

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

NOTICE OF FILING

Notice is given to all parties that the following materials have been filed into the record of this proceeding:


- The digital video recording of the oral argument conducted on October 25, 2011 in this proceeding;
- Certification of the accuracy and correctness of the digital video recording;
- All exhibits introduced at the oral argument conducted on October 25, 2011 in this proceeding;
- The written log listing, *inter alia*, the date and time of where each witness' testimony begins and ends on the digital video recording of the oral argument conducted on October 25, 2011.

A copy of this Notice, the certification of the digital video record, exhibit list, and hearing log have been served by first class mail upon all persons listed at the end of this Notice. Parties desiring an electronic copy of the digital video recording of the hearing in Windows Media format may download a copy at http://psc.ky.gov/av_broadcast/2009-00127/2009-00127_25Oct11_Inter.asx. Parties wishing an annotated digital video

recording may submit a written request by electronic mail to pscfilings@ky.gov. A minimal fee will be assessed for a copy of this recording.

The exhibits introduced at the evidentiary hearing may be downloaded at <http://psc.ky.gov/pscscf/2009%20cases/2009-00127/>.

Done at Frankfort, Kentucky, this 28th day of October 2011.



Linda Faulkner
Director, Filings Division
Public Service Commission of Kentucky

Honorable Douglas F Brent
Attorney at Law
Stoll Keenon Ogden, PLLC
2000 PNC Plaza
500 W Jefferson Street
Louisville, KENTUCKY 40202-2828

Honorable Mary K Keyer
General Counsel/Kentucky
BellSouth Telecommunications, LLC dba AT&T
601 W. Chestnut Street
4th Floor East
Louisville, KY 40203

Christopher Malish
1403 West Sixth Street
Austin, TEXAS 78703

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

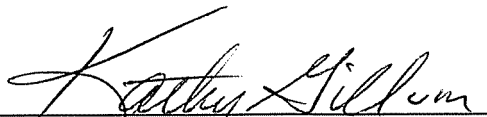
DPI TELECONNECT, L.L.C. V. BELLSOUTH)
TELECOMMUNICATIONS, INC. D/B/A AT&T)
KENTUCKY DISPUTE OVER INTERPRETATION) CASE NO. 2009-00127
OF THE PARTIES' INTERCONNECTION)
AGREEMENT REGARDING AT&T KENTUCKY'S)
FAILURE TO EXTEND CASH-BACK)
PROMOTIONS TO DPI)

CERTIFICATE

I, Kathy Gillum, hereby certify that:

1. The attached DVD contains a digital recording of the oral argument conducted in the above-styled proceeding on October 25, 2011;
2. I am responsible for the preparation of the digital recording;
3. The digital recording accurately and correctly depicts the oral argument;
4. The "Exhibit List" attached to this Certificate correctly lists all Exhibits introduced at the oral argument of October 25, 2011.
5. The "Hearing Log" attached to this Certificate accurately and correctly states the events that occurred at the oral argument of October 25, 2011 and the time at which each occurred.

Given this 28th day of October, 2011.


Kathy Gillum, Notary Public
State at Large

My commission expires: Sept 3, 2013



Case History Log Report

Case Number: 2009-00127_25Oct11

Case Title: dPi Teleconnect and AT&T

Case Type: Complaint

Department:

Plaintiff:

Prosecution:

Defendant:

Defense:

Date: 10/25/2011

Location: Default Location

Judge: David Armstrong, Jim Gardner, Charles Borders

Clerk: Kathy Gillum

Bailiff:

Event Time	Log Event	
10:04:35 AM	Case Started	
10:04:40 AM	Preliminary Comments Note: Kathy Gillum	This proceeding is an oral argument. There are no witnesses, only attorneys for the parties who will be presenting their arguments and answering the Commission's questions.
10:05:07 AM	Introductions Note: Kathy Gillum	Doug Brent and Chris Malish, counsel for dPi; Mary Keyer and Patrick Turner, counsel for AT&T; Jeb Pinney for PSC.
10:06:04 AM	Opening Statement by Chris Malish (dPi) Note: Kathy Gillum	Chris Malish conducted the opening statement for dPi. A video presentation and paper handout was presented to the parties and the Commission. Opening statement mainly concerning cash back offers as related to the resellers. Statements explaining differences between price and cost. Statements regarding promotions of 90 days or less vs. 90 days or more. Cited Sanford case out of 4th Circuit (2007). Statements regarding Retail Promotion Methodology Adjustment (2009). Stated that today's argument is regarding 2003 through 2007 promotions.
10:25:10 AM	Camera Lock Activated (Camera: 9)	
10:25:33 AM	Camera Lock Mode Deactivated	
10:25:33 AM	Normal Mode Activated	
10:25:34 AM	Camera Lock Deactivated	
10:25:22 AM	Commissioner Gardner Note: Kathy Gillum	Commissioner Gardner stated that the documentation cited the figure of 16.79 percent. Commissioner Gardner wanted to know why it had not been addressed.
10:25:59 AM	Chris Malish (dPi) Note: Kathy Gillum	Answers that he will discuss it later in the argument in more detail.
10:26:33 AM	Opening Statement (dPi) continues Note: Kathy Gillum	Mr. Malish continues his opening statement. Statements regarding the issue of pass-thru. Statements regarding the statute of limitations of the discount offers.

10:29:21 AM	Camera Lock Activated (Camera: 9)	
10:29:43 AM	Camera Lock Mode Deactivated	
10:29:43 AM	Normal Mode Activated	
10:29:43 AM	Camera Lock Deactivated	
10:32:39 AM	Commissioner Gardner Note: Kathy Gillum	Commissioner Gardner asks if the new contract states that it is to be governed by Georgia law. Questions regarding contract clause regarding the statute of limitations.
10:34:14 AM	Chris Malish (dPi) Note: Kathy Gillum	Mr. Malish explains his answers to Commissioner Gardner's questions. Statements regarding differences of old contract v. new contract related to disputes.
10:37:19 AM	Commissioner Gardner	
10:37:30 AM	Chris Malish (dPi) Note: Kathy Gillum	Answers question of Commissioner Gardner. States that all disputes were filed within 12 months of them being signed.
10:39:25 AM	Opening Statement (dPi) continues Note: Kathy Gillum	Mr. Malish makes statements regarding competition and breaking up of monopolies. Statements regarding cross class selling. Statements regarding destruction of data by AT&T.
10:45:44 AM	Commissioner Gardner Note: Kathy Gillum	Questions regarding 27 percent error rate.
10:46:59 AM	Camera Lock Activated (Camera: 9)	
10:45:51 AM	Chris Malish (dPi) Note: Kathy Gillum	Mr. Malish answers Commissioner Gardner's questions.
10:47:03 AM	Opening Statement (dPi) continues Note: Kathy Gillum	Mr. Malish continues opening statement regarding Amount Choices. Statements regarding retail customer discount rates v. resellers discount rates. Form contract passed out for review.
10:47:39 AM	Camera Lock Mode Deactivated	
10:47:39 AM	Normal Mode Activated	
10:47:39 AM	Camera Lock Deactivated	
10:48:00 AM	Camera Lock Activated (Camera: 9)	
10:48:12 AM	Camera Lock Mode Deactivated	
10:48:12 AM	Normal Mode Activated	
10:48:12 AM	Camera Lock Deactivated	
10:52:46 AM	Camera Lock Activated (Camera: 9)	
10:53:03 AM	Exhibit dPi 1 Note: Kathy Gillum	Exclusions and Limitations on Services Available for Resale. (Note: all documents will collectively be introduced at the conclusion of hearing as dPi Exhibit 1 and AT&T Exhibit 1 respectively.)
10:53:28 AM	Opening Statement by (dPi) continues Note: Kathy Gillum	Statements regarding the correct way to calculate the avoided cost.
10:55:08 AM	Camera Lock Activated (Camera: 8)	
10:55:27 AM	Camera Lock Activated (Camera: 9)	
10:56:59 AM	Camera Lock Mode Deactivated	
10:56:59 AM	Normal Mode Activated	

