

STATE OF TENNESSEE
TENNESSEE REGULATORY AUTHORITY

In the matter of:)	
)	
NEXUS COMMUNICATIONS, INC.)	
)	
v.)	
)	
BELLSOUTH TELECOMMUNICATIONS,)	DOCKET NO. <u>10-00212</u>
INC. D/B/A AT&T TENNESSEE)	
)	
Dispute over interpretation of the parties')	
interconnection agreement regarding)	
AT&T's failure to extend full value of)	
Cash Back promotions to Nexus)	

NEXUS COMMUNICATIONS, INC.'S ORIGINAL PETITION

TO THE HONORABLE TENNESSEE REGULATORY AUTHORITY:

1. Nexus Communications, Inc. ("Nexus") files this petition seeking to recover cash back promotional credits from BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ("AT&T") and in support thereof, shows as follows:

I. IDENTIFICATION OF PARTIES

2. Complainant Nexus is a corporation headquartered at 3629 Cleveland Avenue, Suite C, Columbus, Ohio, 43224, and is a competitive local exchange carrier ("CLEC"). Designated representatives for petitioner are:

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3. AT&T is an “incumbent local exchange carrier” (“ILEC”) as defined by the Telecommunications Act of 1996 (the “Act”). 47 U.S.C. § 251(h). AT&T’s principal place of business is 675 West Peachtree Street NE, Suite 4300, Atlanta, Georgia, 30308.

II. FACTS AND NATURE OF THE DISPUTE

4. The parties’ dispute arises under their interconnection agreement and centers on credits which are due from AT&T to Nexus as a result of Nexus reselling services subject to AT&T promotional discounts.
5. Federal law provides, among other things, the following:
1. 47 U.S.C. § 251(c)(4)(A). ILECs have the duty to “offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”
 2. 47 U.S.C. § 251(c)(4)(B). ILECS have a duty not to “prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service.”
 3. 47 C.F.R. § 51.613(a)(2). “The following types of restrictions on resale may be imposed: Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:
 - (i) Such promotions involve rates that will be in effect for no more than 90 days; and
 - (ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.”
6. This dispute arises because AT&T has over the past months and years sold its retail services at a discount to its end users under various promotions that have lasted for more than 90 days. Nexus is entitled to purchase and resell those same services at the promotional rate, less the wholesale discount.
7. Of concern in this particular case, AT&T has provided a number of “cash

back”promotions going back to late 2003. Although Nexus met the same qualifications as AT&T’s retail end users, and applied for these promotional credits, AT&T has paid only a fraction of the promotion’s face amount.

8. AT&T contends that, if it is required to extend cash back promotions to CLECs at all, then it should not be required to extend to CLECs the entire amount of the promotion, but rather a lesser amount derived by reducing the promotional amount by the resale discount. AT&T’s contention is incorrect and incompatible with the requirements of the Act and harms competition. To comply with the law, the Authority should properly require AT&T to provide the full amount of the cash back promotions to CLECs.
9. The overarching purpose behind the Act’s resale provisions is to permit CLECs to purchase, for subsequent resale, services from the ILEC at a ***lower*** rate than the ILEC sells those services at ***retail***. In short, ***wholesale*** should always be ***less*** than ***retail***.
10. The flaw in AT&T’s position is dramatically illustrated by the promotions in question, where applying the formula advanced by AT&T results in a situation where the cash back promotion reduces the ***retail*** sale price of the offer in question to a point where it ***is lower than*** the ***wholesale*** price. An easy hypothetical example showing the effect of applying AT&T’s method is shown in Figure 1, below:

Figure 1. Comparison of Results of applying AT&T’s proposed method for calculating promotion amount due resellers to (applying hypothetical 20% wholesale discount to both tariff price and to promotional price).			
Standard/Tariffed price	Special/promotional retail cash back offer	Net retail price	Net wholesale price
\$50	\$0	\$50	\$40
\$50	\$50	\$0	\$0 (retail now same as wholesale)
\$50	\$100	\$-50	\$-40 (retail now LESS than wholesale)

