

July 18, 2011

VIA ELECTRONIC FILING

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



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

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

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

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T
Alabama v. Image Access, Inc. d/b/a NewPhone - **Docket No. 31320**

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

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

Dear Mr. Thomas:

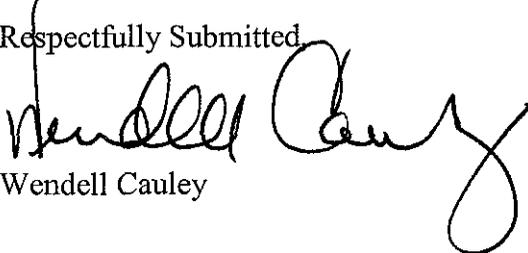
As the Commission is aware, AT&T and various Resellers (including some of the Resellers herein) are involved in consolidated proceedings before eight other state commissions addressing substantively identical issues as those before the Commission in the above-referenced dockets. Of these nine proceedings, hearings on the merits have been held before this Commission, and the commissions in Louisiana, South Carolina and North Carolina, respectively.

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On June 22, 2011, ALJ Michelle Finnegan of the Louisiana Public Service Commission ("LPSC") submitted her Proposed Recommendation in the Louisiana proceeding, which was filed herein on June 28, 2011 by AT&T in its Notice of Subsequent Development.

On July 12, 2011, Staff of the LPSC responded to ALJ Finnegan's Proposed Recommendation by filing its Exceptions to Proposed Recommendation/Draft Order ("LPSC Staff Exceptions"), a copy of which is attached hereto. In the LPSC Staff Exceptions, LPSC Staff points out various flaws in ALJ Finnegan's Proposed Recommendation (namely, that ALJ Finnegan's method and AT&T's method fail to first calculate the "effective retail rate" before applying the wholesale discount), as more fully set forth therein.

The Resellers respectfully request that the Commission consider this recent development in resolving the issues presented in this consolidated proceeding.

Respectfully Submitted,

Wendell Cauley

Enclosure

cc: Honorable John A. Garner, Executive Director and Chief ALJ (w/enclosure)
Mr. Darrell Baker, Director, Telecommunications Division (w/enclosure)
Francis B. Semmes, Esq. (w/enclosure)



Louisiana Public Service Commission

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Deputy Undersecretary

July 12, 2011

2011 JUL 12 PM 4:20
LA PUBLIC SERVICE
COMMISSION

Ms. Terri Lemoine
Louisiana Public Service Commission
Docketing Division
P. O. Box 91154
Baton Rouge, LA 70821

Docket No. U-31364- In re: Consolidated Proceeding to Address Certain Issues Common to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.

Dear Ms. Lemoine:

Please find attached hereto an original and two copies of Staff's Exceptions to Proposed Recommendation/Draft Order on behalf of the Louisiana Public Service Commission for the above referenced docket. Parties are being served via e-mail and U.S. mail. Should you have any questions regarding this filing, please contact me.

Please return me a date stamped copy.

Very truly yours,

Brandon M. Frey
LPSC Deputy General Counsel

BMF/khb

BEFORE THE
LOUISIANA PUBLIC SERVICE COMMISSION

2011 JUL 12 PM 4:20
LA PUBLIC SERVICE
COMMISSION

DOCKET NO. U-31364

**BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTHEAST D/B/A
AT&T LOUISIANA VERSUS 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**

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

STAFF'S EXCEPTIONS TO PROPOSED RECOMMENDATION/DRAFT ORDER

The Staff of the Louisiana Public Service Commission ("Staff") respectfully submits these exceptions to the Proposed Recommendation of this Tribunal issued June 22, 2011. Staff's exceptions, however, are limited to the "cash-back offering" portion of the recommendation. Staff agrees with this Tribunal's conclusions/recommendations regarding the "Waiver of Line Connection Charge" and "Word of Mouth Promotion" and supports their adoption by the Commission. For the reasons set forth herein, and those in Staff's Post-Hearing Brief filed February 9, 2011, Staff re-urges to this Tribunal that the proper treatment of "cash-back offerings" is that proposed by Staff in its Post-Hearing brief.

- I. The ALJ erred in determining the AT&T proposed methodology was the proper methodology to be applied to a "cash-back" offering.*

In the Proposed Recommendation, this Tribunal concluded that the AT&T proposed methodology, that is a discount of the "cash-back" offering by the LPSC's 20.72% avoided cost,

subtracted from the retail rate discounted by the LPSC's 20.72% avoided cost, is consistent with the FCC's Local Competition Order and the Orders of this Commission. Staff respectfully disagrees with this conclusion, as the Proposed Recommendation fails to first calculate the "effective retail rate" created by the "cash-back offering" prior to applying the wholesale discount, thus placing the resale customer at a competitive disadvantage to AT&T. This is particularly the case when applied in a negative, or credit scenario, as the AT&T methodology results in a greater credit to the retail customer.

A. Any reliance on AT&T's claims that Staff's proposed methodology was not previously considered is misplaced.

In the Proposed Recommendation, this Tribunal specifically cites to AT&T's argument that Staff's proposed formula was an approach not addressed at the hearing, and thereafter concludes the AT&T methodology/formula is the proper to apply. While it is not clear whether AT&T's attempts to discredit Staff's proposal had any bearing on this Proposed Recommendation, Staff nonetheless points to the "Supplemental Rebuttal of Resellers to Correct Errors" filed into the docket on March 23, 2011, in support of the conclusion that Staff's methodology was not novel, but rather the "Taylor's formula corrected for reality" presented by Mr. Gillan during the hearing.