10:56:59 AM	Camera Lock Deactivated	
10:56:49 AM	Chairman Armstrong Note: Kathy Gillum	Chairman Armstrong asks if Mr. Malish wanted to make the handout an Exhibit to the hearing. Mr. Malish stated that he may admit all of the documents later as one Exhibit, and also stated that it was already a part of the record.
10:57:14 AM	Patrick Turner (AT&T) Note: Kathy Gillum	Mr. Turner gave location of the document in the case record, and made statement as to the differences in one column between the contracts.
10:58:56 AM	Open Statement (dPi) continues Note: Kathy Gillum	Statements regarding absolute value calculation. Concludes opening statement.
11:05:38 AM	Questions by Jeb Pinney (PSC) Note: Kathy Gillum	Questions regarding consolidated docket.
11:07:23 AM	Chris Malish (dPi) Note: Kathy Gillum	Mr. Malish answers Mr. Pinney's questions.
11:08:37 AM	Questions by Commissioner Borders Note: Kathy Gillum	Questions regarding competition v. monopoly.
11:09:18 AM	Chris Malish (dPi) Note: Kathy Gillum	Mr. Malish explains discount to wholesale customers as related to pass thru.
11:14:59 AM	Questions by Commissioner Gardner Note: Kathy Gillum	Commissioner Gardner asked if there was an agreement prior to 2003. Witness Malish did not know the answer to the question. Questions regarding the 16.79 percent discount.
11:16:06 AM	Douglas Brent (dPi)	
11:16:12 AM	Chris Malish (dPi) Note: Kathy Gillum	Concludes opening statement.
11:18:34 AM	Break	
11:18:56 AM	Case Recessed	
11:35:07 AM	Case Started	
11:36:08 AM	Camera Lock Activated (Camera: 9)	
11:35:21 AM	Opening Statement by Patrick Turner (AT&T) Note: Kathy Gillum	Mr. Turner references power point display and paper copy of power point passed out to parties. Statements regarding issues moot beyond mid-2007. Statements regarding issue regarding cash back and wholesalers withholding monies. (Note: all documents will be collectively introduced at conclusion of hearing).
11:40:16 AM	Chairman Armstrong Note: Kathy Gillum	Chairman Armstrong asks if there are any questions so far. There were none.
11:40:24 AM	Opening Statement by Patrick Turner (AT&T) continues Note: Kathy Gillum	Statements regarding the 16.79 percent discount rate. Statements regarding procedure for applying promotional rates. Mr. Turner explains the calculations of applying discount rate. Mr. Turner cites the Sanford case. Mr. Turner refers to handout number 1. Mr. Turner presented Louisiana and North Carolina decisions to support his argument.
11:48:34 AM	Camera Lock Mode Deactivated	
11:48:34 AM	Normal Mode Activated	
11:48:34 AM	Camera Lock Deactivated	

11:49:06 AM Camera Lock Activated (Camera: 9)

11:53:33 AM Commissioner Gardner
 Note: Kathy Gillum Mr. Gardner asks if the issue today is whether one applies the 16.79 percent or not?

11:54:20 AM Camera Lock Mode Deactivated

11:54:20 AM Normal Mode Activated

11:54:20 AM Camera Lock Deactivated

11:53:58 AM Opening Statement by (AT&T) continues - Exhibit AT&T 1
 Note: Kathy Gillum Mr. Turner gives background. Mr. Turner refers to handout number 8. Statements regarding page 14 of power point regarding landline service. Mr. Turner refers to handout number 3. Mr. Turner refers to handout number 4 (calculations of discount). Mr. Turner refers to handout number 5 (avoided costs). Mr. Turner refers to handout number 6. Mr. Turner refers to handout number 7. (AT&T Exhibit 1 passed out to parties - Motion made at end of hearing to introduce)

11:56:36 AM Camera Lock Activated (Camera: 9)

11:57:54 AM Camera Lock Mode Deactivated

11:57:54 AM Normal Mode Activated

11:57:54 AM Camera Lock Deactivated

12:00:11 PM Camera Lock Activated (Camera: 9)

12:01:35 PM Camera Lock Mode Deactivated

12:01:35 PM Normal Mode Activated

12:01:35 PM Camera Lock Deactivated

12:02:18 PM Camera Lock Activated (Camera: 9)

12:02:35 PM Camera Lock Mode Deactivated

12:02:35 PM Normal Mode Activated

12:02:35 PM Camera Lock Deactivated

12:06:35 PM Camera Lock Activated (Camera: 9)

12:06:35 PM Camera Lock Mode Deactivated

12:06:35 PM Normal Mode Activated

12:06:35 PM Camera Lock Deactivated

12:06:41 PM Camera Lock Activated (Camera: 9)

12:07:02 PM Camera Lock Mode Deactivated

12:07:02 PM Normal Mode Activated

12:07:02 PM Camera Lock Deactivated

12:07:13 PM Camera Lock Activated (Camera: 9)

12:07:28 PM Camera Lock Mode Deactivated

12:07:28 PM Normal Mode Activated

12:07:28 PM Camera Lock Deactivated

12:07:35 PM Commissioner Gardner
 Note: Kathy Gillum Commissioner Gardner asks if it is just the first month in dispute.

12:07:43 PM	Opening Statement by (AT&T) continues Note: Kathy Gillum	Mr. Turner explains one month v. over time theory. Mr. Turner explains how a wholesale price can be higher than the retail price. Mr. Turner refers to page 18 of power point. Mr. Turner explains points in the Sanford case. Mr. Turner refers to handout number 9. End of the cash back.
12:09:16 PM	Camera Lock Activated (Camera: 9)	
12:11:35 PM	Camera Lock Mode Deactivated	
12:11:35 PM	Normal Mode Activated	
12:11:35 PM	Camera Lock Deactivated	
12:11:50 PM	Camera Lock Activated (Camera: 9)	
12:13:20 PM	Camera Lock Mode Deactivated	
12:13:20 PM	Normal Mode Activated	
12:13:20 PM	Camera Lock Deactivated	
12:13:39 PM	Camera Lock Activated (Camera: 9)	
12:13:36 PM	No Questions by Commission	
12:20:53 PM	Camera Lock Mode Deactivated	
12:20:53 PM	Normal Mode Activated	
12:20:53 PM	Camera Lock Deactivated	
12:14:01 PM	Opening Statement by (AT&T) continues Note: Kathy Gillum	Mr. Turner refers to page 21 of power point (regarding federal law). Mr. Turner refers to page 22 of power point (regarding Ky law). Mr. Turner refers to page 23 of power point (regarding NC Commission). Mr. Turner refers to pages 24 and 25 of the power point. Mr. Turner addresses the one year clause (PLF-3, page 57).
12:24:32 PM	Commissioner Gardner Note: Kathy Gillum	Commissioner Gardner asked if none of it was within the 12 months.
12:25:15 PM	Opening Statement by (AT&T) continues Note: Kathy Gillum	Mr. Turner refers to Case Exhibit NWB-1. States that those 7 should not be paid at all. Mr. Turner concludes his argument.
12:26:05 PM	Questions by Jeb Pinney (PSC) Note: Kathy Gillum	Questions regarding promotional items such as ipods, etc., relating to discounts to dPi, etc. Questions regarding whether or not items offered are under telecommunication services.
12:31:13 PM	Chairman Armstrong Note: Kathy Gillum	Chairman Armstrong asked if there were any other issues to be addressed.
12:31:20 PM	Rebuttal by Chris Malish (dPi) Note: Kathy Gillum	Mr. Malish requested to rebutt AT&T's argument. Mr. Malish makes statements regarding 90 day timeline for discounts. Mr. Malish refers to power point titled, "Law: Wholesale must be below retail".
12:44:24 PM	Case Recessed	
12:44:14 PM	Chairman Armstrong	
12:45:44 PM	Case Started	
12:45:45 PM	Chairman Armstrong Note: Kathy Gillum	Chairman Armstrong asks for Motions to introduce documents referred to in hearing as exhibits.

12:45:55 PM	Motion by Chris Malish (dPi) Note: Kathy Gillum	Motion by Chris Malish to introduce collectively, Power Point Presentation titled, "dPi v. BellSouth, Oral Argument; and handout titled, "Exclusions and Limitations on Services Available for Resale" as dPi Exhibit 1.
12:46:05 PM	Motion by Patrick Turner (AT&T) Note: Kathy Gillum	Motion by Patrick Turner to introduce collectively, Power Point Presentation titled, "Docket No. 2009-00127, Oral Argument of AT&T Kentucky, dated October 25, 2011; and Handouts 1 thru 10, titled, "Oral Argument Handouts", as AT&T Exhibit 1.
12:46:24 PM	Chairman Armstrong- Hearing Adjourned Note: Kathy Gillum	Chairman Armstrong accepts Exhibits and adjourns hearing.
12:46:33 PM	Case Recessed	
1:29:58 PM	Case Stopped	



Exhibit List Report

Case Number: 2009-00127_25Oct11

Case Title: dPi Teleconnect and AT&T

Department:

Plaintiff:

Prosecution:

Defendant:

Defense:

Name	Description
AT&T Exhibit 1	Power Point Presentation titled, "Docket No. 2009-00127, Oral Argument of AT&T Kentucky, dated October 25, 2011; and Handouts 1 thru 10, titled, "Oral Argument Handouts".
dPi Exhibit 1	Power Point Presentation titled, "dPi v. BellSouth, Oral Argument; and handout titled, "Exclusions and Limitations on Services Available for Resale"

ORAL ARGUMENT HANDOUT NO. 1

BellSouth Telecom. Inc. v. Sanford, 494 F.3d 439, 450 (4th Cir. 2007)

20% Resale Discount Rate	
Monthly Standard Price	\$120
<u>Monthly Cashback</u>	<u>\$100</u>
Monthly Promotional Price	\$20

Wholesale Price (dPi)¹

\$20 (Promotional Price)
-\$24 (20% of \$120 Standard Price)
(-4) (AT&T pays dPi \$4/month)

or

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

Wholesale Price (4th Cir. /AT&T)²

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

or

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

¹ AT&T and other ILECs have run countless retail promotions since 1996. dPi cannot point to a single time that the wholesale price *has been* calculated in this manner, and it cannot point to a single example of the FCC or any public entity suggesting that the wholesale price *should be* calculated in this manner.

