two-step process properly passes on the price lowering benefit of a cashback promotion to the Resellers by subtracting the properly determined wholesale discount from the lower actual retail price.

Similarly, the Commission is not persuaded by the Resellers' "price squeeze" arguments. Reseller witness Dr. Klein conceded that: he is not claiming that AT&T is trying to force the resellers out of business by creating a price squeeze; he is not claiming that AT&T has any sort of predatory intent; he is not claiming a violation of Section 2 of the Sherman Act; and in his view as an economist, there is not sufficient evidence in this docket to show a violation of section 2 of the Sherman Act. (Klein Cross, Tr. at 305-06). While Dr. Klein stated that he is testifying about a price squeeze in the regulatory context of the 1996 Act and the FCC's Rules and Orders implementing the 1996 Act, (Klein Cross, Tr. at 306-07), he conceded that if this Commission determines and the courts affirm that AT&T's method complies with the resale provisions of federal law, there would be no price squeeze in the "regulatory context" about which he testifies. (See Klein Cross, Tr. at 309). Since AT&T's method does, in fact, comply with federal law, no price squeeze has been evidenced in this proceeding.

Finally, the Resellers' "rebate" argument is likewise not persuasive. Resellers' witness Dr. Klein conceded that end users who receive a cashback "rebate" receive the same features, functionality, and quality of service as end users who do not receive the cashback "rebate," (Klein Cross, Tr. at 313), and that "the only thing that the rebate in and of itself affects" about the service is "the net amount paid for the service." (*Id.*).⁸ The 1996 Act requires AT&T to pass certain aspects of a service along to the Resellers

⁸ See *also* Klein Depo., Klein Evid. Hrg. Ex. No. 1 at 83 ("what we're arguing about on these promotions is the price that should be charged"); *id.* at 84 ("as far as I know about what's at issue here, that's correct. It's just the monetary arrangements.").

in the same manner as provided to retail customers, but price is not one of them. Instead, the 1996 Act as implemented by this Commission authorizes AT&T to establish the wholesale price of a service by applying the 21.5% resale discount rate to the retail price of the service.

This point is confirmed by the *Sanford* decision, which generally characterizes cashback promotions as “rebates.”⁹ Additionally, in addressing the example of a \$120 standard monthly price and a \$100 monthly cashback benefit, *Sanford* specifically refers to “a coupon for a monthly **rebate** check for \$100.”¹⁰ Calling the check a “rebate,” however, did not lead the Fourth Circuit to apply its hypothetical 20% resale discount to the \$120 “standard” price as the Resellers propose. To the contrary, the Fourth Circuit confirmed this Commission’s reasoning that the resale discount must be applied to the promotional price of \$20 that results when the “monthly rebate check for \$100” is applied to the \$120 standard price for the offering.

B. LCCW PROMOTIONS

The LCCW promotion waives the nonrecurring installation charge for new retail customers who are eligible for the promotion. AT&T witness Taylor testified that resellers are initially billed the retail charge for the line connection less the standard wholesale discount. If a timely request for a promotional credit is submitted, AT&T credits the reseller with the amount it initially billed the reseller. As a result, neither the retail customer nor the wholesale customer pays the line connection charge. (Tr. p. 45)

Witness Taylor testified that the line connection charge should be regarded as a telecommunications service since customers generally must buy it with their local exchange service. Thus, he contended that the two services should be treated as a single retail telecommunications service consisting of an upfront, one-time price and a monthly recurring charge, to which the wholesale discount is applied. (Tr. p. 46) Alternatively, Dr. Taylor proposed treating the LCCW as a cashback promotion and providing it for resale at the retail price less the wholesale discount. (Tr. pp. 46-47)

Respondent witness Klein contended that AT&T should credit the reseller with the avoided cost of line connection when the reseller’s customer qualifies for the LCCW. (Tr. pp. 276-278, 280) He argued that the LCCW is in the form of a rebate for the reseller and should be calculated by applying the avoided cost discount to the standard retail rate, and giving the reseller the same rebate that the retail customer receives. (Tr. p. 288).

The Commission finds that AT&T’s methodology of crediting Resellers with the wholesale price of the LCCW does not differ from that determined as proper for the cashback promotion. In regard to the LCCW, the effective retail rate is zero, so the

⁹ See *Sanford*, 494 F.3d at 442, 449.

¹⁰ *Id.* at 450.

effect of the promotion is that neither retail nor wholesale customers are charged the line connection charge, which is appropriate.

C. WORD-OF-MOUTH PROMOTION

AT&T witness Taylor testified that the Word-of-Mouth referral program should be regarded as an AT&T marketing expense. Customers are acting in the capacity of a part-time sales force for AT&T and compensated for successful referrals by receiving a cash reward. (Tr. p. 50) Dr. Taylor also stated that the benefit the recipient receives has no relationship to the services purchased by the recipient from AT&T, and that to receive the Word-of-Mouth payment, the recipient must perform a service of value to AT&T by convincing someone to become a new AT&T customer.

Respondents' witness Klein testified that the Word-of-Mouth referral program is a rebate offered as a term and condition of service and FCC rules require that rebates must be available for resale. (Tr. pp. 287-88) Dr. Klein offered a formula used to calculate the effective rate to the customer based on the rebate, and concluded that if the referral program was not available for resale, AT&T would be evading its wholesale rate obligation.

The Commission agrees with AT&T that the Word-of-Mouth referral program is not subject to the resale obligations of the Act. As explained by witness Taylor, the referral program differs from offerings that are subject to resale obligations in several critical aspects. First, there is no correlation between the referral program and services purchased from AT&T by the recipient; those services may remain unchanged regardless of the number of successful referrals. Instead, the benefit received is directly tied to telecommunications services purchased by other end users, creating a situation where the recipient of the referral program is essentially performing a marketing or sales service on behalf of AT&T. (Tr. p. 51).

The parties agree that marketing and sales costs are specifically included in the calculation of avoided costs as required by FCC rules (§ 51.609). Under cross-examination, Dr. Klein agreed that sales costs associated with several potential individual promotional efforts would not be required to be made available for resale. (Tr. pp. 315-16). The Commission believes that the Word-of-Mouth referral program is analogous to the sales efforts described in the cross-examination of Dr. Klein and is essentially a marketing program for AT&T's services. The Commission is aware of nothing in the *Local Competition Order* requiring a program that markets retail services to be made available for resale by a competitor.

The Commission, therefore, finds and concludes that the Word-of-Mouth referral program is not required to be made available for resale. Since the Commission has determined that the Word-of-Mouth referral program is not subject to the resale obligation, the question of how credits to Resellers should be calculated is moot.

IT IS, THEREFORE, ORDERED as follows:

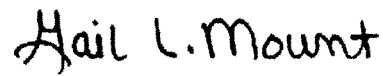
1. That the credits to Resellers for the Cashback and Line Connection Charge Waiver promotions should be calculated by applying the Commission-approved 21.5% resale discount to the retail price of the underlying service; and.

2. That the Word-of-Mouth referral program does not have to be made available for resale.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of September, 2011.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Gail L. Mount". The signature is written in a cursive, flowing style.

Gail L. Mount, Deputy Clerk

Commissioner Lucy T. Allen did not participate in this decision.

lh092211.01

DOCKET NO. P-836, SUB 5

CHAIRMAN EDWARD S. FINLEY, JR., CONCURRING IN RESULT: I concur with the conclusion of the majority that the calculations of any payments due the resellers from AT&T for cash back promotions should result in payments produced by AT&T's formula but for reasons different than those relied upon by the majority in its discussion and conclusions set forth in subsection A. For reasons that do not appear on the record, AT&T has agreed voluntarily to resell the subscription incentives at issue in this docket and has stipulated that it would do so in this case. In my view AT&T has no obligation to resell the promotions under TA-96 or the FCC's Local Competition Order because the subscription incentives are items of economic value, not rate discounts. Moreover, the subscription incentives are one-time promotion payments and the duration of the promotion is for less than 90 days.

All of the difficulties, the differences of opinion and the myriad formulae and calculations with which the Commission has been presented arise because in the one month the subscription incentive payments are made to AT&T's retail customers, the resale price to resellers exceeds the retail price. Under ¶¶ 949 and 950 of the Local Competition Order and 47 C.F.R. § 51.613(a), ILECs are not required to resell short term promotions or promotions that will be in effect for no more than 90 days. Failure to acknowledge that these one-time subscription incentives fall clearly within the short term promotion category has resulted in endless arguments in which the parties struggle mightily to force a square peg into a round hole. These arguments miss the dispositive point.

In North Carolina the Commission's jurisdiction to require ILECs to resell these subscription incentive promotions arises because they are "items of value" affecting the underlying services the subscriber receives and are therefore "de facto" offerings in contrast to "de jure" or "per se" offerings addressed by Congress and the FCC. Because they are only "de facto" offerings they pose less potential anticompetitive harm to resellers. Such was the Commission's holding upheld by the Fourth Circuit in Sanford. Being only "de facto" offerings the subscription incentives need not be assessed by the FCC's requirements on resale at all. If they are to be so assessed, they need not be resold to resellers due to their one-time duration.

