BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee v. BLC Management, LLC dba Angles Communication Solutions*
Docket No. 10-00008

MOTION FOR ORDER FINDING BLC MANAGEMENT LLC DBA ANGLES COMMUNICATIONS SOLUTIONS LIABLE FOR $15,894,723, DISMISSING COUNTERCLAIMS AND CLOSING DOCKET

This case arises out of unpaid charges for telecommunication services provided by BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T Tennessee") to BLC Management, LLC d/b/a Angles Communication Solutions ("BLC") for resale pursuant to the terms of an interconnection agreement which was approved by the Tennessee Regulatory Authority (the "Authority") on July 27, 2005, in Docket No. 05-00107 (the "ICA"). More specifically, BLC manufactured millions of dollars of specious promotional credit requests and improperly offset the value of those requests against millions of dollars otherwise due to AT&T Tennessee for the services BLC ordered from AT&T Tennessee and resold to its own customers. As discussed below, BLC's methods of calculating various credits have been soundly rejected in other forums; and BLC has elected to cease operations and apparently abandon the prosecution of its baseless counterclaims here, rather than pay undisputed amounts due to AT&T Tennessee. AT&T, therefore, seeks an Order finding that BLC owes $15,894,723 under the parties' ICA, dismissing with prejudice all of the Counter-Claims asserted by BLC, and closing this docket.

Background and Procedural History

On January 8, 2010, AT&T Tennessee commenced this case by filing a Complaint and Petition to resolve all billing disputes between AT&T Tennessee and BLC under the ICA, and determine the amount BLC owes AT&T Tennessee under the ICA. The ICA provides that disputes such as these are to be resolved in the first instance by the Authority. When the Complaint in this action was filed by AT&T Tennessee, the past-due and unpaid balance was more than $460,000 for services provided in Tennessee alone. That past-due and unpaid balance has now grown to more than $15 million, including approximately $3 million in late fees on unpaid charges pursuant to the ICA.[1]

On February 25, 2010, BLC filed an Answer and Counter-Claims asserting that it did not owe any monies to AT&T Tennessee under the terms of the ICA. BLC's Answer and Counter-Claims alleged that it was entitled to credits in excess of the amounts otherwise due AT&T Tennessee based upon BLC's creative, and legally unsupportable, method of calculating credits supposedly due to BLC in connection with three promotional credits offered by AT&T Tennessee to its retail customers:

"Cash back" – First, BLC contended that it was entitled to the full retail amount of any "cash back" promotion for which it qualified, without discounting the retail amount by the Authority-approved resale discount.

"Word of Mouth" – Second, BLC asserted that AT&T Tennessee's customer referral marketing promotions (such as the "word-of-mouth" promotion) were subject to resale to BLC's customers.

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[1] At the time AT&T Tennessee's Complaint was filed, BLC additionally had a past-due balance of over $5 million across the nine former BellSouth-region states. That total has now grown to more than $90 million.

"Line Connection Charge Waiver" – Third, BLC sought a credit based upon the full retail amount of AT&T Tennessee's promotional waiver of the line connection charge for new retail customers, again without discounting the retail amount by the Authority-approved resale discount.

Simultaneous with the filing of its Complaint with the Authority against BLC, AT&T Tennessee commenced separate actions with the Authority seeking similar relief against four other Resellers who were withholding monies due to AT&T based upon arguments and excuses substantially similar to those raised by BLC in this action. AT&T Tennessee commenced those four other actions against: (1) Budget Prepay, Inc. d/b/a Budget Phone f/k/a Budget Phone, Inc. ("Budget Prepay") (Docket No. 10-00004); (2) Tennessee Telephone Service, Inc. d/b/a Freedom Communications USA, LLC ("Tennessee Telephone")(Docket No. 10-00005); (3) Image Access, Inc. d/b/a New Phone ("Image Access")(Docket No. 10-00006); and (4) dPi Teleconnect, LLC ("dpi")(Docket No. 10-00007) (collectively, with this action, the "Tennessee Actions").

By Order dated July 28, 2010, the Tennessee Actions were consolidated by the Authority so that it could consider and deliberate the following three issues common to each case: (a) how "cash back" credits to resellers should be calculated; (b) whether the "word-of-mouth" promotion is available for resale; and (c) how credits to resellers for "line connection charge waiver" should be calculated (the "Threshold Issues"). Since entry of that Order, three of the Tennessee Actions were settled between AT&T Tennessee and the respective respondent (namely, Budget Phone, dPi, and Image Access), and Tennessee Telephone has filed for bankruptcy protection, leaving this action against BLC as the only remaining active Tennessee Action.

At the time this action was commenced, BLC was similarly refusing to pay substantial monies for services provided to it in other states. As a result, actions were commenced against BLC with the state regulatory authorities in Alabama, Kentucky, Louisiana, Mississippi, and North Carolina; and BLC defended those actions on substantially the same baseless grounds as those offered by BLC in this action. Thus, those other state regulatory authorities were similarly asked to address and determine the Threshold Issues with respect to BLC's claimed credits. In addition, similar regulatory actions were commenced against other unrelated CLECs. The defenses interposed by those CLECs similarly implicated the Threshold Issues presented here. In an effort to avoid duplication of effort in addressing multiple cases involving overlapping issues and common parties, it was determined that the hearings on the Threshold Issues in the Tennessee Actions would be held in abeyance while the Threshold Issues were addressed in other forums, including Alabama, Louisiana, and North Carolina where BLC was also a party to those proceedings.

Resolution of Threshold Issues in AT&T's favor in Other Forums

As explained below, AT&T has now prevailed on each of the Threshold Issues identified in this proceeding.

1. Cashback

A federal district court in North Carolina and state commissions in Kentucky, Louisiana, North Carolina, and Texas have adopted AT&T's position on the "cashback" issue.[2] In doing so,

[2] *dPi Teleconnect, LLC v. Finley, et al*, Docket No. 5:10-CV-466-BO (USDC, EDNC, Western Div.), Order dated February 12, 2012, at 6-7, attached as Exhibit 1 ("NC Fed Ct Order"); *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. dba AT&T Kentucky*, Docket No. 2009-00127 (Kentucky Public Service Commission), Order dated January 19, 2012, at 12, attached as Exhibit 2; Order dated March 2, 2012 at 4, attached as 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, attached as

each expressly rejected the same arguments that BLC has raised in these proceedings.[3] These decisions are entirely consistent with the Fourth Circuit's holding in *BellSouth Telecommunications, Inc. v. Sanford*[4] and the federal Telecommunications Act of 1996.[5]

2. Word of Mouth

State Commissions in Louisiana and North Carolina have adopted AT&T's position on the "word-of-mouth" issue, and the South Carolina Commission's Directive announces its intention to adopt AT&T's position as well.[6] In doing so, these Commissions considered and rejected the same arguments that BLC has raised in this proceeding. No state commission has ruled otherwise.

3. Line Connection Charge Waiver

State Commissions in Louisiana and North Carolina have adopted AT&T's position on the "line connection charge waiver" issue, and the South Carolina Commission's Directive

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Exhibit 4 ("LA Consolidated Phase Order"). *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, attached as Exhibit 5 ("NC Consolidated Phase Order"). *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 6, affirmed in Order on Motion for Reconsideration of Order No. 15 dated June 14, 1012, attached as Exhibit 7.

[3] The Alabama Commission held an evidentiary hearing in January 2012 and has received post-hearing briefs, but it has not yet ruled. The South Carolina Commission held an evidentiary hearing in December 2010 and in November 2011, it issued a Directive announcing its intent to adopt a method of calculating the "cash back" credit when the retail cashback benefit exceeds the retail price of the underlying service. AT&T South Carolina has since informed the South Carolina Commission of the significant subsequent authority against its Directive and has asked the Commission to reconsider its vote. To date, the Commission has not yet ruled on AT&T South Carolina's request, and it has not entered an order in the matter.