² The *Sanford* court said “the *appropriate wholesale rate is still \$16*, because that is the net price paid by the retail customer (\$20) less the wholesale discount (20%).” *Sanford*, 494 F.3d at 450.

ORAL ARGUMENT HANDOUT NO. 2

Final Recommendation of the Administrative Law Judge, *In Re: Consolidated Proceeding to Address Certain Issues Common to [5 Individual Complaint Dockets]*, Docket No. U-31364 (La. Public Serv. Comm'n August 18, 2001).

<http://lpscstar.louisiana.gov/star/ViewFile.aspx?Id=bd4839d6-b9cb-4d4e-8a2f-6d85d6f31460>

Proposed Order of the Public Staff, *In Re: BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina v. dpi Teleconnect, LLC et. al.*, Docket Nos. P-836, Sub 5, P-908, Sub 2, P-1272, Sub 1, P-1415, Sub 2, and P-1439, Sub 2 (North Carolina Utilities Comm'n June 13, 2011).

<http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=ZAAAAA46111B&parm3=000132105>

ORAL ARGUMENT HANDOUT NO. 3

ATTACHMENT B

Illustration of dPi's Erroneous "Wholesale is Higher than Retail" Argument

Monthly Price	\$	30.00
Cashback Amount	\$	50.00
Resale Discount		16.79%

Months Service is Kept

	1	2	3	4	5	6
AT&T Retail Customer						
Total Amount Paid	\$ 30.00	\$ 60.00	\$ 90.00	\$ 120.00	\$ 150.00	\$ 180.00
Total Cashback	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)
Net Amount Paid	\$ (20.00)	\$ 10.00	\$ 40.00	\$ 70.00	\$ 100.00	\$ 130.00
Proposed Wholesale Price						
AT&T's Method						
Total Paid	\$ 24.96	\$ 49.93	\$ 74.89	\$ 99.85	\$ 124.82	\$ 149.78
Total Cashback	\$ (41.61)	\$ (41.61)	\$ (41.61)	\$ (41.61)	\$ (41.61)	\$ (41.61)
Net Amount Paid	\$ (16.64)	\$ 8.32	\$ 33.28	\$ 58.25	\$ 83.21	\$ 108.17

ORAL ARGUMENT HANDOUT NO. 4

**ESTIMATION OF AVOIDED COSTS WHEN RETAIL PRICE IS "NEGATIVE" \$20
(\$30 Monthly Price, One-Time \$50 Cashback)**

dPi 1	dPi 2	AT&T
16.79% of Standard Retail	Absolute Value of 16.79% of Promotional Retail	16.79% of Promotional Retail
\$30 x .1679	ABS(-\$20 x .1679)	-\$20 x .1679
+\$5.04	+\$3.36*	-\$3.36

*dPi forces this to be a positive number
instead of the negative number that it is

**CALCULATION OF WHOLESALE PRICE WHEN RETAIL PRICE IS "NEGATIVE" \$20
(\$30 Monthly Price, One-Time \$50 Cashback)**

dPi 1	dPi 2	AT&T
Retail Promo Price – Est. Avoided Cost	Retail Promo Price – Est. Avoided Cost	Retail Promo Price – Est. Avoided Cost
-\$20 – (+\$5.04)	-\$20 – (+\$3.36)	-\$20 – (-3.36)
-\$20 – \$5.04	-\$20 – \$3.36	-\$20 + \$3.36
-\$25.04 (Bill Credit to dPi)	-\$23.36 (Bill Credit to dPi)	-\$16.64 (Bill Credit to dPi)

ORAL ARGUMENT HANDOUT NO. 5

MORNING OF AVOIDED COST HEARING

Revenue Service A	\$70.00
<u>Revenue Service B</u>	<u>\$30.00</u>
Total Revenue	\$100.00
Total Avoided Costs	\$16.79

$$\text{Discount} = \$16.79 / \$100 = 16.79\%$$

ESTIMATED AVOIDED COSTS

Service A	=	\$70 x .1679	=	\$11.75
Service B	=	\$30 x .1679	=	\$ 5.04
Total Estimated Avoided Costs	=		=	\$16.79

ORAL ARGUMENT HANDOUT NO. 6

AFTERNOON OF AVOIDED COST HEARING

Service A	\$120.00
“Standard” Service B	\$ 30.00
Promotional Service B	\$ (20.00)
Resale Discount 16.79%	

Revenue from Service A	\$120.00
<u>Revenue from Service B</u>	<u>\$(20.00)</u>
Total Revenue	\$100.00

ESTIMATED AVOIDED COSTS

dPi 1

Service A	=	\$120 x .1679	=	\$20.15
Service B	=	\$30 x .1679	=	\$ 5.08
Total Estimated Avoided Costs	=			\$25.23

dPi 2

Service A	=	\$120 x .1679	=	\$20.15
Service B	=	\$(20) x .1679	=	\$ 3.36* *dPi forces a positive number
Total Estimated Avoided Costs	=			\$23.51

AT&T

Service A	=	\$120 x .1679	=	\$20.15
Service B	=	\$(20) x .1679	=	\$ (3.36)
Total Estimated Avoided Costs	=			\$16.79

ORAL ARGUMENT HANDOUT NO. 7

ATTACHMENT L

**AT&T's Proposal Consistently Yields a 16.79% Difference in the Aggregate Over Time
dPi's Proposals Do Not -- They Yield Higher Differences**

Monthly Price	\$ 30.00
Cashback Amount	\$ 50.00
Resale Discount	16.79%

Months Service is Kept

	1	2	3	4	5	6
AT&T Retail Customer						
Total Amount Paid	\$ 30.00	\$ 60.00	\$ 90.00	\$ 120.00	\$ 150.00	\$ 180.00
Total Cashback	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)
Net Amount Paid	\$ (20.00)	\$ 10.00	\$ 40.00	\$ 70.00	\$ 100.00	\$ 130.00
Proposed Wholesale Price						
AT&T's Method						
Total Paid	\$ 24.96	\$ 49.93	\$ 74.89	\$ 99.85	\$ 124.82	\$ 149.78
Total Cashback	\$ (41.61)	\$ (41.61)	\$ (41.61)	\$ (41.61)	\$ (41.61)	\$ (41.61)
Net Amount Paid	\$ (16.64)	\$ 8.32	\$ 33.28	\$ 58.25	\$ 83.21	\$ 108.17
% Difference from Net Retail	16.79%	16.79%	16.79%	16.79%	16.79%	16.79%
dPi's Method 1						
Total Paid	\$ 24.96	\$ 49.93	\$ 74.89	\$ 99.85	\$ 124.82	\$ 149.78
Total Cashback	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)	\$ (50.00)
Net Amount Paid	\$ (25.04)	\$ (0.07)	\$ 24.89	\$ 49.85	\$ 74.82	\$ 99.78
% Difference from Net Retail	25.19%	100.74%	37.78%	28.78%	25.19%	23.25%
dPi's Method 2						
Net Amount Paid*	\$ (23.36)	\$ 1.61	\$ 26.57	\$ 51.53	\$ 76.49	\$ 101.46
% Difference from Net Retail	16.79%	83.95%	33.58%	26.38%	23.51%	21.96%

	First Month	Subsequent Months
Net Retail	\$ (20.00)	\$ 30.00
20% Lower	\$ (23.36)	\$ 24.96

ORAL ARGUMENT HANDOUT NO. 8

ATTACHMENT E

A Mathematically Correct Application of the Discount Does Not Impede dPi from Competing

Retail Price	\$ 30.00
Price Reseller Charges	\$ 28.00
Cashback	\$ 50.00
Resale Discount	16.79%

Impact on AT&T First Month

Receives from Customer	\$ 30.00
Pays to Customer	\$ (50.00)
Impact	\$ (20.00)

Impact on dPi First Month

Receives from Customer	\$ 28.00
Pays to Customer	\$ (50.00)
Receives from AT&T	\$ 16.64
Impact	\$ (5.36)

ORAL ARGUMENT HANDOUT NO. 9

ATTACHMENT F

A Mathematically Correct Application of the Discount Does Not Impede dPi from Competing