While painting itself into a corner by asserting "AT&T North Carolina is not arguing that the 'short term promotion exception' relieves it of its resale obligation with regard to the cash back promotions at issue in this proceeding" AT&T proceeds to substantiate its arguments on the very principles underlying this exception.

As the discussion of Attachment D above demonstrates, the Resellers' "wholesale is higher than retail" argument is the result of myopically focusing on a single month or two in isolation and ignoring the reality of what happens thereafter.

Brief p. 20.

Indeed, no aspect of a cash back promotion makes economic sense in such a short term, because it would be irrational for AT&T North Carolina to offer \$50 cash back to woo customers who will stay with the Company for only a month or two. Likewise the provisions of the 1996 Act are not intended to enable new entrants to win customers in a single month: that is not competition – it is churn. A proper understanding of the economics of a cash back promotion necessarily looks at a longer term.

Brief p. 21.

And the Resellers cannot honestly claim that what they perceive as a “wholesale is higher than retail” situation persists for an unreasonable period of time – in the example addressed in Attachment D of this Brief, for example, the situation is forever reversed when the service is kept for more than a single month.

Brief p. 22.

Looking at one-month in isolation for the on-going service charges ignores the economic realities of the tenure of the end user customer and does nothing more than encourage Resellers to churn those end users off after one month.

Brief p. 24.

In its Local Competition Order, the FCC excluded short-term promotions from the Federal Act’s resale obligations and thus sanctioned retail prices that temporarily are higher than wholesale prices, recognizing that

Promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

Brief pp. 24-25.

Resellers likewise advance arguments anchored on the principle that the promotion aspect of the subscription incentive lasts for a duration of only one month.

Regarding the cash back promotions, the question before the Commission is how to determine the amount Resellers are entitled when reselling services subject to cash back promotions for that single month when the promotion is processed. No other months are in dispute.

...

However, for this single month in dispute, AT&T continues to resist the requirements that it resell its services to CLECs at the effective retail rate less its costs avoided.

Brief p. 1. (emphasis in original).

It is unclear why this was a concern, since AT&T does not reduce its monthly rate. A cash back promotion is a price gimmick – a one-time deal designed to win business from competitors – that does not change the standard monthly rate and does not indicate a change in avoided costs.

Brief p. 22.

Both parties are absolutely correct. The subscription incentives are short term promotions that, were the FCC rules to apply, would be exempted from any resale requirement. As the ILEC has no obligation to resell the promotion in the first place, the Commission should not force the ILEC to pay Resellers more than the ILEC is willing voluntarily to pay. Endless arguments as to how the payment should be calculated through reference to FCC principles that apply to long term, de jure promotions, not short term and not de facto ones, simply are not useful.

\s\ Edward S. Finley, Jr.
Chairman Edward S. Finley, Jr.

EXHIBIT 2

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DPI TELECONNECT, L.L.C.)	
)	
COMPLAINANT)	
)	
V.)	CASE NO.
)	2009-00127
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)	

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

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

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

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

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

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

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 Sanford¹⁴ 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

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.

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.

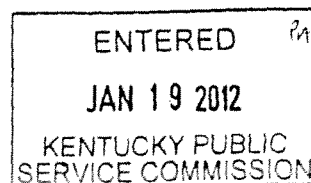
The Commission finds that a telecommunications carrier does not have to seek preapproval for a restriction on resale. As a practical matter, it would be unduly burdensome to the Commission to have to review and approve all promotions that incumbents offer. Telecommunication carriers often have dozens 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.

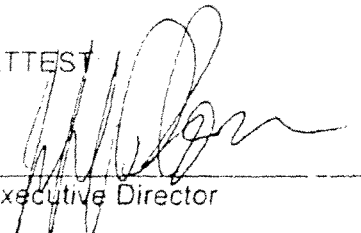
Based on the above, IT IS HEREBY ORDERED that:

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



ATTEST


Executive Director

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

CASE NO.
2009-00127

DISPUTE OVER INTERPRETATION OF THE
PARTIES' INTERCONNECTION AGREEMENT
REGARDING AT&T KENTUCKY'S FAILURE TO
EXTEND CASH-BACK PROMOTIONS TO DPI

ORDER

On February 13, 2012, dPi Teleconnect, Inc. ("dPi") filed with the Commission a Motion to reconsider the Commission's January 19, 2012 Order. BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky") filed its response in opposition to the Motion on February 23, 2012.

DPi challenges the Commission's decision that an AT&T Kentucky promotional "cashback" offer that is offered at resale to dPi must be reduced by the wholesale discount that is normally applied to resale. DPi argues that, because this might result in the wholesale price being higher than the retail price, it is prohibited by the 1996 Telecommunications Act.

DPI initially argued that it should receive the full value of the cashback 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 percent. Therefore, dPi is able to purchase the service at \$16.64. DPI argued, however, that if AT&T Kentucky offered a promotion for a certain monetary value, the discount rate did not apply to the promotional price. For example, if AT&T Kentucky offered a cashback 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.

The Commission found that any promotional discounts should be adjusted by the wholesale discount and 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. The Commission concluded that such a result was absurd and would lead to an anticompetitive environment. The Commission, therefore, ordered that any promotional discount must be reduced by the wholesale discount.

dPi's Argument

DPI argues that the calculation the Commission adopted in its Order "conflicts with federal law and regulations because it violates the core principle of the Telecommunications Act that wholesale pricing should always reflect a price below retail."¹ DPI asserts that applicable federal statutes and regulations require that resale rates be lower than wholesale rates in order to promote competition. DPI also asserts

¹ Motion for Rehearing at 4.

that the FCC, in the Local Competition Order,² also indicated that the wholesale price should be below retail prices, and that promotions cannot be used to circumvent the rule. DPi also relies upon the decision in the Sanford³ case out of the Fourth Circuit Court of Appeals. DPi argues that, in Sanford, the Fourth Circuit determined that, "wholesale must be less than retail," and that the Commission's Order turns the Sanford reasoning on its head. DPi raises several other arguments, none of which are new, all arguing that wholesale rates must always be lower than retail rates.

Discussion

KRS 278.400 contains the standard for the Commission to grant rehearing. If the rehearing is granted, any party "may offer additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. The Commission may also take the opportunity to address any alleged errors or omissions.

DPi has not raised any new arguments in its Motion for Rehearing. Its motion is a recitation of the arguments that it presented in its complaint, in filed testimony, at oral argument and in its post-hearing briefs. The Commission considered all of dPi's arguments that the cashback promotion should not be discounted by the wholesale discount, and rejected them. DPi has presented no compelling argument, produced no new evidence, and pointed to no omissions or errors in the Commission's Order that warrant granting rehearing.

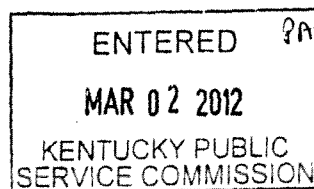
² In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 (rel. Aug. 8, 1996).

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

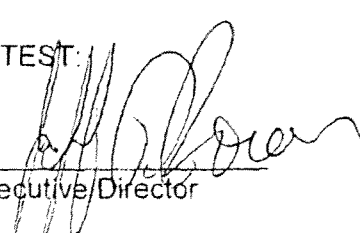
Even assuming that dPi's Motion for Rehearing had some merit, a recent court decision further supports the Commission's decision to discount the cashback promotion by the wholesale discount. In dPi Teleconnect v. Finley, et al.,⁴ the United States District Court for the Western Division of North Carolina addressed a similar issue to the one that is raised at rehearing -- whether a cashback promotion should be reduced by the wholesale discount when it is provided at retail. The Court, applying the reasoning in Sanford, concluded that, "dPi is entitled only to the difference between the rate that it originally paid and the rate it should have paid to AT&T North Carolina. The rate it should have been charged is the promotional rate available to the retail customers less the wholesale discount for residential services"⁵ The Court's reasoning and conclusion in its Opinion underscores the Commission's confidence that it reached the correct decision in its January 19, 2012 Order.

Based on the foregoing, IT IS THEREFORE ORDERED that dPi's Motion for Rehearing is DENIED.

By the Commission



ATTEST:


Executive Director

⁴ dPi Teleconnect LLC v. Finley, (___ F. Supp.2d ___, 2012 WL 580550 (W.D.N.C)). The Order was entered on February 19, 2012, approximately one month after the Commission issued its decision in this case.

⁵ Id. at 3 (Emphasis added.)

