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March 11, 2011

Jeffrey DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40601

RE: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. dba AT&T Kentucky
Dispute Over Interpretation of the Parties' Interconnection Agreement
Regarding BellSouth's Failure to Extend Cash Back Promotions to dPi
Case No. 2009-00127

Dear Mr. DeRouen:

Enclosed please find an original and ten copies of dPi's Reply Brief in the referenced case.

Please acknowledge receipt of this filing by placing your file-stamp on the extra copy and returning to me via the enclosed self addressed postage paid envelope. Thank you.

Sincerely yours,

STOLL KEENON OGDEN, PLLC

Douglas F. Brent

DFB: jms
Enclosures

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MAR 14 2011
PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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

dPi TELECONNECT, LLC's REBUTTAL BRIEF

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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

dPi TELECONNECT, LLC's REBUTTAL BRIEF

I. INTRODUCTION

This case is about preserving the viability of wholesale competition and the efficacy of federal pricing rules. As AT&T has tacitly admitted ever since 2007 by allowing all CLECs to accept its cash back promotional offers, dPi was and is entitled to the cash back promotions from prior to that time. Because AT&T's restricting CLECs from taking cash back promotions was unreasonable and discriminatory, and because in any event AT&T did not seek approval prior to imposing the restrictions, in violation of FCC rules, in general it must be recognized that dPi was and is entitled to be credited for the cash back promotions. dPi's claims were timely submitted and AT&T did not challenge their eligibility at or near the time they were submitted, and it would be improper to dismiss those claims in their entirety.

However, the precise amount, and the method of determining how to calculate the wholesale price when a promotion is play, should be left until this Commission has made its decision in the Consolidated dockets that are addressing this specific issue in depth.

In the event the method of determining how to calculate the wholesale price when a promotion is play is addressed in the determination of this case, dPi's proposed method should be adopted because it recognizes both that wholesale should be less than retail and that the costs avoided in performing a service do not change simply because some customers are eligible to claim a special promotion award in a particular month. AT&T's proposed method should be rejected because it results in wholesale prices being higher than retail prices.

II. ANALYSIS

A. dPi is entitled to the cash back promotions because AT&T's restricting CLECs from taking cash back promotions was unreasonable and discriminatory, and because in any event AT&T did not seek approval prior to imposing the restrictions, in violation of FCC rules

1. AT&T's proposed restrictions are not reasonable and are discriminatory.

AT&T continues to insist that restricting dPi from accepting AT&T's cash back promotion offers was neither unreasonable nor discriminatory. dPi pointed out in its initial brief that the FCC rules presume that such restrictions are unreasonable and discriminatory and gives guidance as to the kinds of restrictions that are acceptable – such as restrictions against cross-class selling, in which an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the only to a certain class of customers eligible for the promotion (*i.e.*, if the ILEC's promotion is directed to *residential* customers, the CLEC cannot cross sell it to *business* class customers). *See* 47 C.F.R. § 51.613. Obviously, blocking all CLECs from accepting cash back promotion offers simply because they are CLECs simply doesn't compare.

As this tribunal probably knows, this issue of whether the cash back promotions should have been made available to dPi has been tried in two other jurisdictions, North Carolina and Louisiana. While not every aspect of those cases were rightly decided, both have so far correctly rejected AT&T's argument that it is reasonable and nondiscriminatory to deny dPi the promotion offers. The North Carolina Commission in particular took the trouble to explode this argument, and the North Carolina Commission's thoughts are worth reproducing at some length[1]:

> AT&T contends that it would be discriminatory against other CLPs if it paid dPi for the cashback promotions in question. ... [T]his claim is illogical...if AT&T's denial of such credit is unreasonable in this matter, it would be unreasonable to deny another CLP's claim that was otherwise valid as well.
>
> ***
>
> AT&T also argues that these restrictions on resale do not stifle competition between dPi and AT&T because dPi does not compete directly with AT&T for the same customer....[However] dPi and AT&T do compete directly for the same customers in a small percentage of cases. In those cases, limited though they may be, AT&T's restriction on resale provides it with a significant advantage over dPi and stifles competition.
>
> Moreover, even if the Commission assumes that AT&T and dPi do not directly compete for the same customers, we simply are not persuaded that dPi's decision to pursue credit-challenged customers overcomes the presumption that these restrictions on resale are unreasonable, discriminatory and harmful to competition. TA96 encouraged CLPs to distinguish themselves from ILECs by offering consumers different options than those provided by ILECs in the hope that overall competition would be increased. To do so, Congress encouraged and permitted CLPs to exploit these distinctions by mandating that the ILECs provide CLPs with access to the ILEC's network and that the ILEC permit CLPs to resale ILEC services on a reduced basis. Within this framework, dPi identified and exploited a market niche that was not being served by BellSouth. Thus, it is antithetical to suggest that a CLP that distinguished itself in a way that is encouraged by TA96 is not competitively stifled by an ILEC's refusal to resale a promotion that will allow the CLP to be a more financially viable competitor.[2]

1

Recommended Order, *In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent,* 2010 WL 1922679, *1922679 (N.C.U.C. May 07, 2010) (No. P-55, SUB 1744), p. 13-14; *affirmed by* Order Denying Exceptions and Affirming the Recommended Order, *In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent,* (N.C.U.C. October 1, 2010) (No. P-55, SUB 1744) ("NC Recommended Order"). A copy is attached as Appendix A.

