



Mary K. Keyer  
General Attorney  
Kentucky Legal Department

AT&T Kentucky  
601 W. Chestnut Street  
Room 407  
Louisville, KY 40203

T 502-582-8219  
F 502-582-1573  
[mary.keyer@att.com](mailto:mary.keyer@att.com)

May 9, 2012

**VIA OVERNIGHT MAIL**

Mr. Jeff Derouen  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, KY 40602

**RECEIVED**

**MAY 10 2012**

**PUBLIC SERVICE  
COMMISSION**

Re: BellSouth Telecommunications, Inc. d/b/a AT&T SouthEast d/b/a AT&T  
Kentucky, Complainant v. BLC Management LLC d/b/a Angles  
Communications Solutions, Defendant  
PSC 2010-00023  
and  
BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T  
Kentucky, Complainant v. LifeConnex Telecom, LLC f/k/a Swiftel LLC,  
Defendant  
PSC 2010-00026

Dear Mr. Derouen:

Enclosed for filing in the above-captioned case are the original and ten (10)  
copies of Joint Status Report.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

  
Mary K. Keyer

Enclosures

cc: Parties of Record

1034181

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC. )  
d/b/a AT&T SOUTHEAST )  
d/b/a AT&T KENTUCKY )  
Complainant )

v. ) Case No.: 2010-00023

BLC MANAGEMENT LLC d/b/a ANGLES )  
COMMUNICATIONS SOLUTIONS )  
Defendant )

BELLSOUTH TELECOMMUNICATIONS, INC. )  
d/b/a AT&T SOUTHEAST )  
d/b/a AT&T KENTUCKY )  
Complainant )

v. ) Case No.: 2010-00026

LIFECONNEX TELECOM, LLC )  
f/k/a SWIFTEL LLC )  
Defendant )

**JOINT STATUS REPORT**

AT&T Kentucky<sup>1</sup> files this joint status report in accordance with the Order entered by the Kentucky Public Service Commission (“Commission”) on April 19, 2011. Counsel for AT&T Kentucky states that she has spoken with counsel for BLC Management LLC d/b/a Angles Communications Solutions, and LifeConnex Telecom, LLC f/k/a Swiftel LLC and he is in agreement with this report.<sup>2</sup>

<sup>1</sup> BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”).

<sup>2</sup> As explained below, Angles and LifeConnex are the only remaining defendants in these proceedings. By Order entered February 10, 2011, the Commission granted the joint motion of AT&T Kentucky and

In its April 19, 2011 Order, the Commission continued to hold the above-captioned cases in abeyance pending the resolution of similar cases pending in other states (*i.e.*, Alabama, Louisiana, North Carolina and South Carolina), and required that the Parties submit a joint status report no later than August 1, 2011, and every 90 days thereafter.

The following developments have occurred since the last joint status report filed on January 30, 2012:

On February 21, 2012, the United States District Court for the Eastern District of North Carolina entered an order affirming the North Carolina Utilities Commission's adoption of AT&T's position on the same "cashback" issue that is before this Commission in these cases (*see* Attachment A);

On March 2, 2012, this Commission entered an order denying reconsideration of its January 19, 2012 Order, entered in the *dPi v. AT&T Kentucky* complaint proceeding, Case No. 2009-00127, which adopts AT&T Kentucky's position on the same "cashback" issue that is before the Commission in these cases (*see* Attachment B);

On March 25, 2012, Angles and LifeConnex informed this Commission that they "are no longer doing business in your state" (*see* Attachment C);

On April 5, 2012, arbitrators in a proceeding before the Public Utility Commission of Texas entered an Order adopting AT&T's position on the same "cashback" issue that is before this Commission in these cases (*see* Attachment D);

On April 26, 2012, the Louisiana Public Service Commission voted 5-0 to adopt an Administrative Law Judge's recommendation to rule in favor of AT&T on each of the three issues in the companion consolidated phase proceedings in that state (*see* Attachment E, Ex. 7, p. 2); and

On May 3, 2012, this Commission entered an order granting the joint motion of AT&T Kentucky and dPi Teleconnect, LLC ("dPi") to dismiss with prejudice Case No. 2010-00029<sup>3</sup> (*see* Attachment F).

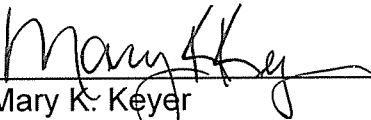
---

Budget Prepay d/b/a Budget Phone to dismiss Case No. 2010-00025, and on May 3, 2012, the Commission granted the joint motion of AT&T Kentucky and dPi Teleconnect, LLC ("dPi") to dismiss with prejudice Case No. 2010-00029.