[4] 494 F.3d 439 (4th Cir. 2007). *See, e.g.*, NC Consolidated Phase Order at 6 ("The Fourth Circuit's decision in [*Sanford*] supports the Commission's decision").

[5] *See , e.g.*, NC Fed Ct. Order at 6 ("AT&T North Carolina's method properly makes wholesale discount adjustments to both relevant rates [the monthly retail price and the retail cashback amount] ***as dictated by the statute.***").

[6] LA Consolidated Phase Order at 18; NC Consolidated Phase Order at 11; *Complaint and Petition for Relief of BellSouth Telecommunications, LLC dba/ AT&T South dba AT&T South Carolina v. Affordable Phones Services, Inc. dba High Tech Communications, et al.* (Consolidated Docket 2010-14-C) (South Carolina Public Service Commission) Commission Directive dated November 9, 2011 at 2 attached as Exhibit 8 ("SC Directive")

announces its intention to adopt AT&T's position as well.[7] In doing so, these Commissions considered and rejected the same arguments that BLC has raised in this proceeding. No state commission has ruled otherwise.

Status of BLC Account and Business

After the commencement of this action, BLC continued to purchase telecommunication services from AT&T Tennessee for resale, but continued to refuse to make payments when due based upon its specious credit calculations which have since been rejected in other jurisdictions. Even if all of BLC's disputed credits were valid, they total no higher than $10,644,146[8] as of May 31, 2012, which is less than the $15,894,723 due to AT&T Tennessee under the ICA for services provided, and late fees due, through that date, leaving an undisputed sum of $5,250,577 due from BLC to AT&T Tennessee even if all of BLC's claimed credits were valid.

BLC's claims for credits, however, are not valid. BLC has claimed credits associated with the Threshold Issues in the amount of $4,002,702. For all of the reasons found by the federal district court in North Carolina and state commissions in Kentucky, Louisiana, North Carolina, and Texas, BLC's claims based on the "cash back" promotions are not valid. Further, no Commission has ruled in a Reseller's favor on the "word-of-mouth" or the "line connection charge waiver" issues.

Moreover, the Authority recently rejected another set of claims submitted by BLC. BLC has withheld $1,783,313 based on its claim that AT&T Tennessee was obligated to fund, via bill credits to BLC, the $3.50 State portion of Lifeline subsidy program for BLC's own Lifeline-eligible

[7] LA Consolidated Phase Order at 18-19; NC Consolidated Phase Order at 10-11; SC Directive at 2.
[8] The BLC dispute amounts are described in the Affidavit of Cynthia A. Clark, attached as Exhibit 9.

customers. By Order dated December 16, 2011, the Authority ruled that BLC has no basis to withhold that amount from AT&T Tennessee and should have paid that amount.[9] BLC, however, has not paid AT&T Tennessee that amount or any other portion of the undisputed amount due over and above BLC's credit claims.[10] Indeed, rather than pay AT&T Tennessee the amounts it wrongfully withheld, BLC ceased providing services to Tennessee residents.

BLC has clearly chosen not to pay AT&T even the undisputed amount due. Moreover, in light of the adverse rulings in other jurisdictions with respect to the substance of BLC's defenses and counter-claims, any efforts by BLC to reduce its debt to that undisputed amount would be futile.

AT&T Tennessee has brought each of the other Tennessee Actions that are not the subject of bankruptcy proceedings to conclusion by settlement, and it is entitled to a resolution of its dispute as to BLC as well. If BLC remains unwilling to pay the undisputed amount and further participate in proceedings here, BLC's Counter-Claims and defenses should be dismissed with prejudice for lack of prosecution on the part of BLC, and BLC should be barred from asserting those defenses, or pursuing those Counter-Claims, in any other forum. Accordingly, AT&T Tennessee respectfully asks this Authority to enter an Order in AT&T Tennessee's favor, including findings that:

1. BLC is no longer serving Tennessee customers;

2. BLC has declined further participation in this proceeding; and

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[9] *Examination of Issues Surrounding BellSouth Telecommunications, LLC dba AT&T Tennessee's Notice of June 28, 2011, Concerning BLC Management, LLC dba Angles Communication Solutions, dPi Teleconnect, LLC, Ganoco, Inc. dba American Dial Tone, Image Access, Inc. dba NewPhone and OneTone Telecom, Inc.* (Docket No. 11-00109) Order dated December 16, 2011, at 16-17, attached as Exhibit 10.

[10] The undisputed amounts are described in the Affidavit of David J. Egan, attached as Exhibit 11.

3. BLC has failed to pay all amounts in issue – including both undisputed amounts and those for which BLC had raised Counter Claims and defenses – resulting in unpaid charges due and owing in the amount of $15,894,723.

Alternatively, AT&T Tennessee requests that the Authority:

1. Find that AT&T Tennessee is entitled to be paid the undisputed balance of $5,250,577, plus $5,786,015 associated with the cash back, word-of-mouth, LCCW and State Lifeline subsidy claims; and

2. Dismiss BLC's remaining Counter-Claims with prejudice for BLC's failure to defend and prosecute those claims in the event BLC fails, upon notice, to appear for further proceedings.

Respectfully submitted,

AT&T TENNESSEE

By: _____

Joelle Phillips
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
615 214-6311
jp3881@att.com

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.	)	ORDER
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.	)	

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, 2005[2], 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

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[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

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

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

Background

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

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

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

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

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

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

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

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

1. dPi's Arguments

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

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

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

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

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

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

[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

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[6] Id. at 6-7.

[7] Id. at 8.

[8] Id. at 9.

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

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

2. AT&T Kentucky's Argument

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

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

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[9] Id. at 10-11.

[10] Id. at 20-32.

directly to the public . . . ." and that 47 U.S.C. § 153(43) defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

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

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

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

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

[12] VR at 2:06:30.

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

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

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

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

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

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

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

[16] Id. at 14-15.

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

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

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

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

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[17] Id. at 18-19.

[18] Id. at 22-26.

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

Discussion

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

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

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

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

[19] Id. at 29.

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

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

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

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

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

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

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

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

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

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

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

[20] VR at 1:19:00.

or

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

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

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

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

or

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

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

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

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

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

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

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

Based on the above, IT IS HEREBY ORDERED that:

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

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

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

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

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

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

7. This is a final and appealable order.

By the Commission

ENTERED

JAN 19 2012

KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:

Executive Director

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

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 Sanford[3] case out of the Fourth Circuit Court of Appeals. DPi argues that, in Sandford, 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.

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[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

ENTERED
MAR 02 2012
KENTUCKY PUBLIC
SERVICE 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 Louisianaand 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	--	$10
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	$-50
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%)]	(40)
Net amount paid	$(16)

The Resellers approach

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

Staff's Compromise Approach

Standard Retail Price	$30
Minus $50 promotion	$-50
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%	--	$ 6
Wholesale Price (Standard Retail Promotional Price minus Estimated Avoided Costs)		$24
Net or Effective Retail Price with a $50 cashback promotion	--	$50
	--	$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

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 Boult 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

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[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

Gail L. Mount

Gail L. Mount, Deputy Clerk

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

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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.

DOCKET NO. 39028

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

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).

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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]

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

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

[4] *Id* at 14-16.

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

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

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

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[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	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

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

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77

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	**November 09, 2011**
			2010-14-C/2010-15-C
			2010-16-C/2010-17-C
MOTOR CARRIER MATTER	☐	DOCKET NO.	**2010-18-C/2010-19-C**
UTILITIES MATTER	☑	ORDER NO.	