LOUISIANA PUBLIC SERVICE COMMISSION**ORDER NO. U-31364-A****BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTHEAST D/B/A
AT&T LOUISIANA****V.****IMAGE ACCESS, INC. D/B/A NEW PHONE;****BUDGET PREPAY, INC. D/B/A BUDGET PHONE D/B/A BUDGET PHONE, INC.;****BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATIONS SOLUTIONS D/B/A
MEXICALL COMMUNICATIONS;****DPI TELECONNECT, LLC;****AND****TENNESSEE TELEPHONE SERVICE, INC. D/B/A FREEDOM COMMUNICATIONS
USA, LLC**

***Docket Number U-31364 In re: Consolidated Proceeding to Address Certain Issues Common
to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.***

ORDER

(Decided at the April 26, 2012 Business and Executive Session)

Background

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana ("AT&T Louisiana") has filed complaints with the Louisiana Public Service Commission ("the Commission" or "LPSC") against Image Access, Inc. d/b/a New Phone, Budget Prepay, Inc. d/b/a Budget Phone d/b/a Budget Phone, Inc., BLC Management, LLC d/b/a Angles Communications Solutions d/b/a Mexicall Communications, and dPi Teleconnect, LLC (collectively known as the "Resellers").

AT&T Louisiana has also filed a complaint against Tennessee Telephone Service, Inc. d/b/a Freedom Communications USA, LLC ("Tennessee Telephone"). On November 1, 2010, a Stipulation Regarding Participation in Consolidated Proceeding on Procedural Issues was filed into this consolidated docket. The stipulation outlines the Tennessee Telephone petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Tennessee, Nashville Division. On September 24, 2010, the Bankruptcy Court entered an Agreed Order on Motion to Determine Automatic Stay Inapplicable or, Alternatively, For Relief from the Automatic Stay which, among other things, terminated, modified and annulled the automatic stay with respect to the Consolidated Proceedings in order

to allow them to proceed notwithstanding the bankruptcy filing. Accordingly, AT&T Louisiana and Tennessee Telephone entered into the following stipulations:

1. As set forth in the Relief From Stay Order, Tennessee Telephone will be bound by all rulings and determinations made in the Consolidated Phase of the proceedings.
2. Tennessee Telephone has decided not to participate as a party to the Consolidated Phase of the proceedings.
3. AT&T Louisiana will not oppose any motion by Tennessee Telephone Service, Inc. d/b/a Freedom Communications USA, LLC to be removed as a party to the Consolidated Phase of the proceeding.

On February 10, 2011, AT&T and Budget Prepay, Inc. d/b/a Budget Phone f/k/a Budget Phone, Inc. ("Budget Phone") filed a Motion to Dismiss in this proceeding, jointly moving that all claims, demands and counter-claims asserted by either of them be dismissed with prejudice, on the grounds that the parties have amicably resolved their disputes. The Commission issued Order No. U-31364 dismissing Budget Phone as a party to consolidated docket number U-31364, with prejudice, on February 15, 2011.

On April 9, 2012, a Joint Motion to Dismiss was filed in this docket by BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T Louisiana and Image access, Inc. d/b/a NewPhone, jointly moving that all claims, demands and counter-claims asserted by either of them be dismissed with prejudice, on the grounds that the parties have amicably resolved their disputes.

On May 13, 2010, the parties in all five complaint proceedings brought by AT&T Louisiana in LPSC Dockets U-31256, U-31257, U-31258, U-31259, and U-31260, requested that the Commission convene a consolidated proceeding for the purpose of resolving certain issues common to the five complaints and common to cases pending before the regulatory commissions of eight other states (the states of the former BellSouth region). A ruling granting the Joint Motion on Procedural Issues was issued by Chief Administrative Law Judge Valerie Seal Meiners, Judge Carolyn DeVitis and Judge Michelle Finnegan on May 19, 2010.

This consolidated proceeding was instituted for the limited purpose of addressing and resolving three issues identified in the joint motion, as well as any other common issues subsequently identified and approved for consolidation. The Parties also requested that all other pending motions in the proceedings be held in abeyance while the common issues were

addressed. It was determined that further proceedings in the five dockets should be stayed pending a resolution of issues in the consolidated proceeding, unless a subsequent Ruling or Order directed otherwise. The Parties, as outlined in the stipulations submitted at the time of the hearing, request a ruling on three basic issues that are to be decided in this consolidated docket, which are: Cashback Offerings, the Line Connection Charge Waiver ("LCCW") and Referral Marketing ("Word-of-Mouth"). A hearing was held on the consolidated issues on November 4 and 5, 2010.

A Proposed Recommendation was issued in this matter on June 22, 2011. The Resellers filed Exceptions to the Proposed Recommendation on July 12, 2011. Staff also filed exceptions on July 12, 2011. While Staff agreed with the proposed recommendation concerning the LCCW and the Word-of Mouth promotion, Staff reurged that the proper treatment of Cash Back Offerings is that proposed by Staff in its Post-Hearing Brief. AT&T Louisiana filed its Opposition Memorandum to Exceptions of Resellers and Staff on July 25, 2011. AT&T Louisiana supported the Proposed Recommendation, requesting it be issued as the Final Recommendation. After consideration of those filings, the administrative law judge issued a Final Recommendation on August 18, 2011.

At the September 7, 2011 Business and Executive session, the Commissioners voted to send this matter back to the administrative law judge for further consideration of the calculation methodology to be applied to cash back promotions.¹

In accordance with the Commission's order, the administrative law judge reopened the case for submission of post-hearing briefs and oral arguments. After argument was heard on November 30, 2011 and after considering the existing record in accordance with the Remand Order, a Final Recommendation of the Administrative Law Judge ("ALJ") on Remand was issued on April 13, 2012. It addresses the calculation methodology to be applied to cash back promotions.

The Final Recommendation on Remand was considered at the April 26, 2012 Commission Business and Executive Session. On motion of Commissioner Skrmetta, seconded by Commissioner Field, and unanimously adopted, the Commission voted to accept the ALJ Recommendation as follows: 1) that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the

¹ Order No. U-31364, Remand Order, September 28, 2011

Resellers at the wholesale discount. A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service. This equals the standard retail price of the service discounted by the resale discount rate established by this Commission. The Commission has previously established the resale discount rate as 20.72%. When the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%. 2) That if the Resellers are entitled to receive a promotional credit for the LCCW, the Resellers are entitled to a credit of the LCCW, less the applicable resale discount rate. 3) That word-of-mouth promotions are not a "telecommunications service". The word-of-mouth promotion is the result of AT&T's marketing referral program and is not subject to resale.

Jurisdiction and Applicable Law

The Commission holds broad power, pursuant to the Louisiana Constitution and statutes, to regulate telephone utilities and adopt reasonable and just rules, regulations, and orders affecting telecommunications services. *South Central Bell Tel. Co. v. Louisiana Public Service Commission*, 352 So.2d 999 (La.1997).

Article IV, Section 21 of the Louisiana Constitution of 1974, provides, in pertinent part, that:

The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties and perform other duties as provided by law.

Louisiana Revised Statutes 45:1163, et seq., similarly provide that the Commission shall exercise all necessary power and authority over telephone utilities and shall adopt all reasonable and just rules, regulations and orders affecting or connected with the service and operation of such business.

Pursuant to its authority, the Commission has issued Orders addressing specific aspects of telecommunications services. Section 1101.B5 of the Commission's Local Competition Regulations provides:

Short-term promotions, which are those offered for 90 days or less, are not subject to mandatory resale. Promotions that are offered for more than ninety (90) days must be made available for resale, at the commission established discount, with the express restriction that TSPs shall only offer a promotional rate obtained from the ILEC for resale to those customers who would qualify for the promotion if they received it directly from the ILEC.

Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 USC section 251 et seq.) regulates local telephone markets and imposes obligations on Incumbent Local Exchange Carriers (“ILECs”) to foster competition, including requirements for ILECS to share their networks with competitors. Pursuant to 47 USC § 251(c)(4)(A), ILECS have a duty,

to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

The wholesale price at which these services are to be provided is the retail rate less avoided costs, pursuant to 47 USC § 252(d)(3). This duty applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term. This excludes rates that are in effect for no more than 90 days and that are not used to evade the wholesale rate obligation. 47 CFR § 51.613(a)(2). The Commission has established that avoided cost (or wholesale discount) at 20.72%, in Order U-22020, and it has been continuously applied.

STIPULATIONS FOR CONSOLIDATED PHASE

In accordance with the Joint Motion on Procedural Schedule submitted in these Dockets on June 16, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana (“AT&T Louisiana”) and each of the Respondents in the above-referenced Dockets (collectively the “Parties”) respectfully submit the following Stipulations for use in resolving the issues presented in the Consolidated Phase of these Dockets.²

I. Introduction

The Parties agree that in the Consolidated Phase of these dockets, it is neither practical nor necessary to identify the terms and conditions of each and every retail promotional offering that may be implicated by the various pleadings in these Dockets, and the Parties have not attempted to do so in these Stipulations. Instead, the Parties submit the stipulations in Section II below to give the Commission a general description of the representative types of promotions that are addressed in the three issues in the Consolidated Phase – *i.e.*, Cashback Offerings, Referral Marketing (“Word-of-Mouth”), and Line Connection Charge Waiver (“LCCW”) – and a general description of the representative types of AT&T retail offerings that are subject to such promotions. In Sections III and IV, the Parties provide a general description of a representative

² See Joint Motion on Procedural Issues submitted May 13, 2010.

process for AT&T's retail customers and its wholesale customers to request a promotional offering. The Parties respectfully ask the Commission to address the issues in the Consolidated Phase based on these stipulations and the representative types of promotions and processes included herein.