<sup>3</sup> As a result of this order and an earlier order dismissing Budget Prepay, Angles and LifeConnex are the only remaining defendants in these proceedings.

In light of these developments, the Parties jointly request that the Commission convene a telephonic status conference to discuss how best to proceed in these two remaining cases.

Respectfully submitted,

  
Mary K. Keyer  
601 West Chestnut Street, Room 407  
Louisville, KY 40203  
(502) 582-8219

COUNSEL FOR AT&T KENTUCKY

Henry M. Walker  
Bradley Arant Boult Cummings LLP  
1600 Division Street, Suite 700  
Nashville, TN 37203  
(615) 244-2582

COUNSEL FOR BLC MANAGEMENTLLC  
D/B/A ANGLES COMMUNICATIONS  
SOLUTIONS

COUNSEL FOR LIFECONNEX TELECOM,  
LLC, F/K/A SWIFTEL, LLC



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

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

ORDER

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

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

#### BACKGROUND

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

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

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

### DISCUSSION

#### **Standard of Review**

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

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



## I. The Telecommunications Act of 1996

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

### 2. Calculating the Value of Promotional Credits

The Act requires that ILECs provide telecommunications services to CLECs at wholesale price—defined as the retail rate for that service less “avoided retail costs.” 47 U.S.C. § 252 (d)(3); 47 C.F.R. § 51.607. However, this “avoided retail costs” figure is not an individualized determination that actually reflects the costs avoided on each transaction. Such a scheme would be cumbersome and inadministrable. Foreseeing this fact, the FCC regulations provide that each state commission may use a single uniform discount rate for determining wholesale prices, noting that such a rate “is simple to apply, and avoids the need to allocate costs among services.” *Local Competition Order* ¶ 916. The NCUC set AT&T North Carolina’s discount rate at 21.5% for the residential services at issue here on December 23, 1996.<sup>1</sup> 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

---

<sup>1</sup> *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<sup>2</sup>, 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

---

<sup>2</sup>*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%.

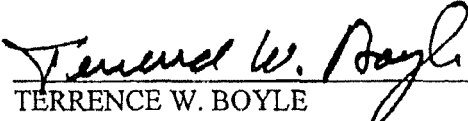
dPi suggests that this method produces anomalous results because, in the case where the cashback amount exceeds the monthly retail price, the “price” to the retail customer in a given month is a negative number. AT&T North Carolina has, therefore, effectively “paid” the retail customer that negative 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.	)	CASE NO.
	)	2009-00127
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
D/B/A AT&T KENTUCKY	)	
	)	
DEFENDANT	)	
_____	)	
	)	
DISPUTE OVER INTERPRETATION OF THE	)	
PARTIES' INTERCONNECTION AGREEMENT	)	
REGARDING AT&T KENTUCKY'S FAILURE TO	)	
EXTEND CASH-BACK PROMOTIONS TO DPI	)	

O R D E R

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."<sup>1</sup> 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

---

<sup>1</sup> Motion for Rehearing at 4.

that the FCC, in the Local Competition Order,<sup>2</sup> 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<sup>3</sup> 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.

---

<sup>2</sup> 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).

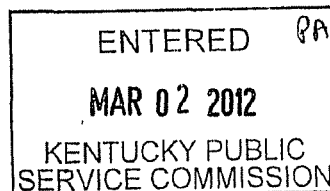
<sup>3</sup> BellSouth Telecom. Inc. v. Sanford, 494 F.3d 439 (4<sup>th</sup> Cir. 2007).



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.,<sup>4</sup> 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 . . ."<sup>5</sup> The Court's reasoning and conclusion in its Opinion underscores the Commission's confidence that it reached the correct decision in its January 19, 2012 Order.

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

By the Commission



ATTEST:

Executive Director

<sup>4</sup> 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.

<sup>5</sup> Id. at 3 (Emphasis added.)





To Whom It May Concern,

Associated Telecommunications Management Service (ATMS) is a parent company to several different subsidiaries.