Admittedly, Staff's error was attempting to reduce this methodology to a formula, much as had been done with the AT&T and Reseller proposals, in an attempt to simplify the issue. Rather than providing clarification, Staff provided AT&T with ammunition to attempt to discredit Staff's position by suggesting the *formula* was new and thus could not be considered. But it cannot be disputed that Staff's methodology, and the result it produces, is not a novel concept to this proceeding, as it was discussed in the hearing by Mr. Gillian.

B. Staff's proposed methodology, unlike the AT&T methodology adopted in the Proposed Recommendation, is consistent with Sanford, and the applicable FCC LPSC's rules.

Staff's proposed methodology is the only proposal consistent with the *Sanford*¹ decision, and thus it should be adopted. The Sanford court concluded,

In this appeal, we conclude that the NC 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."²

The language, as emphasized, is exactly what Staff is proposing- the AT&T "cash-back" offering reduces the retail rate for service, and it is to that reduced retail rate, or "effective retail rate", to which the wholesale discount must be applied. For the AT&T method, adopted in the Proposed Recommendation, to be consistent with *Sanford*, the court would have needed to rule as follows:

We conclude that long term promotional offerings, less the wholesale requirement or discount, have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied.

However, *Sanford* contains no such language, and further makes no suggestion that the promotional credit be reduced by the wholesale discount prior to being applied to the retail rate. On the contrary, *Sanford* continuously emphasizes that cash rebates, such as the cash-back offering at issue here, have the effect of creating "promotional rates" that must be offered to competitors, less a wholesale discount. Again, the precise methodology proposed by Staff.

47 C.F.R. §51.613³, cited by Staff in its Post-Hearing Brief, likewise supports adoption of Staff's, and not AT&T's, position. 51.613(a)(2) provides as follows:

¹ *BellSouth Telecommunications Incorporated v. Sanford*, 494 F.3d 439 (4th Cir. 2007)

² *Id* at 442.

³ The applicable LPSC rule, Section 1101 B of the Competition Regulations, tracks the "promotional rate" language of the federal rule, thus the same analysis applies

(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a *special promotional rate* only if:

(i) Such *promotions involve rates* that will be in effect for no more than 90 days; and

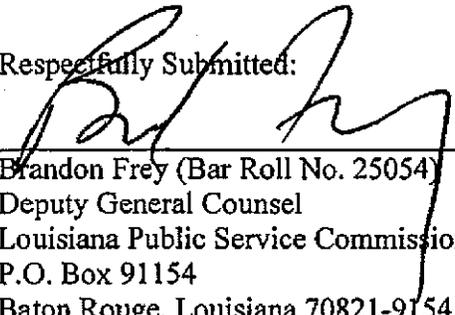
(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day *promotional rates*. (emphasis added)

Thus the FCC rule contemplates the wholesale discount being applied to the "special promotional rate", not the "cash-back offering", minus the wholesale discount, applied to the retail rate, minus the wholesale discount method proposed by AT&T. Once again, the "cash-back offering" has the effect of creating a special promotional rate. *See Sanford*. It is this special promotional rate only, and not the ordinary rate or cash back offering, to which the wholesale discount must be applied. Applying the wholesale discount to the ordinary rate (retail rate) when a promotional rate exists is inconsistent with the above rule.

II. Conclusion

For the reasons stated herein, Staff respectfully requests that this Tribunal amend the Proposed Recommendation and adopt the position advanced by Staff with respect to the correct treatment of "cash-back" promotions as explained herein, and in Staff's Post-Hearing brief previously filed in this docket.

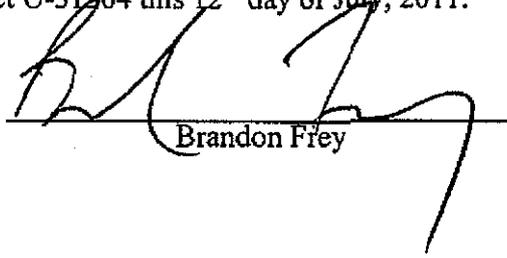
Respectfully Submitted:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via email to the service lists for docket U-31364 this 12th day of July, 2011.



Brandon Frey

Service List for U-31364
as of 7/12/2011

Commissioner(s)

Lambert C. Boissiere, Commissioner
Eric Skrmetta, Commissioner
James "Jimmy" Field, Commissioner
Clyde C. Holloway, Commissioner
Foster L. Campbell, Commissioner

LPSC Staff Counsel

Brandon Frey, LPSC Staff Attorney

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Mexicall Communications and Tennessee Telephone Service, Inc. D/B/A Freedom
Telecommunications USA, LLC

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Respondent: BLC Management, LLC

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Arlington, TN 38002

Respondent: Budget PrePay, Inc. D/B/A N/A

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Respondent:

Image Access, Inc. D/B/A NewPhone

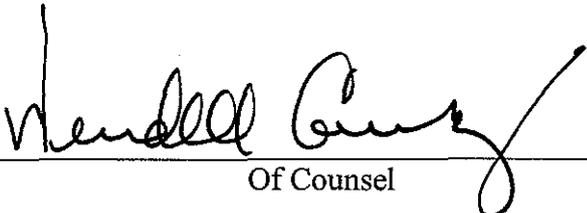
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing letter and attachment have been served on counsel for the parties to the proceedings identified therein through their respective attorneys identified below on this July 18, 2011, via First-Class Mail.

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Of Counsel