SUBJECT:

DOCKET NO. 2010-14-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phones Services, Incorporated d/b/a High Tech Communications;

DOCKET NO. 2010-15-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Dialtone & More, Incorporated;

DOCKET NO. 2010-16-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC;

DOCKET NO. 2010-17-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. OneTone Telecom, Incorporated;

DOCKET NO. 2010-18-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC;

-and-

DOCKET NO. 2010-19-C - Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Image Access, Incorporated d/b/a New Phone - Discuss this Matter with the Commission.

COMMISSION ACTION:

My motion addresses the consolidated complaints by BellSouth Telecommunications against various telecommunications service resellers for amounts allegedly owed to BellSouth in connection with certain promotions offered by BellSouth to end users. Federal law requires that former Bell System companies offer these promotions to competitive local exchange carriers (CLECs). Other federal law requires that retail services purchased for resale by CLECs be provided at the same terms and conditions, less an appropriate discount representing avoided costs by the RLEC. Under South Carolina law, that discount has been established at 14.8%.

The disputed amounts relate to three types of offers:

I. Cash Back Offers. These are rebates to the purchasing consumer that require the purchaser to remain on the BellSouth network for thirty days before the rebate check is forwarded to the customer. These rebates could be for more or less than the first month's service. BellSouth claims that the cash back promotions should be the amount provided to the BellSouth customer less the 14.8% resale discount. The CLECs argue that in order to be on the same terms and conditions as sales to BellSouth Customers, the cash back offer should not be

discounted.

This Commission finds that the rebates should be subject to the resale discount. However since the retail customer gets his rebate after keeping the service for thirty days, this Commission finds that thirty days should be the basis for calculating the rebate. If the rebate is less than the first month's charges the discount should apply to the rebate, since this has the effect of keeping that month's charges to the CLEC within the 85.2% ratio of CLEC charges to the retail rates. In the case where the rebate is greater than the first month's charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended. Therefore, in the special cases where the rebate exceeds the first month's cost of service, we find that the retail discount should not be applied to rebate.

II. Line Connection Charge Waivers. In this promotion, BellSouth offers a waiver of the Line Connection charge to the new customer. BellSouth claims that it is meeting the requirements of equal terms and conditions by waiving the Line Connection Charges. The CLECs argue that the same terms and condition clause requires BellSouth to rebate to them the difference between the BellSouth retail charge and the discounted charge that is being waived.

We find that federal law and regulations do not require the full retail amount of the Line Connection Charge to be credited to the reseller.

III. Word of Mouth Promotions. BellSouth also offers current customers a cash payment for referring new customers to BellSouth. BellSouth argues that these payments are sales promotion activities that are already included in the 14.8% discount and are therefore not available for resale. The CLECs argue that the payment is a reduction of price for the retail service and is subject to resale requirements.

We find that Word of Mouth Promotions are indeed a marketing expense included in the resale discount. It is also important that the payment goes to the referrer and not to the new retail customer. Therefore we find that Word of Mouth Promotions are not included in the resale obligation and are not subject to being paid to the reseller.

PRESIDING: Howard SESSION: Regular TIME: 1:30 p.m.

	MOTION	YES	NO	OTHER
FLEMING	☐	☑	☐	
HALL	☐	☑	☐	
HAMILTON	☐	☑	☐	
HOWARD	☐	☑	☐	
MITCHELL	☐	☑	☐	
WHITFIELD	☐	☑	☐	
WRIGHT	☑	☑	☐	

(SEAL)

RECORDED BY: J. Schmieding

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee v. BLC Management, LLC dba Angles Communication Solutions*
Docket No. 10-00008

AFFIDAVIT OF CYNTHIA A. CLARK IN SUPPORT OF MOTION FOR ORDER FINDING BLC MANAGEMENT LLC DBA ANGLES COMMUNICATIONS SOLUTIONS LIABLE FOR $15,894,723, DISMISSING COUNTERCLAIMS AND CLOSING DOCKET

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 Communications, Inc., d/b/a AT&T Tennessee ("AT&T Tennessee"). In that capacity, I have knowledge of the facts set forth in this Affidavit.

2. AT&T Tennessee and BLC Management, LLC d/b/a Angles Communication Solutions ("BLC") entered into an interconnection agreement ("ICA") and, pursuant to that ICA, AT&T Tennessee 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 Tennessee submitted monthly charges to BLC for those Resale services.

3. BLC has submitted disputes to AT&T Tennessee related to the charges AT&T Tennessee billed for Resale services; and BLC has withheld payment from AT&T Tennessee

based on its disputes. The great majority of disputes raised by BLC concern claims for credits for various promotions offered by AT&T Tennessee 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, as of May 31, 2012, is $10,644,145. Included in that total is $4,002,702 relating to the three dispute issues identified as the "threshold issues" in this proceeding, comprised of: (1) $2,721,416 in what are referred to in this proceedings as the "cash back" promotion disputes; (2) $1,244,861 in the customer referral ("word-of-mouth") promotion disputes; and (3) $36,425 in line connection charge waiver ("LCCW") disputes.

5. The amounts withheld by BLC also includes $1,783,313 based on BLC's claim that AT&T Tennessee was obligated to fund, via bill credits to BLC, the $3.50 State portion of Lifeline subsidy program for BLC's own Lifeline-eligible customers. I understand that, by Order dated December 16, 2011, the TRA ruled that BLC has no basis to withhold that amount from AT&T Tennessee and should have paid that amount. BLC has not withdrawn that dispute or made payment of that amount to AT&T Tennessee.

Cynthia A. Clark

STATE OF GEORGIA

COUNTY OF Putnam

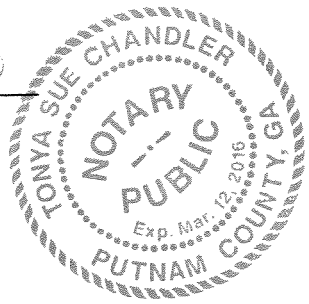
Sworn to and subscribed before me this 28th day of June, 2012.

Tonya Sue Chandler

Notary Public

My Commission expires:

March 12, 2016



BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE
December 16, 2011

IN RE:	)	
	)	
EXAMINATION OF ISSUES SURROUNDING BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T TENNESSEE'S NOTICE OF JUNE 28, 2011 CONCERNING BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATION SOLUTIONS, DPI TELECONNECT, LLC, GANOCO, INC. D/B/A AMERICAN DIAL TONE, IMAGE ACCESS, INC. D/B/A NEWPHONE, AND ONETONE TELECOM, INC.	)	**DOCKET NO. 11-00109**

FINAL ORDER

This matter came before Director Kenneth C. Hill, Director Sara Kyle, and Director Mary W. Freeman, the voting panel of the Tennessee Regulatory Authority (the "Authority") assigned to this docket, for oral argument and deliberations during a regularly scheduled Authority Conference on August 1, 2011.