This letter is in regards to these companies no longer doing business in your state. Below is a list of ATMS subsidiaries and effective dates:

- American Dial Tone, Inc. – effective immediately
- Bellerud Communications, LLC – effective 06/28/11
- BLC Management, LLC dba Angles Communication Solutions – effective 01/09/12
- Dialtone & More, Inc. – effective immediately
- LifeConnex Telecom, LLC – effective 01/09/12
- Ren-tel Communications, Inc. – effective immediately
- SC TXLink, LLC – effective immediately
- Triarch Marketing, Inc. – effective immediately

**RECEIVED**

**MAR 26 2012**

**PUBLIC SERVICE  
COMMISSION**

Should you have any questions, please contact Denielle Townsend, Regulatory Department Head at [dtownsend@telecomgroup.com](mailto:dtownsend@telecomgroup.com).

Regards,

**Thomas E. Biddix**  
**Executive Officer**  
100 N. Harbor City Blvd.  
Melbourne, FL 32935



DOCKET NO. 39028

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

RECEIVED  
12 APR - 5 AM 10:34  
PUBLIC UTILITY COMMISSION  
FILING CLERK

**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.<sup>1</sup> 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.

<sup>1</sup> *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).

69

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.<sup>2</sup>

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.<sup>3</sup> 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).<sup>4</sup>

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]

---

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

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

<sup>4</sup> *Id* at 14-16.

Texas will make the services to [Nexus] available at the avoided cost discount from the promotional rate.”<sup>5</sup> AT&T Texas asserts that this provision was interpreted in the *Bell South Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 441 (4<sup>th</sup> 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)].<sup>6</sup>

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.”<sup>7</sup>

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.<sup>8</sup>

---

<sup>5</sup> *AT&T Texas Motion for Summary Decision* at 4 (September 16, 2011).

<sup>6</sup> *Id* at 4-5.

<sup>7</sup> *Id* at 6-7.

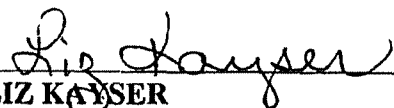
<sup>8</sup> *Id* at 5.


**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 5<sup>th</sup> day of April, 2012.

**PUBLIC UTILITY COMMISSION OF TEXAS**

  
\_\_\_\_\_  
**LIZ KAYSER**  
**ARBITRATOR**

  
\_\_\_\_\_  
**SCOTT SMYTH**  
**ARBITRATOR**





**LOUISIANA PUBLIC SERVICE COMMISSION**  
**MINUTES FROM APRIL 26, 2012**  
**OPEN SESSION**  
**(corrected)**

***MINUTES OF APRIL 26, 2012 OPEN SESSION OF THE LOUISIANA PUBLIC SERVICE COMMISSION HELD IN BATON ROUGE, LOUISIANA. PRESENT WERE CHAIRMAN FOSTER CAMPBELL, VICE CHAIR JIMMY FIELD AND COMMISSIONERS LAMBERT BOISSIERE, ERIC SKRMETTA AND CLYDE HOLLOWAY. ALSO PRESENT WAS EVE KAHAO GONZALEZ.***

---

Open Session of April 26, 2012, convening at 9:15 A.M. and adjourning at 12:06 P.M., Natchez Room, 602 N. 5<sup>th</sup> Street, 1<sup>st</sup> Floor, Baton Rouge, Louisiana, with the above-named members of the Commission and Secretary Eve Kahao Gonzalez.

Ex. 1            Announcements

Commissioner Campbell praised Entergy for enacting a voicemail system alerting customers of outages in their area, or impending outages in their area, along with an estimated time of reconnection. He further encouraged all other utilities, investor owned and cooperatives, to establish a similar procedure and asked that they report back at the May B&E. Commissioner Field joined in the commendation.

Commissioner Field reminded everyone that the Pre B&E function for May will be held May 22, 2012 from 6pm – 8pm at Abacus and the B&E will begin at 9:30 am on May 23, 2012 at the Lafayette Consolidated Government Building Council Auditorium.

Ex. 2            **U-32210 - South Louisiana Electric Cooperative Association, D/B/A SLECA, ex parte. In re: 2012 FRP Annual Report for test year ending November 2011, pursuant to Order U-31835.**

**In re: Discussion and Possible Vote on Motion for Entry of Order Accepting Uncontested Joint Report.**

On motion of Commissioner Field, seconded by Commissioner Campbell, and unanimously adopted, the Commission voted to accept the Staff Recommendation and approve the report and draft order as filed into the record on April 15, 2012.