Retail Price	\$ 30.00
Price Reseller Charges	\$ 60.00
Cashback	\$ 50.00
Resale Discount	16.79%

Impact on AT&T First Month

Receives from Customer	\$ 30.00
Pays to Customer	\$ (50.00)
Impact	\$ (20.00)

Impact on dPi First Month

Receives from Customer	\$ 60.00
Pays to Customer	\$ (50.00)
Receives from AT&T	\$ 16.64
Impact	\$ 26.64

ORAL ARGUMENT HANDOUT NO. 10

ATTACHMENT G

A Mathematically Correct Application of the Discount Does Not Impede dPi from Competing

Retail Price	\$ 30.00
Price Reseller Charges	\$ 60.00
Cashback	\$ 50.00
Resale Discount	16.79%

Impact on AT&T First Month

Receives from Customer	\$ 30.00
Pays to Customer	\$ (50.00)
Impact	\$ (20.00)

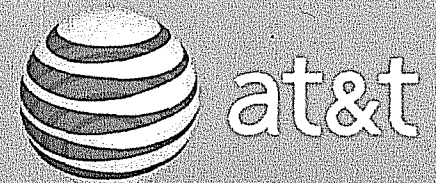
Impact on dPi First Month

Receives from Customer	\$ 60.00
Pays to Customer	\$ -
Receives from AT&T	\$ 16.64
Impact	\$ 76.64

Docket No. 2009-00127

Oral Argument of AT&T Kentucky

October 25, 2011



HOW THIS MATTER AROSE

Hypothetical Retail Promotion:

Buy Telecom Service A for \$80 per month

Get a one-time “cashback” benefit of \$50

When dPi resold this offering to a qualifying end user customer:

AT&T charged dPi \$66.57 for Telecom Service A (\$80 retail price discounted by 16.79%). See Ferguson Direct at 12.

dPi then requested a bill credit for the full \$50 retail cashback amount.

For the 2003 to mid-2007 timeframe at issue in this docket, AT&T gave dPi \$0 credit for the cashback component.

AT&T DENIED THESE REQUESTS IN GOOD FAITH
(RESTS ON ITS BRIEFS REGARDING THESE REASONS)

The cashback component is not a telecommunications service that is subject to the resale obligations. AT&T Brief at 9-10.

Moot beyond mid-2007.

Even if it was, AT&T's decision not to pass any of the cashback amount to dPi was a reasonable and nondiscriminatory restriction on resale. AT&T Brief at 10-18.

Moot beyond mid-2007.

Even if it was not:

some of dPi's requests must be denied because they waited too long to submit, dispute, and/or escalate them. AT&T Brief at 18-22.

Low dollar amounts in Kentucky, not a nation-wide legal issue.

27% of the remaining requests must be denied because of dPi's historical error rate. AT&T Brief at 29.

Low dollar amounts in Kentucky, not a nation-wide legal issue.

FOCUS OF AT&T'S ORAL ARGUMENT

- I. If dPi is entitled to a cashback credit, that credit must be in the amount of the retail value of the cashback benefit discounted by the 16.79% resale discount rate established by this Commission. AT&T Brief at 22-28; AT&T Reply Brief at 3-21.

- II. This is not a resale restriction and, even if it was, it does not require prior approval by the Commission. AT&T Brief at 11-12; AT&T Reply Brief at 22-23.

These issues are at the heart of on-going disputes between AT&T and numerous resellers across the country – more than \$100 million is at stake.

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)

A. This Commission Adopted a 16.79% Discount for Use in Determining Wholesale Prices

dPi can buy AT&T's "telecommunications services" and sell them to dPi's end user customers. See 47 U.S.C. §251(b)(1).

dPi must pay AT&T a wholesale price determined "on the basis of retail rates charged to subscribers for telecommunications services requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier." 47 U.S.C. §252(d)(3).

KY PSC Order Case No. 96-482: the wholesale price is determined by applying a 16.79% resale discount rate to the retail price for the service.

More on this later in the argument.

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)
B. FCC: How to Use 16.79% the Discount to Determine a
Standard Wholesale Price (AT&T Reply Brief at 5-7).

The FCC established uniform percent discount rates that state
Commissions could use on an interim basis. See, e.g., ¶¶ 908, 933.

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.” ¶908.

Applying the Commission’s 16.79% Discount to a Service with a
Retail Price of \$80:

$$\text{\$80} - (\text{\$80})(.1679) *$$

$$\text{\$80} - \text{\$13.43} *$$

\\$66.57 Wholesale Price

*Estimated Avoided Costs

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)
C. FCC: How to Use 16.79% the Discount to Determine a
Promotional Wholesale Price (AT&T Reply Brief at 5-7).

FCC acknowledged that there is a question of what constitutes the “retail price” when a service is subject to a promotional offering.

¶949.

Short-term promotional prices are not “retail rates” for the underlying service and are not subject to the wholesale pricing obligation. ¶949.

“[W]e must also determine when a promotional price ceases to be ‘short term’ *and must therefore be treated as a retail rate for an underlying service.*” ¶950.

A promotional price is long-term “when it is greater than 90 days in duration.” ¶950.

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)
C. FCC: How to Use 16.79% the Discount to Determine a Promotional Wholesale Price (AT&T Reply Brief at 5-7).

In calculating wholesale price, “multiply[] *the retail price* by the discount rate.” ¶908.

When a promotion lasts beyond 90 days, the promotional price “*must therefore be treated as a retail rate for an underlying service.*” ¶950.

In other words, the Commission-approved 16.79% resale discount rate is applied to the lower promotional price of the service.

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)
 C. FCC: How to Use 16.79% the Discount to Determine a
 Promotional Wholesale Price (AT&T Reply Brief at 5-7).

Applying the Commission's 16.79% Discount to a Service with a Retail Price of \$80 that is subject to a one-time \$50 cashback benefit:

$$\begin{aligned}
 &(\$80 - \$50) - (\$80 - \$50)(.1679) \\
 &(\$30) - (\$30)(.1679) \\
 &\$30 - \$5.04 \\
 &\$24.96
 \end{aligned}$$

This is exactly the same as charging dPi the standard wholesale price and giving dPi a credit in the amount of the retail cashback discounted by 16.79%:

Amount dPi was Billed	\$66.57 (\$80 discounted by 16.79%)
<u>Maximum Credit to dPi</u>	<u>(\$41.61)(\$50 discounted by 16.79%)</u>
Net dPi Pays	\$24.96

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)
D. 4th Cir: How to Use 16.79% the Discount to Determine a Promotional Wholesale Price (AT&T Reply Brief at 5-7).

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

When cashback promotions 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.*”
Sanford at p. 450 (emphasis added).

Affirmed the application of the resale discount rate to the lower promotional price of the service (AT&T’s Brief at 24-25; Sanford at p. 450; Handout No. 1).

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)

D. Common Sense Supports AT&T's Position

Same result as a \$50 price reduction.

	Retail	Wholesale
Initial Price	\$80	\$66.57
<u>New Price</u>	<u>\$30</u>	<u>\$24.96</u>
Difference	\$50	\$41.61*

*\$41.61 is the \$50 cashback discounted by 16.79%.

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)

E. Public Entities Agreeing with AT&T's Position

FCC's *Local Competition Order*

Fourth Circuit's *Sanford* Decision

SC ORS Recommendation* 4/27/11 Att. 1.

LA ALJ Proposed Rec. *dPi v. AT&T* AT&T Brief, Exhibit 9.

LA ALJ Proposed Rec. in *Consolidated Phase* URL Address on Handout 2.
Rejects LA Staff Position

North Carolina Entities

NC Staff's Proposed Order in Consolidated Phase URL Address on Handout 2.

NC Commission's *dPi v. AT&T* Order AT&T Brief, Exhibit 7.

NC Commission's Brief in *dPi v. AT&T* (Authored by Attorney General's Office) 4/27/11 Att. 2.

NC Commission's *Consolidated Phase* Order 9/23/11

I. WHY AT&T IS RIGHT (DISCOUNT CASHBACK)

E. Public Entities Agreeing with AT&T's Position

NC Commission After the Sanford Decision

“AT&T’s calculation . . . is consistent with the analysis of the Commission’s decision in the *Sanford* decision.” *dPi Order (AT&T Brief, Exhibit 7) at 21.*

“. . . the method of calculating the [cashback] promotional credits advocated by AT&T is consistent with the method approved in *Sanford*.” *NC Comm’n Br. (4/27/11 Att. 2) at 17.*

“The Fourth Circuit’s decision in [*Sanford*] supports the Commission’s decision [adopting AT&T’s position]. *NC Commission’s Consolidated Phase Order (9/23/11) at 6.*

II. WHY DPI IS WRONG

A. Background

Dpi targets end users who cannot get **landline** service from reputable providers because of unpaid bills. AT&T Brief at 2.