TRAVEL OF THE CASE

On June 28, 2011, the Chief of the Authority's Consumer Services Division received a letter from BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T Tennessee ("AT&T") notifying the Authority that AT&T intended to suspend and disconnect resold local service in Tennessee to BLC Management, LLC d/b/a Angles Communication Solutions; dPi Teleconnect, LLC; Ganoco, Inc. d/b/a American Dial Tone; Image Access, Inc. d/b/a NewPhone; and OneTone Telecom Inc. (collectively, the "Resellers"), unless the Resellers paid, in the aggregate, nearly $1,700,000 of AT&T billings that the Resellers had withheld based on billing

disputes they had submitted to AT&T regarding the $3.50 state Lifeline credit.[1] The Authority's General Counsel requested that the parties file responses explaining why the actions referenced in the letter were not governed by an Authority Order in Docket No. 10-00008 and, therefore, not in compliance with Authority procedural orders.[2] AT&T and BLC Management, LLC d/b/a Angles Communication Solutions ("Angles") submitted filings on this issue. AT&T stated that Docket No. 10-00008 encompassed only three discrete issues, and the order holding the docket in abeyance only applied to those three issues.[3] AT&T stated that the Lifeline credit issue was a separate issue, and thus AT&T was free to pursue any right or relief available, including termination of service for non-payment.[4] The Resellers' reply did not explicitly address the Order in Docket No. 10-00008 or dispute AT&T's position that it could pursue the Lifeline issue.[5] Angles requested that the parties be allowed to come before the Directors at the next conference to address AT&T's threatened actions.[6]

At a regularly scheduled Authority Conference on July 11, 2011, the parties appeared before Chairman Eddie Roberson, Director Kenneth C. Hill, Director Sara Kyle, and Director Mary W. Freeman. After hearing from all parties, the directors voted to open a docket and appoint Director Hill to serve as Hearing Officer for the purpose of preparing this matter for hearing, including handling preliminary matters and establishing a procedural schedule.[7]

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[1] *See In re: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Tennessee Complaint and Petition for Relief v. BLC Management, LLC d/b/a Angles Communication Solutions*, Docket No. 10-00008, *Letter from Paul Stinson to Lisa Cooper*, attached to *AT&T's Response To Letter From Richard Collier* (July 1, 2011).
[2] *See Letter from Richard Collier to Guy Hicks and Henry Walker Requesting Information* (June 28, 2011), *citing Order Holding Dockets in Abeyance, Convening a Consolidated Docket and Appointing a Hearing Officer*, Docket No. 10-00008 (July 8, 2010).
[3] *See Letter from Guy M. Hicks to Richard Collier*, Docket No. 10-00008, p. 2 (July 1, 2011).
[4] *Id.*
[5] *See Letter from Henry Walker to Chairman Mary W. Freeman*, Docket No. 10-00008 (July 11, 2011)
[6] *See Letter from Henry Walker to Richard Collier*, Docket No. 10-00008, p. 1 (July 6, 2011).
[7] *Transcript of Authority Conference*, p. 112 (July 11, 2011).

Status Conference and Procedural Schedule

In an effort to expedite proceedings in this docket, following notice, the Hearing Officer held a Status Conference at 10:00 a.m. on July 13, 2011.[8] During the Status Conference, without objection, the Hearing Officer established the following procedural schedule:

> Initial Briefs to be filed on Wednesday, July 20, 2011.
>
> Reply Briefs to be filed on Tuesday, July 26, 2011.
>
> Oral argument before the panel to occur during the Authority Conference on Monday, August 1, 2011.[9]

Effective Date(s) of Termination of Service to Resellers

In addition, the Hearing Officer addressed the issues of the suspension and termination of service to the Resellers by AT&T. In its June 28, 2011 letter, AT&T had notified the Authority and the Resellers that it would suspend service effective July 14, 2011 and terminate service on July 28, 2011. Because this docket would not be resolved until August 1, 2011, the Hearing Officer asked AT&T to postpone the scheduled date of termination until thirty days after the Authority's deliberations in the docket.[10] AT&T stated that it would consider lifting the suspension of service pending a decision on the merits if the Resellers agreed to put sixty percent of the disputed amount in escrow.[11] The Resellers offered to cease filing disputes on this issue until the matter was resolved by the Authority, but they argued that the parties' interconnection agreements did not require that disputed charges be placed in escrow and objected to that request.[12]

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[8] At the Status Conference, both AT&T and the Resellers acknowledged that Image Access, Inc. d/b/a NewPhone had paid AT&T all amounts it had withheld based on its state Lifeline credits disputes and was therefore not subject to service termination. AT&T confirmed this in a follow-up letter. *See Letter from Guy M. Hicks to Director Kenneth C. Hill* (July 14, 2011).

[9] *Notice of Briefing Schedule and Oral Argument* (July 14, 2011).

[10] *Transcript of Proceedings*, pp. 11-12 (July 13, 2011).

[11] *Id.* at 13.

[12] *Id.* at 13-15.

When the Resellers did not offer the security requested by AT&T, the Hearing Officer declined to direct AT&T to lift the suspension and consulted with Authority Staff to determine what time frame the Authority requires in order to properly notify customers as required by Authority Rules.[13] Staff stated that if the Authority ruled in favor of AT&T on August 1, 2011, Staff would need approximately ten to fourteen days to ensure that customers were properly notified.[14] After a recess, AT&T agreed to the Hearing Officer's request that AT&T postpone the prospective termination date from July 28, 2011 to August 18, 2011.[15]

Briefing Schedule and Statement of Issues Before the Authority

On July 14, 2011, the Hearing Officer issued a Notice of Briefing Schedule and Oral Argument memorializing the briefing schedule, scheduling oral arguments, and setting forth the following issue: "Whether the Resellers . . . have acted in good faith in withholding Lifeline credits from payments to [AT&T]."[16] In discussing this issue, the parties were directed to address:

> (1) Whether the Interconnection Agreements of the parties allow the resellers to withhold Lifeline credits while a dispute over payment of those credits is being adjudicated; and (2) Whether AT&T is allowed to terminate service to resellers for failure to make payment of Lifeline credits if it is determined that those credits have been withheld in bad faith.[17]

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[13] *Id.* at 43-54. Authority Rule 1220-4-2-.40 (Tenn. Comp. R. & Regs. 1220-4-2-.40) pertains to the obligations of resellers and underlying carriers upon the termination of service. Rule 1220-4-2-.40(3)(a) requires the underlying carrier to notify the reseller and the Authority no less than thirty days before service is to be terminated. Rule 1220-4-2-.40(3)(b) requires the reseller to notify its customers of termination no less than fourteen days before disconnection occurs. Finally, Rule 1220-4-2-.40(c) requires the Authority to notify a reseller's customers of termination of service no less than seven days before disconnection occurs, in the event that the reseller fails to notify its customers. AT&T's letter of June 28, 2011 provided the required thirty days' notice. However, given the procedural schedule, unless AT&T agreed to move the proposed date of termination of service, the Authority would have had to provide notice to the Resellers' customers of termination before the Authority could make a determination on the issue of whether AT&T was allowed to terminate service.

[14] *Id.* at 50-54.

[15] *Id.* at 56. AT&T also clarified that the Resellers' ordering capability would be suspended beginning at 11:59 p.m. on July 14, 2011. *See Letter from Guy M. Hicks to Director Kenneth C. Hill* ((July 14, 2011).

[16] *Notice of Briefing Schedule and Oral Argument* (July 14, 2011).

[17] *Id.*

Intervention by Consumer Advocate and Protection Division

Subsequent to the Status Conference, on July 25, 2011, the Consumer Advocate and Protection Division of the Office of the Attorney General ("CAPD") filed a Petition to Intervene. The CAPD stated that its purpose in intervening was to ensure that "the customers of the Resellers . . . are given adequate notice of the possible impending termination of their telephone service and are given further assistance in securing new phone service, particularly Lifeline service, should it become necessary."[18] No objections were filed, and the Petition was granted.

BACKGROUND

The Resellers provide the full amount of mandated Lifeline credits to their end users who qualify for the Lifeline program.[19] The total maximum credit of $13.50 includes a federal portion in the amount of $10.00 that is "flowed through" to the Resellers by AT&T, which receives compensating federal universal service funds for this portion. The remaining $3.50 of the total credit is not subsidized by federal universal service funds but is nevertheless required by federal law; the manner in which this portion is funded is left to the states. The Authority established in Docket No. 00-00230 that each provider of local telephone service in Tennessee must separately fund the state portion of the Lifeline credit.[20] Accordingly, AT&T is not required to and does not "flow through" any amount reflecting the state portion of the Lifeline credit to the Resellers.