Ex. 3            **T-32175 - Louisiana Public Service Commission vs A Maloney Moving & Storage, Inc. (Harahan, Louisiana). In re: Cancellation of Common Carrier Certificate Number 7283 for failure to maintain tariff on file with the Commission as required by General Order 2 dated July 21, 1921 and to pay a citation fee of TWENTY FIVE DOLLARS (\$25.00).**

On motion of Commissioner Skrmetta, seconded by Commissioner Holloway, and unanimously adopted, the Commission voted to accept the ALJ Recommendation and 1) find A Maloney Moving & Storage, Inc. be guilty of failing to maintain a tariff on file with the Commission; 2) Cancel Common Carrier Certificate 7283, previously issued to A Maloney Moving & Storage, Inc., due to A Maloney Moving & Storage, Inc.'s failure to maintain a tariff on file with the Commission; and 3) Require A Maloney Moving & Storage, Inc. to pay the \$25 citation fee if A Maloney Moving & Storage, Inc. applies for reinstatement

Ex. 4            **T-32201 - Louisiana Public Service Commission vs. Select Energy Services, LLC (Gainesville, Texas). In re: Alleged violation of Louisiana Revised Statutes Title 45:161 through 180.1 as amended, by operating Intrastate beyond the scope of authority in LPSC Number 7454 on forty-six (46) counts; allegedly occurring on or about September 1, 2011 through October 31, 2011.**

**In re: Discussion and possible vote on Stipulated Agreement pursuant to Rule 57.**

On motion of Commissioner Field, seconded by Commissioner Boissiere, and unanimously adopted, the Commission voted to exercise its original and primary jurisdiction pursuant to Rule 57.

On motion of Commissioner Field, seconded by Commissioner Boissiere, and unanimously adopted, the Commission voted to accept the Staff Recommendation and approve the agreement between Staff and the Carrier, dated April 5, 2012, wherein the Carrier agreed to

plead guilty and agreed to pay a fine of \$2,000.00, per count, with \$1,500.00 per count being suspended, subject to Select Energy Services, LLC not committing any additional violations within the following 12 months, from the date the agreement was executed herein and agreed that the unsuspended portion of the fine and the citation fee, for a total of \$23,025.00, which must be paid within 15 days from the date of the issuance of the Order herein.

- Ex. 5 **T-32241** - Louisiana Public Service Commission vs. Bolden's Hope St. Towing (Shreveport, Louisiana). In re: Alleged violation of Louisiana Revised Statutes Title 45:161 through 180.1 as amended and General Order dated March 26, 2010, by operating Intrastate without LPSC authority on one count and for exceeding state prescribed rates; allegedly occurring on or about February 17, 2012.

**In re: Discussion and possible vote on Stipulated Agreement pursuant to Rule 57.**

On motion of Commissioner Field, seconded by Commissioner Boissiere, and unanimously adopted, the Commission voted to exercise its original and primary jurisdiction pursuant to Rule 57.

On motion of Commissioner Campbell, seconded by Commissioner Holloway, and unanimously adopted, the Commission voted to accept the Staff Recommendation and approve the agreement between Staff and the Carrier, dated March 8, 2011, wherein the Carrier agreed to plead guilty and agreed to pay a fine of \$1,000.00, per count, with \$500.00 per count being suspended, subject to Bolden's Hope St. Towing not committing any additional violations within the following 12 months, from the date of the executed stipulated agreement and agreed that the unsuspended portion of the fine and the citation fee, for a total of \$525.00, would be paid within 15 days of the issuance of the Order herein.

- Ex. 6 **U-31196** - Entergy Louisiana, LLC and Entergy Gulf States Louisiana, L.L.C., ex parte. In re: Application of Entergy Louisiana, LLC for Approval to Purchase Power Block Two of the Acadia Energy Center, and Joint Application of Entergy Louisiana, LLC and Entergy Gulf States Louisiana, L.L.C. for Approval to Participate in Certain Related Contracts for the Purchase of Capacity and Electric Power and for Cost Recovery.

**In re: Discussion and possible vote to hire Exeter Associates., Inc. to assist Staff with the review of Entergy Louisiana, LLC and Entergy Gulf States Louisiana, L.L.C.'s Compliance Filing and Supplemental Application in Docket No. U-31196.**

On motion of Commissioner Field, seconded by Commissioner Boissiere, and unanimously adopted, the Commission voted to accept the Staff Recommendation and authorize the expansion of Exeter's scope of work in this proceeding to include review of the Compliance Filing and Supplemental Application filed February 29, 2012, and approve Exeter's budget proposal of \$35,500, consisting of \$32,500 for consulting fees and \$3,000 for expenses.