This is why dpi can, and does, charge **significantly more** than AT&T's prices for comparable services. AT&T Brief at 2-3.

Dpi's customer have other options -- particularly prepaid wireless.

Dpi's complaint: for the first month or two, its effective bill credit is less than the effective bill credit of an AT&T end user **that dpi does not try to serve in the first place.** Handout No. 3.

On average, dPi's end users maintain service for **between 3 and 10 months.** AT&T Brief at 28.

"[W]e reject as inconsistent with section 252(d)(3) the policy arguments . . . that we should establish national wholesale discounts at levels that will ensure that resale of local exchange services is a viable business." Local Competition Order at ¶923.

II. WHY DPI IS WRONG

B. dPi's Methods Distort the Avoided Cost Estimate Established by This Commission

Comparison of dPi's incorrect methods to AT&T's correct method. (Handout No. 4.)

dPi's methods violate this Commission's Orders by overstating the estimated avoided costs. Handout Nos. 5&6.

As a result, dPi's methods result in discount rates that far exceed the 16.79% rate established by this Commission. Handout No. 7.

II. WHY DPI IS WRONG

C. dPi's Focus on One Month is Wrong

SC ORS: “it is not appropriate to consider only the month in which the cash-back is received,” and “these types of promotions should be evaluated over a reasonable period of time.” 4/27/11 Att. 1 at 3.

NC Attorney General: “the argument is not compelling that the difference between the retail price and wholesale price in a particular month is problematic” 4/27/11 Att. 2 at 19.

NC Comm'n Consolidated Phase Order: dPi's fundamental assumption that the cashback credit calculation should be based on “that single month when the promotion is processed” cannot be accepted. 9/23/11 Att. at 8.

II. WHY DPI IS WRONG

D. dPi's "Wholesale Should Always be Less than Retail" Argument is Wrong

The *Local Competition Order* (§949) contemplates – and encourages – short-term situations in which the wholesale price is greater than the retail price, recognizing that the pro-competitive effects of such short-term situations outweigh any anticompetitive effects. *AT&T Reply Brief. at 12-14.*

Sanford said wholesale cannot be higher than retail **in perpetuity** (*p. 450*), but
...

It acknowledged the FCC's 90-day exception. *P. 446.*

It noted favorably the NC Commission's inclination to exempt a 9-month cashback promotion from resale. *P. 453.*

II. WHY DPI IS WRONG

D. dPi's "Wholesale Should Always be Less than Retail" Argument is Wrong

NC Commission / Attorney General

dPi's argument "that its method for calculating promotional credits must be used in order to ensure that wholesale prices are *always* lower than retail prices . . . is *flawed for several reasons.*" 4/27/11 Att. 2 at 17.

As a result of the FCC's rule exempting short-term promotional offerings from the resale provisions of federal law, "the price that retail customers pay *may temporarily fall below the wholesale price.*" Id. at 18.

"[T]he argument is not compelling that the difference between the retail price and the wholesale price in a particular month is problematic" Id. at 19.

II. WHY DPI IS WRONG

E. Resellers' "Unable to Compete" Argument is Wrong

Sanford's concern was with ensuring that an ILEC would not be able to "price its competitors out of the market." *Sanford*, 494 F.3d at 451.

Even if a Reseller undercuts AT&T's retail price, the Reseller gets the benefit of the same cashback offering AT&T uses to attract customers for a fraction of the out-of-pocket amount AT&T incurs. *AT&T's Reply Brief at 14-15; Handout No. 8.*

In reality, Resellers' prices are much higher than AT&T South Carolina's retail prices for similar services. *AT&T Brief at 2-3.*

In reality, while AT&T has a negative cash flow in the first month, a Reseller has a positive cash flow in the first month. *AT&T's Reply Brief at 15-16, Handouts 9 & 10.*

III. PRIOR APPROVAL OF A “RESTRICTION” IS NOT REQUIRED

A. Why this is important to AT&T

Resellers across the country are claiming that discounting the cashback amount by the resale discount is a restriction on resale.

They claim AT&T can only do this prospectively, after receiving a Commission order allowing permitting it.

Docket 2010-00023: Answer at p. 7.

Docket 2010-00025: Answer at p. 3 ¶5; p. 5 ¶10; p. 7 ¶2.

Docket 2010-00026: Answer at p. 7.

Docket 2010-00029: Answer at p. 3 ¶21.

III. PRIOR APPROVAL OF A “RESTRICTION” IS NOT REQUIRED

B. Federal Law on Point

The Act prohibits only “unreasonable or discriminatory conditions or limitations” on resale. §252(c)(4)(B).

The FCC established a *presumption* that most restrictions on resale are unreasonable and discriminatory, but AT&T “can rebut this presumption” Local Competition Order at ¶939.

AT&T “may impose a restriction” on resale if it “proves to the state commission that the restriction is reasonable and nondiscriminatory.” FCC Rule 51.613(b).

Nothing in the plain language suggests prior permission is required.

III. PRIOR APPROVAL OF A “RESTRICTION” IS NOT REQUIRED

B. Kentucky and 6th Circuit “Presumption” Law

A rebuttable presumption “does not shift . . . the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was cast.” KRE 301; Magic Coal, AT&T Brief at 11.

Richland Bookmart, Inc. v. Knox County, 555 F.3d 512 (6th Cir. 2009)

Prior restraints on speech are presumed unconstitutional. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

Trial court denied injunction. *Richland Bookmart at 519-20.*

6th Cir. Affirmed, finding the county overcame the presumption. (*Richland Bookmart at 532-33.*)

Ordinance remained in effect while challenged – county did not have to obtain court “approval” prior to enforcing the ordinance.

I. dPi's "PRIOR APPROVAL" EXCEPTION

B. NC Commission' *dPi* Order

AT&T "is not mandated to apply for or receive prior Commission approval before implementing such restrictions." *Exhibit 7 to AT&T's Brief, p. 10.*

If AT&T cannot rebut the presumption, it is subject to retroactively providing any benefit that it should not have withheld. *Id. at p. 11.*

"This is consistent with the North Carolina court's treatment of presumptions in other contexts." *Id.*

dPi's position "would unnecessarily burden the Commission's resources" and would "have a chilling effect on competitive offerings available to consumers" *Id. at p. 10.*

I. dPi's "PRIOR APPROVAL" EXCEPTION

C. The federal decision dPi cites

“. . . the only known federal case on this issue.” dPi's Reply Brief at 4.

That decision was *reversed*. Budget Prepay v. AT&T Corp., 605 F.3d 273, 281 (5th Cir. 2010).

The trial court's preliminary injunction was *vacated*. Id.

“[W]e hold that the district court was *without subject matter jurisdiction* to entertain the claims under the Telecommunications Act raised by Budget Prepay” Id.

I. dPi's "PRIOR APPROVAL" EXCEPTION

C. Practical Considerations

It is no more burdensome for a reseller to challenge a restriction after it is implemented than to challenge a filing seeking approval of the restriction.

ILECs would face a "seek approval or else" dilemma (burdening Commission resources), because anything a reseller does not like is "restriction."

Risk of non-payment in AT&T's approach is minimal.

Risk of non-payment in dPi's approach is excessive.

EXCLUSIONS AND LIMITATIONS ON SERVICES AVAILABLE FOR RESALE (Note 4)

Type of Service	AL		FL		GA		KY		LA		MS		NC		SC		TN	
	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount
1 Grandfathered Services (Note 1)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2 Promotions - > 90 Days (Note 2 & 3)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3 Promotions - < 90 Days (Note 2 & 3)	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
4 Lifeline/Link Up Services	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
5 911/E911 Services	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
6 N11 Services (Note 1)	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	Yes	Yes	Yes	Yes	No	No	Yes	Yes
7 MemoryCall® Service	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
8 Mobile Services	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
9 Federal Subscriber Line Charges	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
10 Nonrecurring Charges	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
11 EUCL Charge	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
12 Public Telephone Access Svc (PTAS)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
13 Inside Wire Maint Service Plan	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No

- Applicable Notes:**
1. Grandfathered services can be resold only to existing subscribers of the grandfathered service.
 2. Where available for resale, promotions will be made available only to customers who would have qualified for the promotion had it been provided by BellSouth directly. Promotions shall be available only for the term set forth in the applicable tariff.
 3. Promotions shall be available only for the term set forth in the applicable tariff.
 4. Some of BellSouth's local exchange and toll Telecommunications Services are not available in certain central offices and areas.

dPi v. BellSouth

Oral Argument

Overview

- Law: What the law requires; key concepts
 - Resale: ILECs must wholesale below retail
 - ILECs cannot use promotions to avoid wholesale obligation
- Eligibility issues, including timing/limitations issues
- Amount: How much credit is appropriate:
Analysis of methods for calculating avoided cost/wholesale discount

Law: competition by resale

- 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.”
- “Resale will be an important entry strategy for many new entrants, especially in the short term when they are building their own facilities. Further, in some areas and for some new entrants, we expect that the resale option will remain an important entry strategy over the longer term. Resale will also be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks.”
 - *Local Competition Order* ¶ 907

Law: Underlying key concept: Wholesale below retail

- **47 C.F.R. § 51.607; 47 USC 252(d)(3)**
- *Sanford*, 494 F.3d 439 (4th Cir. 2007)
- Commission order establishing wholesale price contemplates a DISCOUNT from retail.
- *Local Competition Order*

Law: wholesale is retail price less avoided costs

- **47 C.F.R. § 51.607.** “The wholesale rate that an incumbent LEC may charge for a telecommunications service provided for resale to other telecommunications carriers shall equal the rate for the telecommunications service, *less avoided retail costs*, as described in section 51.609.” [Emphasis added.]
- **47 USC 252(d)(3): Wholesale prices for telecommunications services.** ... 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.**
- *Sanford*, 494 F. 3d. 439, 445 (4th Cir. 2007): “Thus, the wholesale rate consists of the retail rate, *less whatever costs* the incumbent LEC will save by selling the services in bulk to the competitive LEC. “
- So: wholesale is retail *price* less *avoided cost*.