In addressing the specific offerings in the Consolidated Phase, the Parties agree to the following:

a. Cashback and LCCW (described at page 2, paragraphs 2(a) and 2(c), respectively, of the Joint Motion on Procedural Issues). As to these offerings, the Parties ask the Commission **in this Consolidated Phase** to assume that the Parties agree that a Respondent is entitled to receive a promotional credit and **that the only dispute is the amount of the credit** to which the Respondents are entitled.³

b. Word-of-Mouth (described at page 2, paragraph 2(b) of the Joint Motion on Procedural Issues). As to this offering, the Parties ask that the Commission make an initial determination as to whether the word-of-mouth referral reward program described herein is subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law. **If the Commission determines that the referral award program described herein is subject to such resale obligations**, the Parties ask that the Commission further assume that the Parties agree that a Respondent is entitled to receive a promotional credit and **that the only dispute is the amount of the credit** to which the Respondents are entitled.

In reaching the Stipulations below in the Consolidated Phase, no Party waives any of its rights to, after the Commission has issued an order resolving the issues in the Consolidated Phase, present evidence and arguments regarding each and every retail promotional offering that may be implicated by the various pleadings in these Dockets, including how and whether credit requests have been processed and credits issued by AT&T to any Respondent and whether a given Respondent is entitled to receive a given amount of promotional credits.

Similarly, the Parties agree that in the Consolidated Phase, it is neither practical nor necessary to address the facts specific to any Respondents' requested promotional credits, or AT&T's processing of those credits. In order to provide context for the Commission to decide

³ Some of AT&T's cashback promotional offerings are associated with long distance services, and AT&T has denied promotional credit requests associated with such offerings. These stipulations do not address such offerings, and each Party reserves all rights to argue, in subsequent phases of these proceedings and in other forums, that such promotional offerings are or are not subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law.

the issues presented in the Consolidated Phase, however, the parties submit the stipulations in Sections III and IV below. In reaching these Stipulations in the Consolidated Phase, no Party waives any of its rights, after the Commission has issued an order resolving the issues in the Consolidated Phase, to present additional evidence and arguments as to retail and wholesale requests for any offerings that are being or have been processed.

II. Representative Description of Promotions

a. Cashback Offerings

1. Attachment A to these Stipulations are representative descriptions of various Cashback Offerings. Attachment B to these Stipulations are representative descriptions of retail services and prices that are the subject of these representative Cashback Offerings, and the parties stipulate that additional representative descriptions of retail services and prices that are the subject of these representative Cashback Offerings are available at:

<http://cpr.bellsouth.com/pdf/la/a996.pdf>

<http://cpr.bellsouth.com/pdf/la/g996.pdf#page=1>

b. Word-of-Mouth Offerings

2. Attachment C to these Stipulations is a representative description of a “Word-of-Mouth” Referral Offering.

c. LCCW Offerings

3. Attachment D to these Stipulations are representative descriptions of various LCCW Offerings. Attachment B to these Stipulations are representative descriptions of the retail services and prices that are the subject of these representative LCCW Offerings, and the parties stipulate that additional representative descriptions of retail services and prices that are the subject of these representative LCCW Offerings are available at:

<http://cpr.bellsouth.com/pdf/la/a996.pdf>

<http://cpr.bellsouth.com/pdf/la/g996.pdf#page=1>

III. AT&T's Procedure for Processing a Retail Request for a Promotional Offering

4. An AT&T retail customer is billed the standard retail price for the telecommunications services subject to a “cashback” promotional offering. The

AT&T retail customer then requests the benefits of the cashback promotion either on-line or by mailing in a form within the allowable time period as described in the terms and conditions of the particular promotion. If the retail customer meets the qualifications of the promotional offering, AT&T mails a check, gift card, or other item (as described in the promotional offering) to the retail customer's billing address. This process is further described by AT&T in "frequently asked questions" found at <https://rewardcenter.att.com/FAQ.aspx>. Attachment E to these Stipulations is a copy of this description.

5. At the time an AT&T retail customer requests a "LCCW" promotional offering, an AT&T retail representative determines whether the retail customer meets all qualifications of the offering. If the retail customer meets those qualifications, the line connection charge is waived.
6. If an existing AT&T retail customer refers a potential customer to AT&T and the potential customer orders service(s) that qualify for the "Word-of-Mouth" Referral Offering, the AT&T customer referring the new customer to AT&T may be entitled [to] a referral benefit. In order to process the request for the benefit, the referring AT&T retail customer requests the benefits of the promotion on-line by: (1) registering in the program; (2) nominating a potential customer before that customer orders qualifying service(s) from AT&T; and (3) after the potential customer orders qualifying service(s) from AT&T, providing that customer's account information to AT&T online. If the referring retail customer meets the qualifications of the promotional offering, AT&T mails a gift card or other item (as described in the promotional offering) to that retail customer's billing address. The AT&T retail customer that refers a potential customer as set forth above is billed the standard retail price for the telecommunications services he or she purchases from AT&T.

IV. AT&T's Procedure for Processing a Wholesale Request for a Promotional Offering

7. When a Respondent purchases for resale the telecommunications services that are subject to any of the offerings described herein, AT&T bills the Respondent the wholesale rate (the retail rate less the 20.72% residential resale discount established by this Commission) for those telecommunications services.

8. After being billed by AT&T, the Respondent submits promotional credit requests seeking any credits to which it believes it is entitled pursuant to the offering.⁴
9. Upon receipt of these requests, AT&T reviews them to determine whether it believes the Respondent is entitled to the credits it requests. To the extent AT&T determines that the Respondent is entitled to the requested credits, AT&T applies the credits that it believes are due on a subsequent bill to the Respondent.⁵
10. For purposes of this Consolidated Phase, the Parties agree that AT&T did not seek prior approval from the Commission regarding the methodology it used to calculate the amount of promotional credits to Respondents that are the subject of the Consolidated Phase.

Witnesses

Dr. William Taylor, an employee of National Economic Research Associates, Inc., testifying on behalf of AT&T.

Joseph Gillan, an economist with a consulting practice specializing in telecommunications, testifying on behalf of the Resellers.

Christopher Klein, an Associate Professor in the Economics and Finance Department of Middle Tennessee State University, testifying on behalf of Resellers.

Overview of Party Positions

AT&T Louisiana's Positions

AT&T Louisiana uses a two-step process to resell a telecommunications service that is subject to a retail cashback promotion: (1) a reseller orders the requested telecommunications service and is billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the 20.72% resale discount rate established by the Commission); and (2) the reseller requests a cashback promotional credit which, if verified as valid by AT&T Louisiana, results in the reseller receiving a bill credit in the amount of the face value of the retail cashback benefit discounted by the 20.72% resale discount rate established by the Commission. The issue becomes whether the 20.72% resale discount rate is to be applied to the standard retail price of the affected service and not to the cashback benefit or to the retail

⁴ Those stipulations address only the process for the 9-state former BellSouth region and not the process for the other 13 states in which an AT&T entity operates as an ILEC.

⁵ As mentioned above, neither Respondents nor AT&T stipulate that AT&T has or has not processed or applied all credits that AT&T has deemed are due, and neither Respondents nor AT&T stipulate that AT&T has or has not processed all credits that are actually due.

promotional price of the service. AT&T Louisiana avers it is correctly applying the 20.72% resale discount rate to the promotional price of the service.

AT&T Louisiana argues that the Resellers position concerning LCCW is incorrect because discounting the \$0 retail price by 20.72% produces a wholesale price of \$0. It avers it is not only the mathematically accurate result, but also the result envisioned by the 1996 Act. The controlling statute provides that wholesale prices shall be set "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to [costs avoided by the ILEC]."

Concerning the word-of-mouth program, AT&T Louisiana argues that these referrals are marketing promotions and are not subject to resale. Resale obligations apply only to "telecommunications services" AT&T Louisiana provides at retail, and a marketing referral program like "word-of-mouth" is not even arguably a telecommunications service. Rather it is a marketing activity that AT&T induces from its customers.

The Resellers Positions

The Resellers state this docket is about preserving the viability of wholesale competition and the efficacy of federal pricing rules. They espouse in their post-hearing brief at page 2:

At issue is whether retail should be less than wholesale – that is, whether AT&T's retail price for telecommunication services should ever be less than the wholesale price at which AT&T resells those services to competitive local exchange carriers (CLEC") such as the Resellers. Obviously, it should not: the whole concept behind requiring Incumbent Local exchange Carriers ("ILECs") like AT&T to resell their services at wholesale rates hinges on retail rates being greater than wholesale rates. Nevertheless, the Louisiana Public Service Commission ("Commission") is here confronted with the problem that AT&T's use of "cashback" promotions, combined with its failure to extend the full value of those promotions to the Resellers, results in retail prices less than wholesale. AT&T's promotional pricing practices are unreasonable, discriminatory, and contrary to the requirements and purposes of the Federal Telecommunications Act of 1996 ("FTA") and the FCC's rules on resale.