11. Obviously, adopting a model which results in the wholesale price that is no longer less than the retail price guts the purpose of the Act and dooms competition. Accordingly, AT&T's model cannot be correct.
12. The appropriate method for determining the wholesale price is to first calculate the amount of the avoided cost discount, then subtract the avoided cost from the actual sales price. *See* 47 U.S.C. 252(d)(3).¹ At the times when these resale agreements were first built in 1996 and 1997, the avoided cost (and thus the wholesale discount) was calculated upon the ILECs' standard tariffed pricing, at the time still regulated. The calculations were *not* based on promotion prices, which did not then exist, and which in any event by definition are not standard prices, but the equivalent of a special sale price. To determine the avoided cost, one multiplies the resale discount factor times the tariffed price. ***This gives one the base amount of the avoided cost, and thus the amount by which the wholesale amount should be lower than the retail price.*** Obviously, there will always be *costs* to providing service, regardless of what the *sales price* is, and although initially formulated as a percentage to avoid recalculating the costs as tariffed rates rose, the avoided cost is best considered a fixed amount of the *standard, or tariffed*, rate.
13. Since the actual sales price is not necessarily the tariffed price, but can be lowered by short term "promotional" offers, *i.e.*, special sales, the Federal Communication Commission ("FCC") has required ILECs to make the benefits of those promotions available

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47 U.S.C. § 252(d)(3): Wholesale prices for telecommunications services.

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

to CLECs.² The FCC has discussed the promotion issue at length in various dockets, notably including *Local Competition Order*.³ Indeed, in the *Local Competition Order* the FCC expressly recognizes that ILECs could use promotions like AT&T's to manipulate their retail rates and effectively avoid their resale obligations. Consequently, the FCC found that the resale requirement of section 251(c)(4) of the Act

makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted) (emphasis added).

14. Consequently, the *price* to which the avoided cost discount is applied is simply the lower of the tariffed standard price, or, if any, the promotional price in effect for the services in question. Stated another way, the three steps to finding the wholesale price are:

- STEP 1: Find the retail price in the tariff.
- STEP 2: Multiply the standard tariffed retail price by the wholesale discount factor. This gives you the value of the avoided costs.
- STEP 3: Subtract the avoided cost from the retail sales price, which is standard tariffed price, or, if a promotion applies, the price after applying the promotion.

The results of using this method are shown below in Figure 2. Note that by using this

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47 C.F.R. § 51.605: Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall *offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis* to subscribers that are not telecommunications carriers for resale **at wholesale rates**

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In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15954, ¶907 (rel. Aug. 8, 1996) ("Local Competition Order").

method, the wholesale price is always the same amount less than the retail price, which is a better reflection of the fact that the cost to provide the services is constant regardless of what the sales price turns out to be.

Figure 2. Comparison of results of applying just avoided cost discount based on standard/tariffed retail price			
Standard/Tariffed price	Special/promotional retail discount	Net retail price	Net wholesale price
\$50	\$0	\$50	\$40 (avoided cost is \$10)
\$50	\$50	\$0	\$-10 (wholesale still \$10 avoided cost less than retail)
\$50	\$100	\$-50	\$-60 (wholesale still \$10 avoided cost less than retail)

15. Because Nexus has consistently been credited not the full amount of the promotions to which it is entitled, but instead by that amount less the wholesale discount, Nexus is entitled recover the difference, and hereby pleads for the same.

WHEREFORE, PREMISES CONSIDERED, based upon the foregoing, Nexus respectfully requests and prays the Tennessee Regulatory Authority issue a ruling such that Nexus is entitled to recover all promotional credits due and any other such relief as it is entitled to in law and equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing document has been served on AT&T through its attorneys on this 5th day of November, 2010, via facsimile and First Class Mail.

/s/Chris Malish
Christopher Malish