Law: wholesale must be below retail

Price v. Cost

Two very different concepts:

- “Cost is the value of the products and services which are necessary to produce a unit of output.
- “Price is the value or what a customer has to give up in order to acquire that.
- “Simply because a price changes does not necessarily mean that a cost has changed. It certainly doesn't cause a cost to change.

Law: wholesale must be below retail

- Part VIII B 5 of the *Local Competition Order* addresses how states may calculate wholesale rates in general; in paragraph 910, the FCC pointedly states that when using percentages in calculating the wholesale rates from regular retail rates, states may select a rate:

“between 17 and 25 percent below retail rate levels.”

Law:

cannot use promotions to avoid wholesale obligation

The FCC expressed its concern that promotions would be used by ILECs to avoid their resale obligations – namely, the obligation to wholesale their services at a rate “below retail rate levels” – *no less than five times* between paras. 948 and 952 of the *Local Competition Order*:

- “We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition”
- “we are concerned that excluding promotions [from the wholesale obligation] may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale.”
- “*To preclude the potential for abuse of promotional discounts*, any benefit of the promotion must be realized within the time period of the promotion. . .”
- “In addition, an incumbent LEC *may not use promotional offerings to evade the wholesale obligation*, for example by consecutively offering a series of 90 day promotions.”

What the law requires:
wholesale applies to promotions, too

Accordingly, in the *Local Competition Order* ¶ 948 the FCC found that the resale rates 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.

“Our rules require the incumbent LEC to apply the wholesale discount to the special reduced rate.” Arkansas Preemption Order.

Law: wholesaling promotions: wholesale below retail

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

- For long-term promotional offerings, the avoided cost or wholesale discount must be applied to the actual, or effective, retail rate created by applying the value of the promotional offering to the retail rate of the underlying service. 494 F.3d at 442
- “Bellsouth’s position [in which its retail customers pay less than its wholesale customers] would obviously impede competition.” *Id.* at 451.

Law: wholesale below retail

- *The FCC makes the wholesale discount is specifically applicable even to services sold below cost. See para. 956:*
 - “We believe that below-cost services are subject to the wholesale rate obligation under section 251(c)(4). . . . The resale pricing standard is not based on cost plus a reasonable profit. The resale pricing standard gives the end user the benefit of an implicit subsidy in the case of below cost service . . . just as it continues to take the contribution if the service is priced above cost.”

Law: the FCC was right to be worried....

Bellsouth pattern of using promotions to avoid
wholesale obligation

- Gift Cards: BellSouth sought to avoid extending gift card and cash back promotions altogether, but was made to do so against its will. *See e.g., BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 442 (4th Cir. 2007);
- “Cash back.” No cash back at all for cash back promotions. Halted in 2007 after the *Sanford* case in 2007. *In the Matter of dPi Teleconnect, LLC, v. BellSouth Telecommunications, Inc.*; Docket No. P-55, Sub 1744, before the North Carolina Utilities Commission.
- “RPMA” (2009): Bellsouth attempted to implement a scheme in which it proposed to credit resellers in KY only \$5.92 for each instance in which they were otherwise eligible for a cash back promotion paying eligible retail customers \$50. AT&T’s “Retail Promotion Methodology Adjustment” model was enjoined by the U.S. District Court for the Northern District of Texas. *See Budget Prepay, Inc. et al., v. AT&T Inc., f/k/a SBC Communications, Inc. et al., Cause No. No. 3:09-CV-1494-P in the U.S. District Court, Northern District of Texas, Dallas Division (reversed on other grounds.)*

Eligibility: BellSouth's "yeah, buts"

- “yeah, but a promotion is not a “service” we have to sell at wholesale!”
- “yeah, but if they don’t give it to their past end users, we don’t have to give it to them!”
- “yeah, but they’re late! They’ve waived their rights!”
- “yeah, but undercutting their pricing doesn’t hurt competition!”
- “yeah, but they must have made some mistakes; we should be allowed reduce payments by an estimated “error rate!”

Eligibility: promotion must be offered because it affects the *rate* charged for services

- Whether “promotion” is a service is not the inquiry here; inquiry is what the rate is at which the service is provided:

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.”

- SBC has resold promotions all along
- BellSouth has resold promotions since summer 2007.

Eligibility: law does not require direct pass-through to customers

“yeah, but if they don’t give it to their past end users, we don’t have to give it to them!”

NO. NOT CONTINGENT ON RESELLER’S INTERACTION WITH 3d PARTIES

- Parties wish to interconnect “pursuant to Sections 251 and 252 of the Act” GTC p.1
- Governing Law: “... this agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC....” GTC p. 15.
- Resale Attachment’s General Provision sections 3.1: p. 4: “...Subject to effective and applicable FCC and Commission rules and orders, *BellSouth shall make available to DPI for resale those telecommunications services BellSouth makes available...to customers* who are not telecommunications carriers.”
- Parity: “When DPI purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be be ... subject to the same conditions... that BellSouth provides to its ...End Users.” GTC p. 3

Eligibility: limitations is 6 years, and
no waiver for delay

- Under contract in place from 2003 to June 2007, Agreement to be governed by federal and state substantive communications law, but in all other respects “governed by and construed and enforced in accordance with the laws of the State of Georgia...”
- Georgia statute of limitations for written contracts is 6 years: O.C.G.A. 9-3-24.

Eligibility: limitations is 6 years, and no waiver for delay

- No waiver: contract specifically provides at GTC sec. 16 that:

“A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which has been herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.”

Eligibility: no waiver: all
disputes filed within 12 mos of
new contract

- Even if new contract governs activity undertaken during period of old contract, disputes still filed within 12 mos of new contract

Eligibility: “competition”: the competition furthered by the FTA is competition by new entrants with incumbents

- CLECs are harmed when their prices are undercut. The further CLECs like dPi have their prices undercut by AT&T, the harder it is for them to compete.
- The fact that dPi has few lines in KY, and that no other CLECs have the resources to fight these battles with AT&T shows the anemic state of wireline competition.

Eligibility: purpose of FTA: eliminate monopolies, encourage competition by CLECs

- “[The] provisions of the Telecommunications Act of 1996... were intended to eliminate the monopolies enjoyed by the inheritors of AT&T’s local franchises” (*Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002))1 and also to promote competition with them.
- Purpose is NOT to facilitate competition by ILECs with new entrants

Eligibility: AT&T's restrictions against all resellers are not reasonable

Types of restrictions that *are* reasonable

47 C.F.R. § 51.613 Restrictions on resale provides an example of the kinds of promotion restrictions that are reasonable and non-discriminatory:

- (a)(1) Cross-class selling. [an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the promo available only to a certain class of customer – i.e., if the ILEC's promotion is directed to residential customers, the CLEC cannot cross sell it to business class customers.]

This is not at all similar.

Eligibility: No “error rate”

- Bellsouth had full information at time requests were submitted allowing them to verify all requests
- Did not kick out ANY requests for any reason other than “that’s not available for resellers.”
- *Then* destroyed data (while disputes were pending), which could have allowed for further examination.
- Not appropriate to permit unsubstantiated “error rate” under these circumstances.