- Ex. 7 **U-31364** - Bellsouth Telecommunications, Inc. D/B/A AT&T Southeast D/B/A AT&T Louisiana versus Image Access, Inc. D/B/A New Phone; Budget Prepay, Inc. D/B/A Budget Phone D/B/A Budget Phone, Inc.; BLC Management, LLC D/B/A Angles Communications Solutions D/B/A Mexicall Communications; dPi Teleconnect, LLC; and Tennessee Telephone Service, Inc. D/B/A Freedom Communications USA, LLC.. In re: Consolidated Proceeding to Address Certain Issues Common to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.

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 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.

- Ex. 8            **U-32088** - Entergy Louisiana LLC, ex parte. In re: Application for Relief from Prior Directive and Order Related to the Proposed Purchase of Entergy Power LLC's interest in Unit 2 of the Independence Steam Electric Station (ISES).
- In re: Discussion and possible vote on Unopposed Motion for Direct Consideration by the Commission Pursuant to Rule 51 and 57 of the LPSC's Rules of Practice and Procedure.**
- On motion of Commissioner Skrmetta, seconded by Commissioner Holloway, and unanimously adopted, the Commission voted to bring this matter up under Rules 51 and 57 of the LPSC's Rules of Practice and Procedure.
- On motion of Commissioner Holloway, seconded by Commissioner Field, and unanimously adopted, the Commission voted to rescind the Commission's February 2008 directive requiring ELL to exercise its option to purchase an ownership interest in the Independence Steam Electric Generation Station Unit 2.
- Ex. 9            **U-32187** - Dixie Electric Membership Corporation ("DEMCO"), ex parte. In re: 2011 FRP Annual Report Filing.
- In re: Discussion and Possible Vote on Joint Report and Motion for Entry of Order Accepting the Report.**
- On motion of Commissioner Skrmetta, seconded by Commissioner Field, and unanimously adopted, the Commission voted to accept the Staff Recommendation and approve the report and draft order as filed into the record on March 29, 2011.
- Ex. 10          **U-32222** - Washington-St. Tammany Electric Cooperative, Inc. (WSTE), ex parte. In re: Petition for Expedited Approval of Power Supply and Services Agreement Extension.
- In re: Discussion and possible vote to hire outside consultant to assist Staff in this matter.**
- On motion of Commissioner Skrmetta, seconded by Commissioner Holloway, and unanimously adopted, the Commission voted to retain the consulting firm of Henderson Ridge to assist Staff in this matter for a budget of \$17,500 for professional fees plus expenses not to exceed \$1,500, for a total budget of \$19,000.
- Commissioner Holloway complained to General Counsel of the tardiness of issuing RFPs.
- Ex. 11          **U-32224** - Claiborne Electric Cooperative, Inc., ex parte. In re: Petition for Expedited Approval of Power Supply and Services Agreement Extension.
- In re: Discussion and possible vote to hire outside consultant to assist Staff in this matter.**
- On motion of Commissioner Skrmetta, seconded by Commissioner Holloway, and unanimously adopted, the Commission voted to retain the consulting firm of Henderson Ridge to assist Staff in this matter for a budget of \$17,500 for professional fees plus expenses not to exceed \$1,500, for a total budget of \$19,000.
- Ex. 12          **U-31407** - Huntington Properties, LLC d/b/a Huntington Water & Sewer Company, ex parte. In re: Request for Application for Rate Increase of water and sewerage.
- In re: Discussion and possible vote on ALJ Final Recommendation.**
- In re: Request for Oral Argument received by Huntington Properties, LLC.**
- Last month's Ex. 10.**
- Counsel for Huntington Properties, LLC, Andy Ezell, waived the request for Oral Argument previously filed.
- Commissioner Campbell offered a motion to accept ALJ Recommendation. Commissioner Field seconded this motion. However, Commissioner Holloway offered a substitute motion.

On motion of Commissioner Holloway, seconded by Commissioner Campbell, and unanimously adopted, the Commission voted to accept the ALJ Recommendation with the following amendment: the water usage included in the minimum monthly customer charge be decreased from 2,700 to 2,000 gallons.

- Ex. 13      **R-31825** - Louisiana Public Service Commission, ex parte. In re: Possible Amendment to Section 501 A (c) and (e) of the Regulations for Competition in the Local Telecommunications Market (White Page Directory Distribution Requirement).