The Resellers state the question before the Commission is how to calculate the amount the Resellers are entitled to when reselling services subject to cash back, LCCW and referral (or word of mouth) promotions for the month in which the promotion is earned. They argue that no other months are in dispute. The FTA and federal regulations set the resale rate for telecommunications services that an ILEC may charge as "the rate for the telecommunications service, less avoided retail costs, as described in section 51.609. Thus, the "wholesale discount" must by law be calculated as the avoided cost. The Resellers argue that the appropriate method

for determining the wholesale price is to first calculate the amount of the avoided cost, then subtract the avoided cost from the actual sales price.

Resellers state that to properly determine the avoided cost, one multiplies the resale discount factor times the standard/tariffed price. This gives one the base amount of the avoided cost, and thus the amount by which the wholesale amount should be less than the retail price. They argue this is because the costs associated with the service remain the same, even if the price is temporarily changed for a particular customer pursuant to a special sale or promotion. They state that it also makes sense to measure the avoided costs based on the standard/tariffed retail rate because that is how the model was originally designed, years prior to the introduction of cashback and other promotions. The resellers state the three steps to finding the wholesale price are:

STEP 1: Find the pre-promotion standard/tariffed retail price.

STEP 2: Find the avoided cost: multiply the standard/tariffed retail price by the wholesale discount factor.

STEP 3: Subtract the avoided cost from the retail sales price, which is the standard/tariffed price, or, if a promotion applies, the price after applying the promotion. By applying this method, they state, the wholesale price is always the same amount less than the retail price which, as AT&T's witness acknowledged, is what the FCC intended.

The Resellers further state that they are entitled to the full value of AT&T's cash back promotions because according to the FTA and pertinent FCC regulations, AT&T is required to offer its services for resale "subject to the same conditions" that AT&T offers its own end-users and at "the rate for the telecommunications service less avoided retail costs." There are scenarios where this would result in AT&T giving credit balances to the Resellers.

The LPSC Staff's Position

Staff concludes that:

1) the proper wholesale rate applicable when a "cashback" promotion is offered is the "effective retail price" of the telecommunications service multiplied by the LPSC's 20.72%

avoided cost. Staff uses the following equation: Wholesale Rate = (Retail Rate) – (Cash-back) x (Discount).

2) credits to resellers for the WLCC promotion should be equal to the amount the reseller was charged for the service; and

3) word-of-mouth promotions should not be available for resale.

On remand, Staff adopts a compromise position concerning cashback promotions that result in a negative price scenario. Staff states that AT&T's methodology results in a greater benefit being provided to its retail customers than is provided to wholesale customers when the effective price is negative.⁶ "In simple terms, AT&T should provide the same credit amount to a reseller than [sic] it provides to its retail customers, if the cash-back amount is greater than the price of the service."⁷ Staff requests that the Commission adopt the position advanced by Staff with respect to the correct treatment of "cash-back" promotions. In the alternative, Staff respectfully requests consideration of Staff's alternative compromise that ensures Resellers receive equal benefits to those received by retail customers.

Issues and Analysis

All parties to this proceeding are to be complimented for their work in narrowing down the issues to be addressed by the Commission. The Joint Stipulation specifically requests that three issues be decided. Since there is no need to review any individual promotions or offers, the Commission, upon a review of pre-filed testimony, exhibits, testimony elicited at the hearing and briefs on the issues, answers the questions presented to it by the Parties as succinctly as possible.

Cashback Offerings

The Parties have requested for the Commission to assume that the Parties agree that Resellers are entitled to receive a promotional credit for cashback offerings. The Parties state the only dispute is the amount of the credit to which the Resellers are entitled.

Resale services must be sold at wholesale prices established by state commissions based on the retail rate less avoided costs. 47 U.S.C. § 252(d)(3). The duty to sell services to resellers at wholesale prices applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term (i.e., rates that are in

⁶ Staff's Brief on Remand, page 4.

⁷ Staff's Brief on Remand, page 6.

effect for no more than 90 days and that are not used to evade the wholesale rate obligation). 47 C.F.R. § 51.613(a)(2); See *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007) (“Sanford”). The cashback offerings in this case are based upon a one-time rebate that is applied as a credit to AT&T retail customers as well as the Resellers. It is not necessary to determine what length of time must be considered in evaluating the promotions. AT&T grants the rebates to its customers if they stay for 30 days and complete the requisite paperwork. The same time frame applies to the Resellers.

Cashback offerings are used to entice customers to purchase service. A cashback promotion is a reduction in the price of a service and does not result in a change to tariffed rates. In the instance of AT&T, it is hoped that using such enticements will result in customers who will not only purchase the service, but keep it long term. “It would be irrational for AT&T to offer cashback promotions to woo customers who will stay with the company for only one month; . . . a proper understanding of the economics of a cashback promotion necessarily looks at a longer term.”⁸ The ruling in *Stanford* holds that if these cashback offerings are offered for more than 90 days, the promotional rates shall be available for resale at the wholesale discount. These promotions need not be refunded to the Resellers’ customers. The Resellers are entitled to receive the cashback incentive in the month earned. It need not be averaged over several months.

A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the 20.72% resale discount rate established by this Commission). When the Reseller requests a valid cashback promotional credit, the Reseller first receives a bill credit in the amount of the face value of the retail cashback benefit. AT&T discounts the retail cashback benefit by the 20.72% resale discount rate established by the Commission. Resellers oppose this practice of deducting the resale discount rate from the cashback benefit. Resellers argue that the avoided costs (the wholesale discount percentage of 20.7%) should not be applied to the promotional cash back amount but should only be applied to standard retail prices. Resellers argue that by AT&T taking this deduction, particularly when it results in a credit to AT&T’s retail customers, it results in a pricing situation where the wholesale price is greater than the retail price. Resellers argue that wholesale must always be less than retail.

⁸ Reply brief of AT&T page 14.

Avoided costs are calculated as a percentage of the retail price. This amount is then deducted from the retail price. It is a basic mathematical equation. Thus, avoided costs vary with the retail price. As the retail price increases, so does the amount attributable to the avoided costs. Accordingly, the lower the retail price, the lower the amount of the avoided costs. AT&T's method of calculation is correct. Although this theory does not embrace the calculation methods proposed by the Resellers or Staff, this result is consistent with the FCC's Local Competition Order and the orders of this Commission.

Example 1, with no promotional discount, the following calculation would apply:⁹

AT&T Standard Retail Price	\$30
Estimated Avoided Costs = Standard Retail Price x 20% (\$30 x 20% = \$6)	\$ 6
Wholesale Price (Standard Retail Price minus Estimated Avoided Costs) \$30-\$6 =	\$24

Therefore, the Resellers pay \$24 for the services purchased from AT&T.

Example 2, with a \$10 promotional discount (lasting over 90 days), the following calculation would apply:

Standard Retail Price	\$30
Minus \$10 promotional discount	-- <u>\$10</u>
Net or Effective Retail price	\$20
Estimated Avoided Costs = Standard Retail Price x 20% (\$20 x 20% = \$4)	\$ 4
Wholesale Price (Net or Effective Retail Price minus Estimated Avoided Costs)	
	\$20-\$4 = \$16

Therefore, the Resellers pay \$16 for the services purchased from AT&T.

Example 3, with a \$50 promotional discount (lasting over 90 days), the following calculation would apply:

Standard Retail Price	\$30
Minus \$50 promotion	<u>\$-50</u>
Net or Effective Retail price	\$-20

⁹ A hypothetical 20% wholesale discount percentage is used for demonstration purposes and mathematical ease only.

Given the scenario in Example 3, how much do the Resellers pay or receive, under these circumstances? It appears that all parties are in agreement as to the calculation of the Resellers' wholesale price in Examples 1 and 2. It is when the cashback promotion results in a credit to the AT&T retail customer that disputes about how to calculate the Resellers price (or credit) arise between the parties. This topic is in dispute in many venues. In this case alone, numerous briefs, extensive testimony, charts and calculations have been submitted to the Commission concerning how to handle this specific situation. AT&T, the Resellers and Staff have each proposed solutions and all are different.

AT&T's approach:

AT&T's wholesale price to Resellers	\$24
Total cashback [cashback offer less estimated avoided costs(\$50 x 20%)]	<u>(40)</u>
Net amount paid	\$(16)

The Resellers approach

AT&T's wholesale price to Resellers	\$24
Total cashback [cashback equals promotional offer to retail customers]	<u>(50)</u>
Net amount paid	\$(26)

Staff's Compromise Approach

Standard Retail Price	\$30
Minus \$50 promotion	<u>\$-50</u>
Net amount paid	\$-20

AT&T contends that Staff's formula is flawed because it adds the avoided cost estimate rather than subtracting it, causing AT&T to give resellers a high credit, which therefore increases the expense of the promotion to AT&T. AT&T postulates that "by making it more expensive for AT&T to offer these promotions, Staff's proposed new formula would discourage these pro-competitive promotions that are beneficial to consumers in Louisiana."¹⁰ AT&T claims that the formula Staff proposes is an approach that was not addressed at the hearing. The Resellers aver that the Staff's proposal was not novel. The Resellers urge that the formula is the same as "Taylor's formula corrected for reality" proposed during the hearing by Reseller Witness Mr.