The Resellers' respective interconnection agreements with AT&T allow them to withhold payments to AT&T based on good faith billing disputes until such disputes are resolved.

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[18] *Petition to Intervene*, p. 2 (July 25, 2011).

[19] The Lifeline program is designed to increase the availability of telecommunications services to low income subscribers by providing a credit to monthly recurring local service for qualifying residential subscribers. *See* G.S.S.T. Tariff A3.31.1.A, now found in AT&T's publicly-available General Exchange Guidebook, at A3.31.1.A.

[20] *See Complaint of Discount Communications, Inc. against BellSouth Telecommunications, Inc.*, Docket No. 00-00230, *Order*, pp. 11-12 (Sept. 28, 2000), *aff'd sub nom. Discount Communications, Inc. v. BellSouth Telecommunications, Inc.*, 2002 WL 1255674 (Tenn. Ct. App. June 7, 2002).

Relying on these provisions, the Resellers have disputed and withheld payments to AT&T based on their position that AT&T is required to provide to them a $3.50 state Lifeline credit.

POSITIONS OF THE PARTIES

A. AT&T

AT&T argued that an interconnection agreement is "the Congressionally-prescribed vehicle for implementing the substantive rights and obligations set forth in the [1996 Federal Telecommunications] Act,"[21] and once a carrier enters into such a contract in accordance with Section 252 of the 1996 Act, "it is then regulated directly by the interconnection agreement."[22] Accordingly, AT&T stated, once an interconnection agreement is approved, the parties are "governed by the interconnection agreement" and "the general duties of [the 1996 Act] no longer apply."[23] AT&T further contended that the Authority-approved interconnection agreements relevant to this matter make clear that AT&T is not required to provide a state Lifeline credit to the Resellers.[24]

AT&T asserted that each Reseller has contractually agreed to resell services subject to the terms and conditions of AT&T's tariffs. For example, the interconnection agreement between AT&T and Angles states:

> [R]esold services can only be used in the same manner as specified in [AT&T's] Tariffs. Resold services are subject to the same terms and conditions as are specified for such services when furnished to an individual End User of [AT&T] in the appropriate section of [AT&T's] Tariffs.[25]

AT&T's tariff expressly provides, in relevant part:

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[21] *Brief of AT&T Tennessee*, p. 12, n. 28, quoting *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003).
[22] *Id.*, quoting *Law Offices of Curtis V. Trinko LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 104 (2d Cir. 2002).
[23] *Id.*, quoting *Mich. Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003).
[24] *Id.* at 7-8.
[25] *Interconnection Agreement Between AT&T Tennessee and Angles*, Section 4.2 (quoted in *Brief of AT&T Tennessee*, p. 7).

> The non-discounted federal Lifeline credit amount will be passed along to resellers ordering local service at the prescribed resale discount from this Tariff, for their eligible end users. The additional credit to the end user will be the responsibility of the reseller.[26]

Citing these provisions, AT&T contended that each Reseller has contractually agreed that the Reseller, and not AT&T, must provide the state Lifeline credit for the Resellers' end-users.[27] AT&T asserted that the language in the interconnection agreements and its tarriff is unambiguous, controlling, and entirely consistent with Tennessee's substantive telecommunications law[28] as set forth in the Authority's Order in Docket No. 00-00230[29] and the Tennessee Court of Appeals' Opinion affirming that Order.[30] AT&T stated that allowing the Resellers to dispute that they are required by their contracts to comply with the plain language of AT&T's tariff would render the language of the contracts meaningless.[31]

AT&T pointed out that each of the agreements requires the Resellers to act in good faith in exercising their rights and performing their duties under the contracts.[32] AT&T further stated that under controlling Georgia contract law, a contract may be so patently clear and explicit on a given point that any construction different from its obvious and exclusive meaning would constitute a gross mistake or error that simply cannot support a claim of good faith.[33] AT&T asserted that Georgia law is clear that "[w]here the language of a contract is plain and unambiguous, no construction is required or permissible and the terms of the contract must be

[26] *See* Tariff/Guidebook, § A3.31.2.A.9 (quoted in *Brief of AT&T Tennessee*, p. 7).
[27] *Brief of AT&T Tennessee*, p. 7.
[28] The interconnection agreements are governed by Tennessee's "substantive telecommunications law." *Id.* at 6.
[29] *In Re: Complaint of Discount Communications, Inc. Against BellSouth Telecommunications Inc.*, Docket No. 00-00230, *Order* (Sept. 28, 2000).
[30] *Discount Communications*, 2002 WL 1255674.
[31] *Reply Brief of AT&T Tennessee*, pp. 5-6.
[32] *See Reply Brief of AT&T Tennessee*, p. 5.
[33] *Id.*

given an interpretation of ordinary significance."[34] And even when it is necessary to interpret a contract to resolve some ambiguity in its language, Georgia law makes clear that:

> The contract is to be considered as a whole, and each provision is to be given effect and interpreted so as to harmonize with the others. The construction of the contract should give a reasonable, lawful and effective meaning to all manifestations of intention by the parties rather than an interpretation which leaves a part of such manifestations unreasonable or of no effect. And any construction that renders portions of the contract language meaningless should be avoided.[35]

Additionally, AT&T argued that the Resellers clearly were asking the Authority to re-write their agreements to say that AT&T is required to provide the Resellers the state Lifeline credit.[36] AT&T cited a Georgia decision stating that "[n]either the trial court nor this [appellate] Court is at liberty to rewrite or revise a contract under the guise of construing it."[37] According to AT&T, disputes that are based on intentional breaches of contractual obligations and are in defiance of controlling law simply are not made in good faith.[38]

On this basis, AT&T asserted that it is entitled as a matter of law to terminate service to the Resellers when they breach their respective interconnection agreements by refusing to pay for no other reason than that they do not like the lawful decision of the Authority.[39] AT&T contended that each of the arguments the Resellers make in attacking the Authority's existing

[34] *Id.* at 6, n. 11, citing *Fernandes v. Manugistics Atlanta, Inc.*, 582 S.E.2d 499, 502 (Ga. Ct. App. 2003).
[35] *Id,* at 6, n. 12, citing *Thomas v. B&I Lending, LLC*, 581 S.E.2d 631, 634 (Ga. Ct. App. 2003). AT&T further stated that this is consistent with Tennessee law. *Id.*, citing *Collateral Plus, LLC v. Max Well Medical, Inc.*, Slip Copy, 2011 Tenn. App. LEXIS 150 at *16 (Tenn. Ct. App. March 29, 2011).
[36] *Id.* at 2.
[37] *Id.* at 6-7, n. 14, quoting *Fernandes v. Manugistics Atlanta, Inc.*, 582 S.E.2d 499, 503 (Ga. Ct. App. 2003); and citing *Berry v. Travelers Ins. Co.*, 14 S.E.2d 196, 201 (Ga. Ct. App. 1941) ("If it be said that the provision is a harsh one, the answer is that the rights of the parties are to be determined under the contract as made, and it is not within the power of this court to rewrite it."). AT&T adds that this is consistent with Tennessee law. *Id.*, citing *Collateral Plus, LLC v. Max Well Medical, Inc.*, Slip Copy, Tenn. App. LEXIS 150 at *16 (Tenn. Ct. App. March 29, 2011) ("The court enforces the parties' contract as it is written; it does not make a new contract for the parties.").
[38] *Id.* at 7.
[39] *Id.*