**In re: Discussion and possible vote on Staff's Final Recommendation.**

Commissioner Field read a proposed motion into the record to amend Staff's Final Recommendation.

The proposed motion amended Section 501 (A) of the Local Competition Regulations to add Subsection (1)(e)(4) which shall read as follows: "A TSP shall rely on the most recent election of a customer who has chosen to "opt-in" to receive the directory until that customer affirmatively acts to alter their election, or the customer no longer resides at the same address."

Item No. 13 was then passed until the Business and Executive Session to be held in May.

- Ex. 14      **R-30738** - LPSC ex parte. In re: Merchant Transmission Investment in Louisiana.  
**U-28155** - Entergy Louisiana, LLC and Entergy Gulf States Louisiana, L.L.C. In re: Application for Independent Coordinator of Transmission.  
**U-32148** - Entergy Louisiana, LLC and Entergy Gulf States Louisiana, L.L.C. In re: Application for MISO membership.

**In re: Discussion and possible vote to approve updated budgets for consultants and counsel.**

On motion of Commissioner Field, seconded by Commissioner Campbell, and unanimously adopted, the Commission voted to approve the updated budgets for consultants and counsel as follows: J. Kennedy and Associates' net budget is for \$120,000, plus \$12,000 in expenses; Patterson Consulting's budget is for \$140,000, plus \$30,000 in expenses; Exeter Associates' net budget is for \$68,000 in fees, and it requires no additional budgeted expenditures; Stone Pigman's net budgeted fees are \$385,739, and it requires no additional budgeted expenditures. These budgeted fees and expenditures are netted against remaining increments for fees and expenses from budgets previously approved by the Commission.

- Ex. 15      Discussion and possible vote to amend General Order dated 12-28-2000

Staff requested to review and reopen the two general orders (General Order dated April 23, 2011 and General Order dated December 28, 2000) to assure that they are consistent with General Order R-31953 dated November 22, 2011 and bring this issue back up in May.

- Ex. 16      Directive to Staff to open a rulemaking docket to establish a standard rate of return on equity for investor-owned electric and gas utilities. This standard will be used as the authorized return for those utilities within 180 days after it is established absent a filing and demonstration by any affected utility that a different rate is warranted. Among other factors the established standard return should take into consideration the following recent developments: stabilization of capital markets, lower interest rates and long-term treasury yields, reduced risk to utilities resulting from advance approval of major capital additions, increased use of riders allowing immediate recovery of expenditures, and the use of securitization to fund storm repairs and cancellation costs. Staff is additionally directed to issue RFPs within 30 days seeking outside consultants and counsel to assist in this docket.

**At the request of Commissioner Campbell.**

**Last month's Ex. 18**

**PASSED**

Ex. 17 Report by utilities on plans for natural gas usage given its decrease in price as well as the effect on pricing of exporting natural gas as requested by Commissioners Campbell and Field at the March B&E.

**PASSED**

Commissioner Skrmetta directed Brad Mittendorf to coordinate with Staff the presentation by American National Gas Association.

Ex. 18 Possible Executive Session pursuant to La RS 42:17 to discuss litigation strategy regarding Louisiana Public Service Commission, et al V. Louisiana State Legislature, Docket No. 2011-CA-0943, Louisiana Court of Appeal, First Circuit.

On motion of Commissioner Skrmetta, seconded by Commissioner Field, and unanimously adopted, the Commission voted to go into Executive Session.

On motion of Commissioner Skrmetta, seconded by Commissioner Field, and unanimously adopted, the Commission voted to come out of Executive Session.

Ex. 19 1) Reports  
2) Resolutions  
3) Discussions

Commissioner Skrmetta directed Staff to investigate the effect of the LPSC causing EGSL and ELL to leave the System Agreement and respond back to the Commission at the most reasonable time.

Commissioner Holloway reminded everyone that a technical conference for Docket R-31417 will be held immediately after the B&E is adjourned.

Commissioner Campbell told everyone of his experience in driving a natural gas fueled truck in the past few days.

Mrs. Brenda Headlee of the LPSC Do Not Call Program reported on the work that the DNC program has done and the issues that have come up regarding identity theft which have been discussed with the Attorney General's office.

Commissioner Skrmetta directed Staff to open a dialogue with the AG's office to quantify data in order to possibly request the enactment of legislation.

Commissioner Campbell directed Staff to look into the FL statute in which fraudulent calls to anyone over the age of 65 are deemed a felony.