¹⁰ Reply brief of AT&T page 14

Joseph Gillan and illustrated on Reseller Exhibit #4. AT&T contends that the formula it uses is the long standing fundamental formula Staff supports in all other circumstances. Staff correctly posits this as an alternative method of calculation.

The Resellers argue that they should receive the full-value of the cash-back promotion (\$50). Resellers also aver that the value of the promotion should not be reduced by the wholesale discount rate applied to resale of regular services. In this example, for each eligible rebate, the Resellers want AT&T to provide the service for the Resellers' customer (a value of \$24) and pay the Reseller \$26. This would make the Wholesale Price \$-26, or \$6 less than the net or effective retail price. The Resellers argue that wholesale must always be less than retail.

In other words, the AT&T retail customer who qualified for the \$50 cashback promotion would pay the standard retail price of \$30. Then, upon AT&T's satisfaction that the retail customer qualified for the cashback promotion, the retail customer would receive a credit of \$50, so that particular retail customer would effectively receive the service for free that month and get the equivalent of \$20 back from AT&T. This results in a net or effective retail price of \$-20.

The Resellers are asking the Commission to require AT&T provide the same \$50 cash back promotion to them and not reduce that \$50 by the wholesale discount. It is Resellers position that this is necessary to ensure that wholesale is always less than retail. The Resellers want the \$50 cash back promotion deducted from the wholesale price of \$24. This necessarily results in a "negative" price. For example: An AT&T retail customer would pay the Standard Retail Price of \$30 and receive \$50 from AT&T in a cashback promotion, as outlined in the preceding paragraph. This results in the AT&T customer being issued a credit that results in a credit to their account of \$20.

The Resellers' argument yields the following result:

Standard Retail Price		\$30
Estimated Avoided Costs = Standard Retail Price x 20%	--	<u>\$ 6</u>
Wholesale Price (Standard Retail Promotional Price minus Estimated Avoided Costs)		\$24
Net or Effective Retail Price with a \$50 cashback promotion	--	<u>\$50</u>
	--	\$26

The Resellers would receive a credit from AT&T of \$26, thus making the net effective retail price -\$26. The Resellers urge that this is the correct application because it provides them with a lower price than AT&T's retail customers, or "wholesale must always be less than retail". This is not always the case. There are certainly times during limited promotions where the wholesale price is greater than the retail price and this is permissible. The Resellers are not entitled to the entire rebate because they will receive a reimbursement that is greater than the price they paid for the service. The Resellers do not pay the net or effective retail price. They pay less because the percentage attributable to the avoided costs is deducted from the price AT&T charges Resellers.

If the same scenario were applied to "positive" numbers you would have the following: Standard Retail Price is \$100. AT&T provides a \$50 cashback promotion and the retail customer winds up paying \$50 for the service. The Resellers would only pay \$40 for the same service.

Is the 20.72% resale discount rate to be applied to the standard retail price of the affected service and not to the cashback benefit or to the retail promotional price of the service? Currently, when the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%. AT&T argues that this is the correct calculation: applying the 20.72% resale discount rate to the promotional price of the service. We have thoroughly reviewed AT&T's, the Resellers' and Staff's proposals and concur with AT&T's calculation. To do otherwise results in the Resellers being paid to take service from AT&T. The Resellers should be entitled to no more credit for the cash-back component than it would be entitled to if AT&T had simply reduced the retail price of the affected service by the same amount.

This Commission finds that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the Resellers. The Reseller requesting a telecommunications service is to be billed the standard wholesale price of the service. The standard wholesale price of the service equals the net or effective retail price of the service discounted by the resale discount rate previously established by this Commission as 20.72%.

Waiver of Line Connection Charge

The Parties have stipulated that the Resellers are entitled to receive a promotional credit for the LCCW and that the only dispute is the amount of the credit to which the Resellers are entitled. An AT&T retail customer normally incurs a charge for the line connection. As a result of the LCCW, the retail customer is charged nothing. The Resellers are charged the line connection charge at the applicable wholesale discount. If the Resellers qualify for the LCCW, they are then credited back the amount initially charged. For example, if the line connection charge is \$50, the retail customer is charged \$50. However, if the LCCW is granted the retail customer pays nothing. The amount that the Resellers are entitled to is the line connection charge, less the applicable wholesale discount. Using 20% (for ease of calculation) as the applicable wholesale discount, the Resellers will pay \$40. The Resellers are entitled to a credit of the amount paid, namely \$40. Under the Reseller's proposal, the LCCW would amount to a rebate and thus the full amount, prior to the application of the wholesale discount, must be credited to the Reseller. We agree with Staff's conclusion that the application espoused by the Resellers can result in a situation where AT&T pays the Resellers to connect its customers. Accordingly, the proper method for applying the waiver of the line connection charge is to provide a credit to Resellers equal to the amount previously charged to the Resellers.

Word of Mouth Promotion

The Parties ask that the Commission make an initial determination as to whether the word-of-mouth referral reward program described herein is subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law. They propose that if the Commission determines that the referral award program is subject to such resale obligations, that the Commission assume the Parties agree a Reseller is entitled to receive a promotional credit and determine the amount of the credit to which the Resellers are entitled.

The Commission agrees with the positions of Staff and AT&T Louisiana that word-of-mouth is a promotion that is not subject to resale. Retail customers of AT&T can receive promotional benefits such as cash or gift cards under word-of-mouth promotions. The retail customers, who choose to participate in said program, convince friends and family members who are not currently retail customers of AT&T to purchase particular services. The retail customers who convinced friends and family members to sign up for AT&T's offerings must then apply to

receive the cash or near-cash offerings. This word-of-mouth referral is not a "telecommunications service" AT&T provides at retail. It is the result of AT&T's marketing referral program and should not be subject to resale.

In accordance with the conclusions reached in this consolidated docket;

IT IS HEREBY ORDERED that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the Resellers at the wholesale discount. A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service. This equals the standard retail price of the service discounted by the resale discount rate established by this Commission. The Commission has previously established the resale discount rate as 20.72%. When the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%.

IT IS FURTHER ORDERED that if the Resellers are entitled to receive a promotional credit for the LCCW, the Resellers are entitled to a credit of the LCCW, less the applicable resale discount rate.

IT IS FURTHER ORDERED that word-of-mouth promotions are not a "telecommunications service". The word-of-mouth promotion is the result of AT&T's marketing referral program and is not subject to resale.

**BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA**

May 25, 2012

/S/ FOSTER L. CAMPBELL

DISTRICT V

CHAIRMAN FOSTER L. CAMPBELL

/S/ JAMES M. FIELD

DISTRICT II

VICE CHAIRMAN JAMES M. FIELD

/S/ ERIC F. SKRMETTA


DISTRICT I

COMMISSIONER ERIC F. SKRMETTA

/S/ LAMBERT C. BOISSIERE

DISTRICT III

COMMISSIONER LAMBERT C. BOISSIERE, III



EVE KAHAO GONZALEZ
SECRETARY

/S/ CLYDE C. HOLLOWAY

DISTRICT IV

COMMISSIONER CLYDE C. HOLLOWAY

DOCKET NO. 39028

PETITION OF NEXUS	§	PUBLIC UTILITY COMMISSION
COMMUNICATIONS, INC. FOR	§	
POST-INTERCONNECTION	§	OF TEXAS
DISPUTE RESOLUTION WITH	§	
SOUTHWESTERN BELL	§	
TELEPHONE COMPANY D/B/A	§	
AT&T TEXAS UNDER FTA	§	
RELATING TO RECOVERY OF	§	
PROMOTIONAL CREDIT DUE	§	

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: $\text{wholesale price} = [\text{retail price} - (\text{avoided costs} \times \text{retail price})] - [\text{promotional cash back} - \text{avoided costs} \times \text{promotional cash back}]$.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.

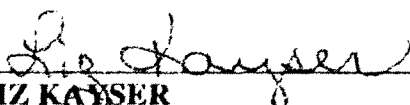
⁸ *Id.* at 5.

III.
Ruling

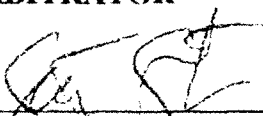
The Arbitrators find that AT&T Texas' motion should be granted for the reasons contained in that motion and AT&T Texas' supporting documentation. All pending requests for relief of Nexus are hereby denied and this case is dismissed without prejudice.