Order and, by necessity, the Court of Appeals' Opinion affirming it, was carefully considered and rejected by the Authority in the proceedings that led to the Order the Resellers now attack.[40]

B. The Resellers

The Resellers contended that there is no disagreement that the parties' interconnection agreements allow them to dispute any charge from AT&T and to withhold payment of that charge pending a resolution of the dispute by the Authority.[41] The Resellers asserted that under Georgia law, which they agree governs the contracts, all contracts require either explicitly or implicitly that the parties perform "in good faith."[42] The Resellers cited a Georgia decision that defines "good faith" as "any reasonable ground for contesting the claim," such as where there is a "disputed question of fact or doubtful question of law."[43]

The Resellers stated that it was not the purpose of this proceeding to reargue the merits of the Lifeline subsidy issue, which was addressed in 2000.[44] Nevertheless, the Resellers argued that at the time of that decision the Authority said the issue was one of "policy," not law, and that the Authority's policy was intended only to be an "interim" one.[45] On this basis, the Resellers claimed that they are entitled to file a billing dispute asking the Authority to revisit its interim policy and reach a different result.[46]

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[40] *Id.* at 8-10.
[41] *Initial Brief of Resellers*, p. 1 (July 20, 2011). The Resellers cite the dPi interconnection agreement, which states at Attachment 7, Section 1.4.1: "Payment Due. Payment for services provided by BellSouth, not including disputed charges, is due on or before the next bill date." *Id.* at 1, n. 2.
[42] *Id.* at 3.
[43] *Id.* at 5, quoting *Lawyers Title Ins. Corp. v. Griffin*, 691 S.E.2d 633, 637 (Ga. Ct. App. 2010).
[44] *Id.* at 6.
[45] *Id.* The Authority's Final Order in Docket No. 00-00230 stated that in deciding that "it is the policy of this state that each individual reseller fully fund the state portion of the Lifeline assistance program from the reseller's internal resources," the Director's "further recognized, however, that this policy is an interim one." *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000). The Authority referred to its own *Interim Order on Phase I of Universal Service*, Docket No. 97-00888, p. 43 (May 20, 1998), in which the Authority stated that "the interstate portion of Lifeline and Link-up shall be funded from the intrastate USF."
[46] *Initial Brief of Resellers*, p. 6 (July 20, 2011).

The Resellers stated that the Authority had intended that its interim policy would remain in place only until the Authority established an intrastate Universal Service Fund, which would be used to fund "the state subsidy portion of Lifeline service."[47] In the Resellers' view, when this interim policy was adopted the Authority had already decided to create a state universal service fund and anticipated that the money in the fund would be used to supply the state share "once the fund becomes established and operational."[48]

The Resellers argued that, on appeal, the Tennessee Court of Appeals affirmed the Authority's decision because, according to the Court, the issue was a question of policy which the Federal Communications Commission ("FCC") had left to the discretion of the state commissions.[49] The Resellers contended that the Court deferred to the FCC's finding that states could chose among "many" acceptable methods for subsidizing the Lifeline program and therefore held that the Authority was "free to continue its policy of placing the burden of the state subsidy on the carriers that sell the services to the Lifeline customers."[50]

The Resellers acknowledged that in the ensuing eleven years the "intrastate Universal Service Fund" they state was anticipated by former Authority Directors as a mechanism for funding the state's share of the Lifeline program had not been created.[51] As a result, the Resellers argued, the Authority's interim policy has the effect of requiring some carriers to bear a disproportionate share of the cost of the Lifeline program, an effect which undermines the availability of Lifeline service.[52]

The Resellers asserted that the FCC recognized that many states, like Tennessee, had been funding the state's share of the Lifeline subsidy through the ratemaking process, ordering

[47] *Id.* at 9, quoting *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000).
[48] *Id.*, quoting *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000).
[49] *Id.* at 6.
[50] *Id.* at 9-10.
[51] *Id.* at 10.
[52] *Id.* at 9-10.

incumbent LECs to charge Lifeline customers a discounted rate and allowing them to recover the revenue by charging other subscribers more.[53] The Resellers also stated that in the words of the FCC, "Many methods exist, including competitively neutral surcharges on all carriers or the use of general revenues," that states could use to fund the Lifeline program "that would not place the burden on any single group of carriers."[54] The Resellers added, however, that any method adopted by a state to fund the Lifeline program must be "equitable" and "non discriminatory" and contribute to the "preservation and advancement of universal service" as required by Section 254(f) of the 1996 Federal Telecommunications Act.[55]

In sum, according to the Resellers, the state commissions were presented with the following options: requiring resale of Lifeline service at the reduced Lifeline rate; imposing a non-discriminatory, competitively neutral surcharge on all carriers; or funding Lifeline through state tax revenues.[56] Whatever method the state chose also had to promote the availability of Lifeline services.[57] The Resellers stated that the Authority chose none of these options but, instead, adopted an "interim" policy of requiring that "each individual reseller fully fund the state portion of the Lifeline assistance program from the reseller's internal sources."[58]

The Resellers believe that the Authority's interim policy does not comply with federal law and that the Authority must choose one of the options suggested by the FCC.[59] In the absence of a "neutral surcharge" on all carriers or a program to fund the Lifeline subsidy with tax

[53] *Id.* at 7; *cf. In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776 (May 8, 1997) ("*Universal Service Order*"), ¶ 361
[54] *Id.* at 8, quoting *Universal Service Order*, ¶ 157.
[55] *Id.*, quoting *Universal Service Order*, ¶ 361.
[56] *Id.* at 8.
[57] *Id.*
[58] *Id.* at 8-9, quoting *Final Order*, Docket No. 00-00230, p. 11 (Sept. 28, 2000).
[59] *Id.* at 10.

revenue, the Resellers stated, the Authority can comply with federal law only by requiring AT&T to offer Lifeline service for resale at the discounted Lifeline rate.[60]

The Resellers argued that AT&T's state tariffs referred to in the parties' interconnection agreements cannot override federal law; otherwise, AT&T could "prevail" on any debate over the meaning of a federal rule by incorporating AT&T's interpretation of the law into a state tariff.[61] The Resellers argued that when a state tariff conflicts with the federal statutory law or the rules of a federal agency, federal law prevails.[62] Here, the Resellers contended, the FCC's rules and orders implementing Section 254(f) of the 1996 Act require that in the absence of a neutral funding mechanism AT&T must pass on the subsidy to the Resellers.[63] Thus, the Resellers argued, if the Authority finds that AT&T's tariffs, as referenced in the parties' interconnection contracts, are inconsistent with federal law, the Authority can simply direct that AT&T's tariff language be changed to comply with federal law.[64]

The Resellers did not dispute that the Authority's "interim policy" established in Docket No. 00-00230 is the law in Tennessee until such time as the Authority orders otherwise.[65] The Resellers contended, however, that the issue in this case is whether they have the right under their interconnection agreements to ask the Authority to revisit that policy and change it.[66] The Resellers cited a decision of the Tennessee Court of Appeals holding that the Authority "is free to reverse course if public policy demands it."[67]

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[60] *Id.*
[61] [Resellers'] *Reply Brief*, p. 1 (July 26, 2011).
[62] *Id.* at 1-2.
[63] *Id.* at 2.
[64] *Id.*
[65] *Id.* at 3.
[66] *Id.*
[67] *Id.*, quoting *United Cities v. Tenn. Public Service Comm'n*, 709 S.W.2d 256 (Tenn. 1990).

FINDINGS AND CONCLUSIONS

At a regularly-scheduled Authority Conference held on August 1, 2011, the Directors heard oral argument from the parties. Following oral argument, the Directors deliberated and announced their unanimous decision, based on the following analysis.