Commissioner Holloway directed Staff to make 2,000 gallons the minimum usage amount in all future water rate cases.

Commissioner Field directed Staff to begin issuing RFPs as they see necessary to expedite the hiring process.

Ex. 20 **R-26968** - Louisiana Public Service Commission, ex parte. In re: Review of the General Order dated March 12, 1999. (Pole Attachment Rates).

**In re: Discussion of possible reopening of rulemaking proceeding.**

**At the request of Commissioner Holloway.**

On motion of Commissioner Boissiere, seconded by Commissioner Campbell, with Commissioners Skrmetta and Holloway concurring and Commissioner Field temporarily absent, the Commission voted to direct Staff to reopen the instant rulemaking proceeding and to allow additional interested parties an opportunity to file notices of intervention.

Ex. 21 **R-31417 - LPSC, ex parte. In re: Re-examination of the Commission's Net Energy Metering Rules found in General Order No. R-27558, dated November 30, 2005 (the "Net Metering Order")**

**In re: Discussion and possible vote to hire an outside consultant to assist Staff in this matter.**

**At the request of Commissioner Field.**

On motion of Commissioner Skrmetta, seconded by Commissioner Boissiere, and unanimously adopted, the Commission voted to reissue this RFP in hopes of obtaining more applicants and more reasonable bids.

On motion of Commissioner Holloway, seconded by Commissioner Field, and unanimously adopted, the Commission voted to allow a 20 day response and further ordered Staff to reissue this RFP immediately in order that they may vote at the May B&E.

Ex. 22 Entergy Louisiana, LLC Formula Rate Plan filing for Test Year 2011

**In re: Discussion possible vote to expand the scope of work for Exeter Assoc., Inc. to include review of 2011 filing in existing budget.**

**At the request of Commissioner Field.**

On motion of Commissioner Field, seconded by Commissioner Campbell, and unanimously adopted, the Commission voted to accept the Staff Recommendation and authorize Exeter to assist Staff with the review of ELL's 2011 FRP filing using its remaining budget as needed.

On motion of Commissioner Skrmetta, seconded by Commissioner Campbell, and unanimously adopted, the Commission voted to adjourn the meeting.

**MEETING ADJOURNED**

The next Business and Executive Session will be held May 23, 2012 at 9:30 a.m. in Lafayette, Louisiana.

**LOUISIANA PUBLIC SERVICE COMMISSION**

**ADMINISTRATIVE HEARINGS DIVISION**

**DOCKET NO. U-31364**

**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**

---

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

---

**FINAL RECOMMENDATION**

**OF THE ADMINISTRATIVE LAW JUDGE ON REMAND BY THE LOUISIANA  
PUBLIC SERVICE COMMISSION**

**DRAFT ORDER**

*Background*

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



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

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

On February 10, 2011, AT&T and Budget Prepay, Inc. d/b/a Budget Phone f/k/a Budget Phone, Inc. (“Budget Phone”) filed a Motion to Dismiss in this proceeding, jointly moving that all claims, demands and counter-claims asserted by either of them be dismissed with prejudice, on the grounds that the parties have amicably resolved their disputes. The Commission issued

Order No. U-31364 dismissing Budget Phone as a party to consolidated docket number U-31364, with prejudice, on February 15, 2011.

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

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

This consolidated proceeding was instituted for the limited purpose of addressing and resolving three issues identified in the joint motion, as well as any other common issues subsequently identified and approved for consolidation. The Parties also requested that all other pending motions in the proceedings be held in abeyance while the common issues were addressed. It was determined that further proceedings in the five dockets should be stayed pending a resolution of issues in the consolidated proceeding, unless a subsequent Ruling or Order directed otherwise. The Parties, as outlined in the stipulations submitted at the time of the hearing, request a ruling on three basic issues that are to be decided in this consolidated docket, which are: Cashback Offerings, the Line Connection Charge Waiver ("LCCW") and Referral

Marketing (“Word-of-Mouth”). A hearing was held on the consolidated issues on November 4 and 5, 2010.

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

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

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 on Remand was issued. It addresses the calculation methodology to be applied to cash back promotions.

***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

---

<sup>1</sup> Order No. U-31364, Remand Order, September 28, 2011.

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.<sup>2</sup>

#### **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

---

<sup>2</sup> See Joint Motion on Procedural Issues submitted May 13, 2010.

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 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.<sup>3</sup>

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

---

<sup>3</sup> 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.