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

PUBLIC UTILITY COMMISSION OF TEXAS



LIZ KAYSER
ARBITRATOR



SCOTT SMYTH
ARBITRATOR

PUC 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

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PUBLIC UTILITY COMMISSION
OF TEXAS

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ORDER ON MOTION FOR RECONSIDERATION OF ORDER NO. 15

This Order addresses the motion for reconsideration of Order No. 15 by Nexus Communications, Inc. The Commission finds that the determination of the arbitrators in Order No. 15 is correct. Therefore, the Commission denies Nexus's motion for reconsideration and upholds the arbitrators' ruling in Order No. 15.

SIGNED AT AUSTIN, TEXAS the 14th day of June, 2012.

PUBLIC UTILITY COMMISSION OF TEXAS
DONNA L. NELSON, CHAIRMAN
KENNETH W. ANDERSON, JR., COMMISSIONER
ROLANDO PABLOS, COMMISSIONER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:10-CV-466-BO

DPI TELECONNECT, L.L.C.,)
Plaintiff,)
)
v.)
)
EDWARD S. FINLEY, JR., *Chairman,*)
North Carolina Utilities Commission;)
WILLIAM T. CULPEPPER, III,)
Commissioner, North Carolina Utilities)
Commission; LORINZO L. JOYNER,)
Commissioner, North Carolina Utilities)
Commission; BRYAN E. BEATTY,)
Commissioner, North Carolina Utilities)
Commission; SUSAN W. RABON,)
Commissioner, North Carolina Utilities)
Commission; TONOLA D. BROWN-)
BLAND, *Commissioner, North Carolina*)
Utilities Commission; LUCY T. ALLEN,)
Commissioner, North Carolina Utilities)
Commission; BELL SOUTH)
TELECOMMUNICATIONS, INC., *doing*)
business as AT&T NORTH CAROLINA;)
Defendants.)

ORDER

This matter is before the Court on Plaintiff's Motion for Summary Judgment [DE 41]. For the following reasons, Plaintiff's Motion is DENIED and summary judgment is entered for Defendants. Because the Court here decides the dispositive Motion, Defendant's Motion for Decision on the Briefs [DE 73], Plaintiff's Motion for Oral Argument on Summary Judgment [DE 56], Motion to Abate Pending Related Action by the North Carolina Utilities Commission [DE 57], and Opposed Motion for Oral Argument on Summary Judgment [DE 74] are DENIED

as MOOT. In light of Judge Louise W. Flanagan's Order of January 19, 2012 in *dPi Teleconnect, L.L.C., v. Bell South Telecomms., L.L.C.*, No. 5:11-CV-576-FL, Plaintiff's Motion to Consolidate Cases [DE 77] is also DENIED as MOOT.

BACKGROUND

This is an action for declaratory judgment to determine whether the North Carolina Utilities Commission ("NCUC") erred in determining how promotional credits should be calculated for resale services that Defendant Bell South Telecommunications, Inc. ("AT&T North Carolina"), sold to dPi pursuant to the requirements of the Telecommunications Act of 1996 ("the Act"). See 47 U.S.C. §§ 251(c)(4); 252(d)(3) (1999). dPi filed a complaint with the NCUC seeking a determination that it is entitled to recovery of promotional credits from AT&T North Carolina pursuant to the parties' interconnection agreements ("ICAs"). Following an evidentiary hearing and oral arguments, the NCUC issued an order on October 1, 2010 [DE 39-16], finding that dPi is entitled to credits for the promotions from 2003 through mid-2007 and that the promotional credits must reflect an adjustment of both the retail rate and the corresponding wholesale discount that applies for services sold to resellers. dPi now seeks declaratory relief from the NCUC decision.

dPi argues that it is entitled to the full value of AT&T North Carolina's cashback promotion because AT&T North Carolina cannot discriminate against competitive local exchange carriers ("CLECs") as against retail customers—otherwise, AT&T North Carolina could price CLECs out of the market and defeat the purpose of the Act. AT&T North Carolina argues that dPi is only entitled to credits in the amount of the retail cashback amount, less the percentage discount (21.5%) offered to resellers—this preserves the discount to resellers, and gives them the "benefit" of the promotion without giving the actual cash or gift of the promotion to retail

customers. This Court's ruling is guided by the Court of Appeals for the Fourth Circuit's decision in *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 447 (4th Cir. 2007). Because the NCUC properly determined the method for calculating promotional credits, summary judgment is granted for Defendants.

DISCUSSION

Standard of Review

This Court reviews actions of state commissions taken under 47 U.S.C. §§ 251 and 252 *de novo* to determine whether they conform with the requirements of those sections. *Id.* However, the order of the state commission reflects “a body of experience and informed judgment to which courts...may properly resort for guidance.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The NCUC proceedings involved initial pleadings, discovery, pre-filed testimony, evidentiary hearings, and the submission of written briefs. The NCUC issued a recommended order, allowed the parties to file exceptions, and then issued a final order with additional explanation. Although Defendants contend that the correct way to calculate the amount of promotional credits is predominantly a factual issue and entitled to “substantial evidence” review, this Court disagrees. Determining the proper method of calculation requires interpretation of the Act and of Fourth Circuit precedent, and as such it requires the application of law to fact. Therefore, this Court will apply *de novo* review with appropriate *Skidmore* deference to the NCUC's special role in the regulatory scheme. *See Sanford*, 494 F.3d at 447-49.

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); Fed. R. Civ. P. 56. Here, all the parties concede that no genuine issue of material fact exists; they dispute only matters of law.

I. The Telecommunications Act of 1996

The Telecommunications Act of 1996 introduced a competitive regime for local telecommunications services, which had previously been provided primarily by regional telecommunications monopolies. To encourage vibrant competition, the Act requires incumbent local exchange carriers (“ILECs”), such as AT&T North Carolina, to enter into interconnection agreements (“ICAs”) with competitive local exchange carriers (“CLECs”), such as dPi. These agreements establish rates, terms, and conditions under which ILECs provide their competitors with interconnection with the incumbent’s network and telecommunications services at wholesale rates, for competitors to resell at retail. The statute sets the pricing standards for resale services.

2. Calculating the Value of Promotional Credits

The Act requires that ILECs provide telecommunications services to CLECs at wholesale price—defined as the retail rate for that service less “avoided retail costs.” 47 U.S.C. § 252 (d)(3); 47 C.F.R. § 51.607. However, this “avoided retail costs” figure is not an individualized determination that actually reflects the costs avoided on each transaction. Such a scheme would be cumbersome and inadministrable. Foreseeing this fact, the FCC regulations provide that each state commission may use a single uniform discount rate for determining wholesale prices, noting that such a rate “is simple to apply, and avoids the need to allocate costs among services.” *Local Competition Order* ¶ 916. The NCUC set AT&T North Carolina’s discount rate at 21.5% for the residential services at issue here on December 23, 1996.¹ In other words, if AT&T North Carolina sells a service to its residential retail customers for \$100 a month, it must sell the same

¹ *In the Matter of Petition of AT&T Communications of the Southern States, Inc. For Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub. 50 at 43.

service to dPi and other resellers for \$78.50.

When AT&T North Carolina offers promotions to attract potential retail customers, and those promotions are available at retail for more than 90 days, AT&T North Carolina must also offer a promotional benefit to resellers, like dPi, who purchase services subject to the promotion. 47 C.F.R. § 51.613 (a)(2); *Sanford*, 494 F.3d at 442 (holding that promotional offerings that exceed 90 days “have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied.”). When these promotions take the form of a cashback benefit, resellers are typically afforded a credit, which is applied against the amounts the reseller owes to AT&T North Carolina.

In *Sanford*, the Fourth Circuit reviewed the NCUC’s order of June 3, 2005², noting that “while the value of a promotion must be factored into the retail rate for the purposes of determining a wholesale rate for would-be competitors, the promotion *itself* need not be provided to would-be competitors.” *Sanford*, 494 F.3d at 443. Rather, the order requires that “the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers *by applying the wholesale discount to the lower actual retail price.*” *Id.* at 443-44 (emphasis added). The Fourth Circuit noted that promotions offered for more than 90 days result in a promotional rate that “becomes the ‘real’ retail rate available in the marketplace.” *Id.* at 447.

dPi contends that it is entitled to the full face value of the cashback amount [DE 1 at 5]. AT&T North Carolina contends that it owes dPi credits for the value of the cashback amount

²*In re Implementation of Session Law 2003-91, Senate Bill 814 Titled “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* N.C. Utilities Comm’n, Docket No. P-100, Sub 72b (June 5, 2005) (Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay).

reduced by the 21.5% wholesale discount [DE 39-10 at 20]. The NCUC adopted AT&T North Carolina's method of calculating the value of the promotional credits. AT&T North Carolina's method properly makes wholesale discount adjustments to both relevant rates, as dictated by the statute. dPi originally paid the standard retail rate less the wholesale discount. After the *Sanford* decision, it is clear that dPi should have paid the promotional rate less the wholesale discount. As noted by the NCUC, the difference between these two figures accurately reflects the value of the credits due to dPi. This figure can alternatively be calculated by reducing the cashback amount by the 21.5% wholesale discount, as AT&T North Carolina suggests.