Amount: Choices: formulas for calculating the avoided cost discount

- (1) **Resellers:** calculating the wholesale (cost avoided) discount associated with a service from the standard/tariffed cost avoided for that service; this is the method advocated by Resellers;
- (2) **AT&T:** calculating the wholesale (cost avoided) discount associated with a service as a percentage of the standard/tariffed price less a percentage of the cash back promotion amount. Advocated by AT&T under the theory that it results in “reducing” the net retail price by the wholesale discount; and
- (3) **True percent “below” method:** calculating the wholesale (cost avoided) discount associated with a service as a percentage *below* the net retail price for that service;

stated algebraically, the wholesale price is the effective retail rate reduced by the amount arrived at by multiplying the *absolute value* of the effective retail rate by the discount percentage rate:

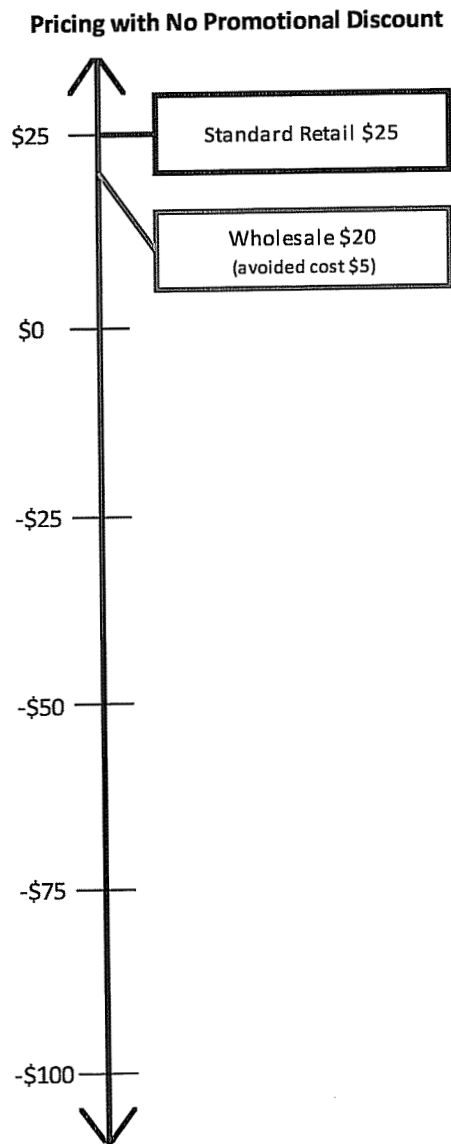
$$\text{Wholesale} = (\text{retail price} - \text{cash back}) - \% * \text{ABS}(\text{retail} - \text{cash back})$$

This is the *correct* mathematical expression of the concept of having the effective retail rate being *reduced* by a particular percentage.

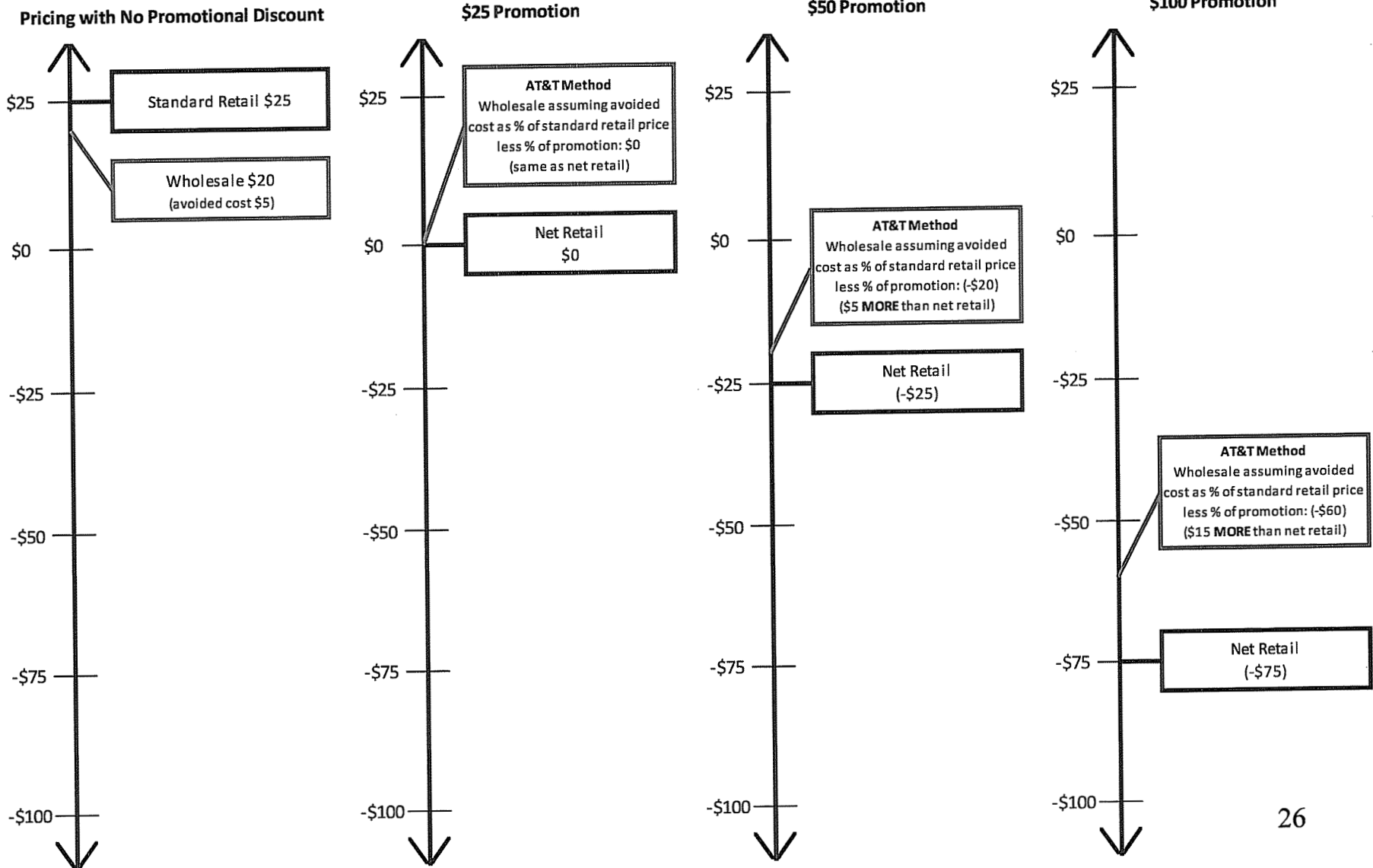
Amount: How not to calculate the avoided cost

- Applying the discount to the amount of the *promotion*, as opposed to the *net retail rate*, contravenes the purpose of the Act:
 - Results in Wholesale being above, or more expensive than Retail –the *opposite* result of what was intended

Amount: Wholesale pricing with no promotion in play



Amount: How not to calculate the avoided cost: AT&T's method makes wholesale above retail



Amount: Most correct way to calculate the avoided cost

- Correct methodology:

STEP 1: Find the standard/tariffed retail price.

STEP 2: Find value of avoided costs: multiply the standard/tariffed retail price by the wholesale discount factor. This gives you the value of the avoided costs.

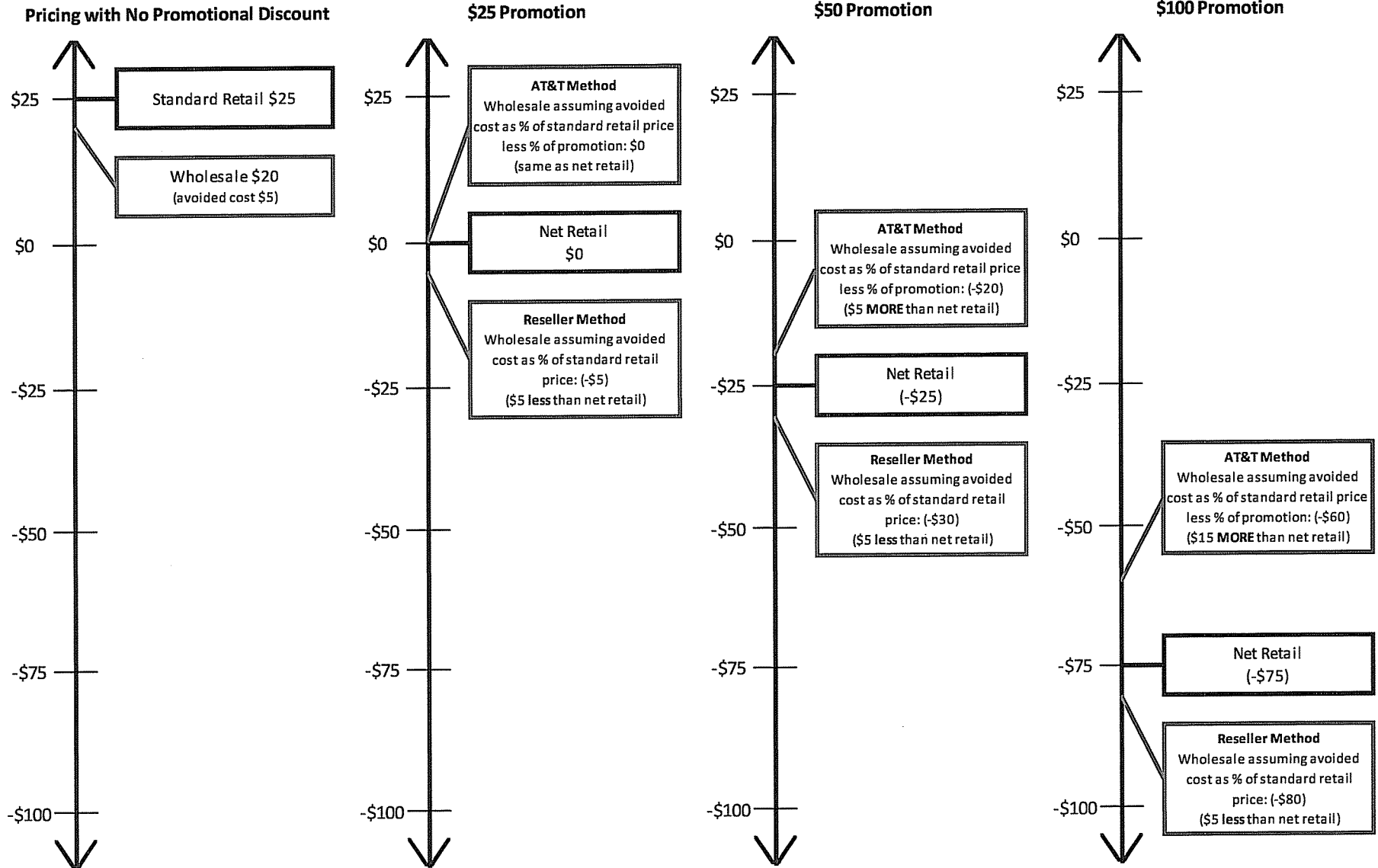
STEP 3: Subtract the avoided cost from the retail sales price, which is standard tariffed price, or, if a promotion applies, the price after applying the promotion.