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 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.<sup>4</sup>
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.<sup>5</sup>
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.

---

<sup>4</sup> 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.

<sup>5</sup> 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.

*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 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.<sup>6</sup> “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.”<sup>7</sup> 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

---

<sup>6</sup> Staff’s Brief on Remand, page 4.

<sup>7</sup> Staff’s Brief on Remand, page 6.

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 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 (4<sup>th</sup> 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.”<sup>8</sup> 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.

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.

---

<sup>8</sup> Reply brief of AT&T page 14.



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:<sup>9</sup>**

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

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

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

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

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

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

---

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

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

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

AT&T's approach:

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

The Resellers approach

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

Staff's Compromise Approach

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

AT&T contends that Staff's formula is flawed because it adds the avoided cost estimate rather than subtracting it, causing AT&T to give resellers a high credit, which therefore increases the expense of the promotion to AT&T. AT&T postulates that "by making it more expensive for AT&T to offer these promotions, Staff's proposed new formula would discourage these pro-competitive promotions that are beneficial to consumers in Louisiana."<sup>10</sup> 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. 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.

---

<sup>10</sup> Reply brief of AT&T page 14

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

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

The Resellers' argument yields the following result:

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

The Resellers would receive a credit from AT&T of \$26, thus making the net effective retail price -\$26. The Resellers urge that this is the correct application because it provides them with a lower price than AT&T's retail customers, or "wholesale must always be less than retail". This

is not always the case. There are certainly times during limited promotions where the wholesale price is greater than the retail price and this is permissible. The Resellers are not entitled to the entire rebate because they will receive a reimbursement that is greater than the price they paid for the service. The Resellers do not pay the net or effective retail price. They pay less because the percentage attributable to the avoided costs is deducted from the price AT&T charges Resellers.

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

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

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

effective retail price of the service discounted by the resale discount rate previously established by this Commission as 20.72%.

#### **Waiver of Line Connection Charge**

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

#### **Word of Mouth Promotion**

The Parties ask that the Commission make an initial determination as to whether the word-of-mouth referral reward program described herein is subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law. They propose that if the

Commission determines that the referral award program is subject to such resale obligations, that the Commission assume the Parties agree a Reseller is entitled to receive a promotional credit and determine the amount of the credit to which the Resellers are entitled.

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

In accordance with the conclusions reached in this consolidated docket;

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

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

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

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

---

**DISTRICT II  
CHAIRMAN JAMES M. FIELD**

---

**DISTRICT IV  
VICE CHAIRMAN CLYDE C. HOLLOWAY**

---

**DISTRICT V  
COMMISSIONER FOSTER L. CAMPBELL**

---

**DISTRICT III  
COMMISSIONER LAMBERT C. BOISSIERE, III**

---

**EVE KAHAO GONZALEZ  
SECRETARY**

---

**DISTRICT I  
COMMISSIONER ERIC F. SKRMETTA**





COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.	)	
D/B/A AT&T SOUTHEAST D/B/A AT&T	)	
KENTUCKY	)	
	)	
COMPLAINANT	)	
V.	)	CASE NO. 2010-00029
	)	
DPI TELECONNECT, LLC	)	
	)	
DEFENDANT	)	

O R D E R

On June 26, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") and dPi Teleconnect, LLC ("dPi") jointly filed a motion with the Commission to dismiss this case with prejudice. As grounds for their joint motion, the parties state that they have reached an agreement with respect to AT&T Kentucky's claims and dPi's counterclaims. The parties also claim that there are no remaining disputes requiring the Commission's attention.

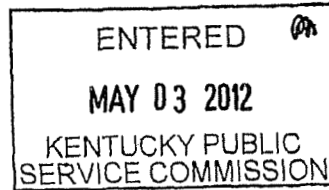
The Commission finds that the parties have provided sufficient grounds to support their joint motion and that no issues remain that require Commission action. Accordingly, the Commission will grant the parties' joint motion to dismiss the complaint with prejudice.

IT IS THEREFORE ORDERED that:

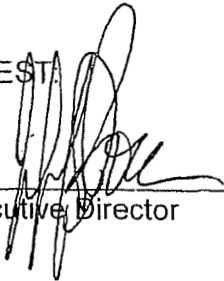
1. This case is removed from abeyance.

2. This case is dismissed with prejudice and removed from the Commission's docket.

By the Commission



ATTEST:

  
\_\_\_\_\_  
Executive Director