When the NCUC considered the appropriate method for calculating promotion credits, dPi had already paid AT&T North Carolina for the services—using AT&T North Carolina's standard retail rate less the wholesale discount of 21.5% for residential services. Following the reasoning of *Sanford*, dPi is entitled only to the difference between the rate that it originally paid and the rate that it should have paid to AT&T North Carolina. The rate that it should have been charged is the promotional rate available to retail customers less the wholesale discount for residential services, or 21.5%.

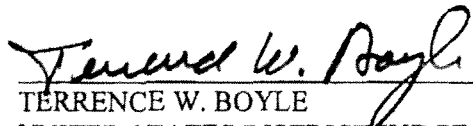
dPi suggests that this method produces anomalous results because, in the case where the cashback amount exceeds the monthly retail price, the “price” to the retail customer in a given month is a negative number. AT&T North Carolina has, therefore, effectively “paid” the retail customer that negative price during the month of service in which the cashback benefit is received. dPi argues that this cannot be the correct result because the Act dictates that the wholesale price must always be less than the retail price. However, dPi misapprehends the Act's mandate. As noted by the FCC in the *Local Competition Order*, “short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale

rate obligation.” ¶ 949. Such short-term rates are exempted from the ILEC’s resale obligation so long as the rate is “in effect for no more than 90 days.” 47 C.F.R. § 51.613(a)(2). Even if dPi’s anomaly should occur, the effect of a cashback amount greater than the monthly retail price is appropriate and permitted for a period of 90 days or less, after which any continuing distortion could be remedied by additional promotional credits.

CONCLUSION

For the foregoing reasons, Plaintiff’s Motion for Summary Judgment is DENIED and summary judgment is entered for Defendants. Because the Court here decides the dispositive Motion, Defendant’s Motion for Decision on the Briefs [DE 73], Plaintiff’s Motion for Oral Argument on Summary Judgment [DE 56], Motion to Abate Pending Related Action by the North Carolina Utilities Commission [DE 57], and Opposed Motion for Oral Argument on Summary Judgment [DE 74] are DENIED as MOOT. In light of Judge Louise W. Flanagan’s Order of January 19, 2012 in *dPi Teleconnect, L.L.C., v. Bell South Telecomms., L.L.C.*, No. 5:11-CV-576-FL, Plaintiff’s Motion to Consolidate Cases [DE 77] is also DENIED as MOOT. The Clerk is DIRECTED to enter summary judgment for Defendants.

SO ORDERED, this the 19 day of February, 2012.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

In the Matter of)	Docket No. 31322
BellSouth Telecommunications, LLC)	
d/b/a AT&T Alabama vs. BLC)	
Management, LLC d/b/a Angles Communications)	
Solutions)	

**AFFIDAVIT OF DAVID J. EGAN IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT FINDING
BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATIONS SOLUTIONS
LIABLE FOR UNDISPUTED AMOUNTS DUE**

David J. Egan, having been duly sworn, hereby states as follows:

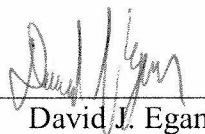
1. My name is David J. Egan. My business address is 722 N. Broadway, Floor 9, Milwaukee, Wisconsin. I am employed by AT&T Services, Inc., as a Lead Credit Analyst. In that position, I manage a group within the Wholesale Credit & Collections group that is responsible for, among other things, pursuing collection from CLECs that fail to pay AT&T entities, including BellSouth Telecommunications, LLC d/b/a AT&T Alabama ("AT&T Alabama"), for services. In that capacity, I have knowledge of the facts set forth in this Affidavit.

2. AT&T Alabama and BLC Management, LLC d/b/a Angles Communication Solutions ("BLC"), entered into an interconnection agreement in 2004 ("ICA") which was filed with the Alabama Public Service Commission.

3. After entering the ICA, AT&T Alabama provided Resale services to BLC, *i.e.*, local telecommunications services that BLC resold to its end users. AT&T Alabama maintains

records of all amounts billed to BLC, all billing adjustments and all payments for Resale services.

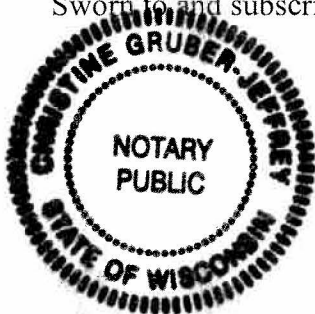
4. BLC has failed to pay all of AT&T Alabama charges for Resale services. According to AT&T Alabama's records, as of its final bill to BLC in March, 2012, the total amount BLC has failed to pay AT&T Alabama is \$19,934,131, after application of all security deposits to BLC's unpaid balance. Included in that amount is \$3,237,981 in late fees on unpaid charges for Resale services, resulting from BLC's withholding of payments, pursuant to the terms of the ICA. A summary of the amounts billed by AT&T Alabama, billing adjustments provided by AT&T Alabama and payments made by BLC is attached hereto as Attachment A.

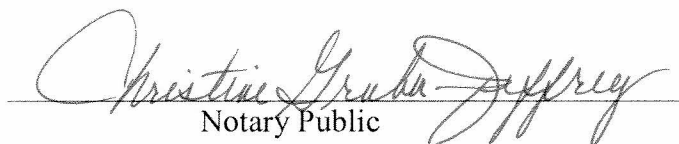

David J. Egan

STATE OF WISCONSIN

COUNTY OF Milwaukee

Sworn to and subscribed before me this 24th day of October, 2012.




Notary Public

My Commission expires:

October 13, 2013

Attachment A

Customer BLC MANAGEMENT
State AL

	Sum of Prev Bal	Payments	Adjustments	Sum of Bal Due	Current Charges	Late Payment Charges	Sum of Total Due
June-08							
July-08							
August-08							
September-08							
October-08							
November-08							
December-08							
January-09							
February-09							
March-09							
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August-11							
September-11							
October-11							
November-11							
December-11							
January-12							
February-12							
March-12							

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

In the Matter of)	Docket No. 31322
BellSouth Telecommunications, LLC)	
d/b/a AT&T Alabama vs. BLC)	
Management, LLC d/b/a Angles Communications)	
Solutions)	

**AFFIDAVIT OF CYNTHIA A. CLARK IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT FINDING
BLC MANAGEMENT LLC D/B/A ANGLES COMMUNICATIONS SOLUTIONS
LIABLE FOR UNDISPUTED AMOUNTS DUE**

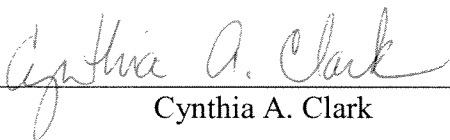
Cynthia A. Clark, having been duly sworn, hereby states as follows:

1. My name is Cynthia A. Clark. I am employed by AT&T Services, Inc. as a Senior Quality/M&P/Process Manager. My business address is 2300 Northlake Centre Drive, Tucker, Georgia 30084. My group is part of the AT&T Wholesale Customer Care organization, and I am responsible for, among other things, managing certain aspects of billing disputes raised by CLEC customers of the AT&T ILECs, including BellSouth Telecommunications, LLC d/b/a AT&T Alabama (“AT&T Alabama”). In that capacity, I have knowledge of the facts set forth in this Affidavit.

2. AT&T Alabama and BLC Management, LLC d/b/a Angles Communication Solutions (“BLC”) entered into an interconnection agreement (“ICA”) and, pursuant to that ICA, AT&T Alabama provided Resale services to BLC, *i.e.*, local telecommunications services that BLC resold to its end users. Pursuant to the terms of the ICA, AT&T Alabama submitted monthly charges to BLC for those Resale services.

3. BLC has submitted disputes to AT&T Alabama allegedly related to the charges AT&T Alabama billed for Resale services; and BLC has withheld payment from AT&T Alabama based on its disputes. The great majority of disputes raised by BLC concern claims for credits for various promotions offered by AT&T Alabama to its retail customers. My group reviews such disputes and assesses whether to grant or deny the dispute as appropriate.

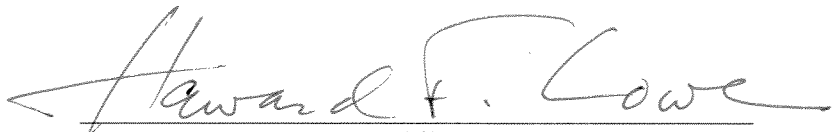
4. My group maintains detailed records of all of the disputes submitted by CLECs, such as BLC. Those records show that the total amount withheld by BLC as a result of its disputes is \$7,531,669. Included in that total is \$993,791 relating to the late payment charges imposed by AT&T Alabama under the terms of the ICA. Eliminating those late payment charge disputes, the total outstanding disputes submitted by BLC against monthly charges for services by AT&T Alabama is \$6,537,878.


Cynthia A. Clark

STATE OF GEORGIA

COUNTY OF Gwinnett

Sworn to and subscribed before me this 30th day of October, 2012.


Notary Public

My Commission expires:

2/21/2014

1048716