Because AT&T has elected market regulation pursuant to Tenn. Code Ann. § 65-5-109(m), the Authority's jurisdiction to hear this dispute is narrowly defined by Tenn. Code Ann. § 65-5-109(m) – (n). Subsection (m) provides, in relevant part:

> Notwithstanding the limitations on authority jurisdiction over market-regulated companies under state law as set forth in this section, it is the express intent of the general assembly that the Tennessee regulatory authority is authorized as a matter of state law . . . to arbitrate and enforce interconnection agreements.

And subsection (n) provides, in relevant part:

> A certificated provider electing market regulation shall be subject to the jurisdiction of the authority only when:
> . . .
> (7) The authority is exercising jurisdiction respecting the Life Line or Link Up programs consistent with FCC rules, including, but not limited to, 47 CFR 54.403(a)(3) and relevant Tennessee public service commission orders on file with the authority as of January 1, 2009[.]

The interconnection agreements at issue in this matter are governed by Georgia contract law. In addition, by incorporation in AT&T's tariff and pursuant to the Authority's decisions administering the Lifeline program, the agreements require AT&T to flow through to the Resellers that portion of the Lifeline subsidy which is funded by the federal Universal Service Fund. In its decision relevant to the state Lifeline credit, the Authority determined that each provider of local telephone service would be responsible for that portion of the total credit. The Court of Appeals affirmed the Authority's decision, which remains in effect. In the absence of a state universal service fund, and in accordance with the Authority's decision, AT&T does not

flow through any additional amount for the state Lifeline component. Accordingly, the interconnection agreements obligate the Resellers to make payments to AT&T for the state portion of the Lifeline credit.

The interconnection agreements expressly provide for billing disputes. The relevant sections of the agreements also provide by implication that the party bringing a billing dispute may withhold payment of the disputed amounts pending resolution of the dispute. The parties agree that this is the case. As the parties also agree, the agreements contain both expressly and as a matter of Georgia law an obligation to perform in good faith.

As stated by the Hearing Officer, the issues before the Authority are whether the agreements "allow the resellers to withhold Lifeline credits while a dispute over payment of those credits is being adjudicated" and "[w]hether AT&T is allowed to terminate service to resellers for failure to make payment of Lifeline credits if it is determined that those credits have been withheld in bad faith." Whether the Authority's Order in Docket No. 00-00230 is inconsistent with the FCC's Universal Service Order, therefore, is not at issue. Generally, whether a party has acted in good faith is a question of fact.[68] Here, however, there is no dispute that the Resellers' decision to withhold payment was based exclusively on their belief that if the Authority were to revisit the issue in Docket No. 00-00230 it would reach a completely different result. The question whether the Resellers brought their billing disputes in good faith can be determined, therefore, by examining this action in light of the plain terms of the interconnection agreements.[69]

A billing dispute, as commonly understood and as apparently contemplated by the interconnection agreements, is a challenge to the manner in which a bill submitted to the

[68] *Re/Max Executives, Inc. v. Vacalis*, 507 S.W.2d 235, 237 (Ga. Ct. App. 1998).
[69] Summary judgment is appropriate where the plain language of an agreement admits of only one interpretation. *Megel v. Donaldson*, 654 S.W.2d 656, 662 (Ga. Ct. App. 2007).

disputing party was calculated or the basis on which payment was demanded. In some circumstances, a billing dispute might arise which would be characterized as a challenge to the other party's interpretation of the terms of the parties' agreement. Here, however, the Resellers are challenging neither AT&T's administration of the agreements nor its interpretation of them. Instead, the Resellers have based their billing disputes and their decision to withhold payment solely on the theory that the Authority should and, if requested to, will reverse its prior decision on the state Lifeline credit. The Resellers are quite frank in admitting that the interconnection agreements do not require AT&T to flow through the state Lifeline credit, and they do not pretend that they are disputing AT&T's bills on the basis of AT&T's calculation methods or its interpretation of the agreements. Instead, they are seeking action by the Authority that would necessarily begin with the Authority's determination that its own order is ineffective.

The Authority concludes that the good faith requirement contained in the interconnection agreements extends to the provision allowing a party to withhold payment pending resolution of a billing dispute. The Authority agrees with AT&T that the Resellers have not relied on a good faith basis for lodging their disputes and, therefore, are not entitled to withhold payment of the state Lifeline credit.[70] The provision for billing disputes contained in the interconnection agreements does not allow a party to withhold payments on no other basis than conjecture about possible changes in the substantive law incorporated into the agreements.[71]

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[70] Whereas bad faith may not be found where the accused party had "any reasonable ground" for the dispute it raised, bad faith "is shown by evidence that under the terms of the [agreement] under which the demand is made, . . . [the party raising the dispute] had no 'good cause' for resisting and delaying payment." *Lawyers Title*, 691 S.E. at 637. As the terms of the interconnection agreements at issue obligate the Resellers to fund the state Lifeline credit, a fact the Resellers do not dispute, the Reseller's dispute was not lodged in good faith.

[71] The Resellers' suggestion that the Authority's decision in Docket No. 00-00230 is somehow unlawful on its face, see *Initial Brief of Resellers,* p. 10, is not well-taken. The FCC's Universal Service Order acknowledged the approach taken by the Authority and in effect today:

> The Joint Board observed that many states currently generate their matching funds through the state rate-regulation process. These states allow incumbent LECs to recover the revenue the carriers lose from charging Lifeline customers less by charging other subscribers more. Florida PSC points out that this method of generating Lifeline support

Consequently, a party lodging a dispute which does not do so in good faith is not relieved of its continuing obligation to make payments. The Resellers' continued failure to pay may result in AT&T's termination of service to the Resellers on or after August 18, 2011, pursuant to the terms of the Authority-approved interconnection agreements between the parties. In accordance with Authority Rule 1220-4-2-.40(3)(c), if the Resellers do not notify their customers within fourteen (14) days of disconnection of their service or within such other time as the Authority may allow the Resellers to notify their customers, and the Authority is obligated to send notification letters, the Authority will recover from the Resellers its costs associated with notification.

The parties are instructed to work with Authority Staff, as reasonably necessary, to refine the list of Reseller customers that may need to be notified, because of changes in the customer base that have taken place in the last few weeks, in order to avoid duplicative or unnecessary customer notices in the event that service is not disconnected.

IT IS THEREFORE ORDERED THAT:

1. The Authority finds that the Resellers did not act in good faith in disputing charges and withholding payments to AT&T related to the state Lifeline credit.

> from the intrastate jurisdiction could result in some carriers (i.e., ILECs) bearing an unreasonable share of the program's costs. *We see no reason at this time to intrude in the first instance on states' decisions about how to generate intrastate support for Lifeline. We do not currently prescribe the methods states must use to generate intrastate Lifeline support, nor does this Order contain any such prescriptions. Many methods exist, including competitively neutral surcharges on all carriers or the use of general revenues that would not place the burden on any single group of carriers. We note, however, that states must meet the requirements of section 254(e) in providing equitable and non-discriminatory support for state universal service support mechanisms.*

Universal Service Order, ¶ 361 (Emphasis added). In affirming the Authority's decision in Docket No. 00-00230, the Court of Appeals quoted with approval the highlighted portion of this passage. *See* 2002 WL 1255674, at *3. The Resellers suggest that the last sentence of Paragraph 361 would independently invalidate the Authority's approach, but the better reading is that the FCC would not have included the last sentence if it already believed that the method it had just described, and which the FCC had just stated that it would leave alone, inherently violated it.

2. The Authority finds that the Resellers are obligated by the terms of their interconnection agreements to pay AT&T the amounts withheld for the state Lifeline credit.