Amount: Most correct way to calculate the avoided cost

- Costs of providing a specific service are the same, even if some customers get a special sales price on the service:

Simply because a price changes does not necessarily mean that a cost has changed. It certainly doesn't cause a cost to change.

Amount: Most correct way to calculate the avoided cost



Amount: Net credit to CLEC?

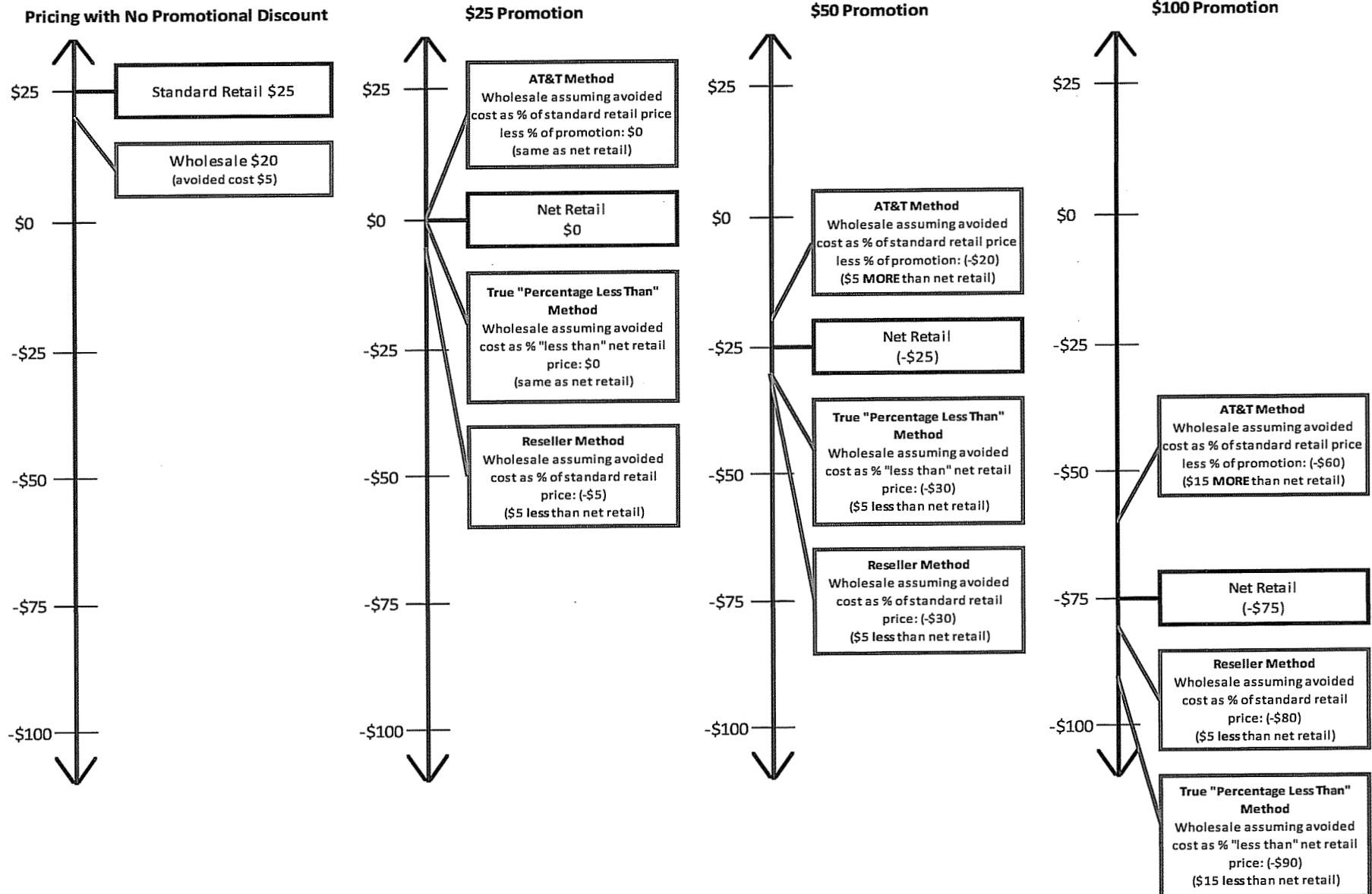
YES.

- Troubling? NO: that is what AT&T is doing for its retail customers as well.
- Prevents AT&T from undercutting resellers
- Preserves margin between retail and wholesale
- Resellers not in “better off position than they would be if AT&T just reduced its price” if full amount of promotion given, because one time promotion is NOT not a permanent change in price.

Amount: FCC does not say you must apply the percentage to the net/effective retail rate – just the avoided cost discount

- the FCC says “must apply the wholesale discount to the special reduced rate”
- This language implies that there will be a DISCOUNT from the retail price – in other words, that the wholesale price will be LESS than the retail price. *IT DOES NOT necessarily mean the % must be applied to the net effective retail rate.* It just means the avoided cost discount must be applied. So you still have to figure out how to calculate the avoided cost. This is best done by taking a % of the regular retail price, *as this is the only methodology which preserves the original intent of the rule .*
- In any event, need to make sure if reseller method not adopted, the 20% “below” discount is to be applied correctly, so that wholesale price is LESS than RETAIL

Amount: Comparison of all three methods



Conclusion

- To ensure that Wholesale is less than Retail, the wholesale rate should be calculated by:
 - finding the cost avoided (by applying the wholesale discount percentage to the standard, or tariffed, rate), then
 - subtracting this avoided cost figure from the net retail price (standard or tariffed price less the promotion amount).
 - If “% less than” method to be used, must be corrected to accurately state mathematically intended outcome:

Wholesale =

(retail price – cash back) – % * ABS(retail – cash back)

EXCLUSIONS AND LIMITATIONS ON SERVICES AVAILABLE FOR RESALE (Note 4)

Type of Service	AL		FL		GA		KY		LA		MS		NC		SC		TN	
	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount	Resale	Discount
1 Grandfathered Services (Note 1)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
2 Promotions - > 90 Days(Note 2 & 3)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
3 Promotions - < 90 Days (Note 2 & 3)	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
4 Lifeline/Link Up Services	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
5 911/E911 Services	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
6 N11 Services (Note 1)	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No	No	Yes	Yes	Yes	Yes	No	No	Yes	Yes
7 MemoryCall SM Service	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
8 Mobile Services	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
9 Federal Subscriber Line Charges	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
10 Nonrecurring Charges	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
11 EUCL Charge	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
12 Public Telephone Access Svc(PTAS)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
13 Inside Wire Maint Service Plan	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Applicable Notes:																		
1.	Grandfathered services can be resold only to existing subscribers of the grandfathered service.																	
2.	Where available for resale, promotions will be made available only to customers who would have qualified for the promotion had it been provided by BellSouth directly. Promotions shall be available only for the term set forth in the applicable tariff.																	
3.	Promotions shall be available only for the term set forth in the applicable tariff.																	
4.	Some of BellSouth's local exchange and toll Telecommunications Services are not available in certain central offices and areas.																	