3. If the Resellers fail to notify their customers within fourteen days of disconnection of service by AT&T, pursuant to Authority Rule 1220-4-2-.40(3)(c), or within such other time as the Authority may allow the Resellers to notify their customers, the Authority will recover costs associated with such customer notification from the Resellers.

4. Any party aggrieved by the decision of the Authority may file a Petition for Reconsideration with the Authority within fifteen (15) days of the entry of this Order.

5. Any party aggrieved by the decision of the Authority may file a Petition for Review with the Tennessee Court of Appeals, Middle Division, within sixty (60) days of the entry of this Order.

Kenneth C. Hill, Director

Sara Kyle, Director

Mary W. Freeman, Director

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T Tennessee v. BLC Management, LLC dba Angles Communication Solutions*
Docket No. 10-00008

AFFIDAVIT OF DAVID J. EGAN IN SUPPORT OF MOTION FOR ORDER FINDING BLC MANAGEMENT LLC DBA ANGLES COMMUNICATIONS SOLUTIONS LIABLE FOR $15,894,723, DISMISSING COUNTERCLAIMS AND CLOSING DOCKET

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 Communications, Inc., d/b/a AT&T Tennessee ("AT&T Tennessee"), for services. In that capacity, I have knowledge of the facts set forth in this Affidavit.

2. AT&T Tennessee and BLC Management, LLC d/b/a Angles Communication Solutions ("BLC"), filed an interconnection agreement ("ICA") with the Tennessee Regulatory Authority ("TRA") which was approved by the TRA on July 27, 2005, in Docket No. 05-00107.

3. After entering the ICA, AT&T Tennessee provided Resale services to BLC, *i.e.*, local telecommunications services that BLC resold to its end users. AT&T Tennessee 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 Tennessee's charges for Resale services. According to AT&T Tennessee's records, as of May 12, 2012, the total amount BLC has failed to pay AT&T Tennessee is $15,894,723. Included in that amount is $3,360,025 in late fees on unpaid charges for Resale services. A summary of the amounts billed by AT&T Tennessee, billing adjustments provided by AT&T Tennessee and payments made by BLC is attached as Exhibit A.

David J. Egan

STATE OF WISCONSIN

COUNTY OF Milwaukee

Sworn to and subscribed before me this 26th day of June, 2012.

CHRISTINE GRUBER-JEFFREY NOTARY PUBLIC STATE OF WISCONSIN

Christine Gruber-Jeffrey
Notary Public

My Commission expires:

October 13, 2013

BLC Management

State	Balance Forward	Payments	Adjustments	Balance Forward minus (Payments + Adjustments) Col B - (Col C + Col D)	Current Charges	Late Payment Charges (not included in Col F)	Amount Due
Tennessee	(Bill account numbers 615Q891076, 615Q891792, 615Q893750 and 615Q896049)						
October-08	$1,470,404	($136)	($349,564)	$1,120,704	$258,356	$1	$1,379,061
November-08	$1,379,061	($80)	($135,953)	$1,243,027	$299,253	$0	$1,542,280
December-08	$1,542,280	($440)	($55,100)	$1,486,741	$292,038	($1)	$1,778,778
January-09	$1,778,778	$0	($3,268)	$1,775,510	$253,403	$0	$2,028,913
February-09	$2,028,913	$0	($196,671)	$1,832,243	$256,831	($1)	$2,089,073
March-09	$2,089,073	($10)	($198,100)	$1,890,964	$224,918	$0	$2,115,882
April-09	$2,115,882	($80)	($283,562)	$1,832,240	$239,909	$0	$2,072,149
May-09	$2,072,149	($94)	($75,783)	$1,996,272	$249,597	$1	$2,245,870
June-09	$2,245,870	($60)	$0	$2,245,810	$343,107	($1)	$2,588,916
July-09	$2,588,916	($70)	($37,201)	$2,551,645	$305,821	$0	$2,857,466
August-09	$2,857,466	($24)	($157,897)	$2,699,544	$327,256	$0	$3,026,800
September-09	$3,026,800	$0	($150,014)	$2,876,786	$397,601	$0	$3,274,387
October-09	$3,274,387	($928)	($2,539)	$3,270,920	$534,589	$1	$3,805,510
November-09	$3,805,510	$0	($760,184)	$3,045,326	$659,080	$0	$3,704,406
December-09	$3,704,406	($105)	($38,318)	$3,665,983	$701,393	$0	$4,367,376
January-10	$4,367,376	($1,338)	($138,729)	$4,227,308	$557,263	$0	$4,784,571
February-10	$4,784,571	($3,016)	$55	$4,781,610	$663,263	$0	$5,444,873
March-10	$5,444,873	($6,594)	$16	$5,438,295	$667,717	$1	$6,106,013
April-10	$6,106,013	($179)	($1,122,278)	$4,983,556	$682,131	$0	$5,665,687
May-10	$5,665,687	($3,000)	($1,556)	$5,661,131	$671,592	$0	$6,332,723
June-10	$6,332,723	($1,054)	($18,942)	$6,312,727	$604,922	$0	$6,917,649
July-10	$6,917,649	($3,339)	($144,980)	$6,769,330	$588,032	$0	$7,357,362
August-10	$7,357,362	($377)	($119,808)	$7,237,178	$825,445	$0	$8,062,623
September-10	$8,062,623	($394)	($3,079)	$8,059,150	$814,142	$0	$8,873,292
October-10	$8,873,292	($528)	$395	$8,873,159	$654,105	$0	$9,527,264
November-10	$9,527,264	($1,122)	($341,963)	$9,184,179	$495,386	$210,001	$9,889,566
December-10	$9,889,566	($135)	($150,708)	$9,738,722	$293,993	$210,000	$10,242,715
January-11	$10,242,715	($304)	($78,471)	$10,163,940	$332,415	$210,000	$10,706,355
February-11	$10,706,355	($750)	$512	$10,706,117	$449,090	$210,000	$11,365,207

BLC Management

State	Balance Forward	Payments	Adjustments	Balance Forward minus (Payments + Adjustments) Col B - (Col C + Col D)	Current Charges	Late Payment Charges (not included in Col F)	Amount Due
March-11	$11,365,207	($311)	($52,868)	$11,312,028	$325,358	$210,000	$11,847,386
April-11	$11,847,386	($850)	($83,704)	$11,762,832	$588,869	$0	$12,351,700
May-11	$12,351,700	($50)	($132,144)	$12,219,506	$384,148	$210,000	$12,813,654
June-11	$12,813,654	($406)	($69,694)	$12,743,553	$529,992	$210,000	$13,483,545
July-11	$13,483,545	($97)	($118,593)	$13,364,855	$437,826	$210,000	$14,012,681
August-11	$14,012,681	($630,100)	$630,000	$14,012,581	$273,923	$210,000	$14,496,505
September-11	$14,496,505	($236)	$50	$14,496,319	($100,900)	$210,000	$14,605,419
October-11	$14,605,419	$0	$0	$14,605,419	$5,419	$210,001	$14,820,838
November-11	$14,820,838	($20,000)	$176	$14,801,014	$5,242	$210,002	$15,016,259
December-11	$15,016,259	$0	$20,000	$15,036,259	$4,311	$210,003	$15,250,572
January-12	$15,250,572	($25)	$0	$15,250,547	$4,028	$210,005	$15,464,580
February-12	$15,464,580	$0	$0	$15,464,580	$3,632	$210,006	$15,678,218
March-12	$15,678,218	($34)	$0	$15,678,184	$2,939	$210,006	$15,891,129
April-12	$15,891,129	($55)	$0	$15,891,074	$3,649	$0	$15,894,723