2

[FOOTNOTE IN ORIGINAL] The Commission takes judicial notice that, as of August 28, 2009, there were 185 certified CLPs in North Carolina. *Report of the North Carolina utilities Commission to the Joint Legislative utility Review Committee.* p. 7. While we have no way of knowing with any certainty, it is reasonable to presume that one or

***

[I]t would be antithetical to suggest that dPi is not competitively stifled by AT&Ts refusal to provide dPi with the benefits of these long-term promotions because dPi exercised an option permitted by TA96.

***

Stated more simply, we find that AT& Ts restriction on resale of the cashback promotions was unreasonable, discriminatory and harmful to competition.

2. Federal law requires ILECs seeking to restrict resale of promotions to secure pre-approval from this Commission to do so.

Even were AT&T'S restrictions ultimately considered reasonable and non-discriminatory, it was nevertheless improper to impose those restrictions against dPi without prior Commission approval. AT&T urges this Commission to rule that it may, after the fact, condone AT&T imposition of restrictions on resale. But such a holding would be in direct contravention of 47 C.F.R. § 51.613(b) and the only known federal case on this issue. Following the FCC rules and precedent will neither unduly tax the Commission's resources (since only rarely should ILECs be seeking to impose restrictions on CLECs accepting promotional offers given that all restrictions are presumed to illegal), nor should it chill ILECs from offering promotions, since pre-approval is not necessary for instituting promotions, but only from blocking access to those promotions.

a. The FCC rule and the only known federal case to specifically address the issue all show that ILECs must secure Commission approval prior to imposing restrictions on a CLEC's acceptance of promotional offers.

AT&T urges that an ILEC may restrict resale of these presumptively unreasonable and discriminatory promotions that are offered in excess of 90 days without securing pre-approval from

more of these CLPs would compete with or would like to compete with AT&T for the same core customers that AT&T has identified as its customer of choice. In those instances, AT&T's long-term restricted resale policy discourages rather than encourages entry into the market by conferring an unfair advantage upon AT&T over any CLP that chooses to or might choose to compete directly against AT&T but *cannot* offer a similar cash back bonus. As a result, competition is stifled and these core customers are left with fewer choices for telecommunications services.

this Commission to do so. This position directly contravenes 47 C.F.R. § 51.613(b)[3] and a recent federal case on this issue.

i. Federal law requires pre-approval of restrictions on resale, including promotions

In selling telecommunication services to CLECs like dPi, an ILEC has a duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunication service." 47 U.S.C. § 251(c)(4)(B). This rule is refined and reinforced by FCC regulations, which provide, with very limited exceptions, that the "incumbent LEC shall not impose restrictions on the resale by [a competitive LEC] of telecommunication services offered by the incumbent LEC." 47 C.F.R. 51.605(e).

If an ILEC wishes to impose any restriction on resale, it may do so, but "only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b). Even then, the FCC has imposed a negative presumption on the validity of any resale restriction or condition that must be overcome. As the FCC ruled in its *Local Local Competition*

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47 C.F.R. § 51.613 Restrictions on resale.

(a) Notwithstanding §51.605(b), the following types of restrictions on resale may be imposed:

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

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

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

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

(b) **With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction *only if it proves to the state commission that the restriction is reasonable and nondiscriminatory*.**

Order,[4] "we, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we... *presume* resale restrictions and conditions to be ... in violation of *section 251(c)(4)*." Therefore, ILECs have a heavy burden to overcome *prior* to being permitted to impose a restriction or limitation on resale. The rationale for establishing the presumption is to eliminate litigation burdens on *resellers* – "This presumption **should reduce unnecessary burdens on resellers** seeking to enter local exchange markets, which may include small entities, **by reducing the *time and expense of proving affirmatively* that such restrictions are unreasonable**." *Id.* [emphasis added].

AT&T would reverse this federal presumption that resale restrictions are unreasonable and discriminatory by essentially *allowing restrictions unless challenged*; and, instead of requiring an ILEC to follow the federal directive to obtain Commission approval before restricting resale, incorrectly places the burden on the CLEC to challenge each restriction on resale. This is diametrically opposed to the federal scheme outlined by the FCC in its rules and orders.

ii. Federal precedent requires pre-approval of restrictions on resale, including promotions.

This issue about whether an ILEC must secure state commission approval prior to imposing restrictions on the resale of promotions came up in federal court in 2009 in *Budget Prepay, Inc. et al., v. AT&T Inc., f/k/a SBC Communications, Inc. et al.*, Cause No. No. 3:09-CV-1494-P in the US District Court, Northern District of Texas, Dallas Division (reversed on other grounds.) In that case, AT&T was attempting to impose its "RPMA" restrictions on the cash back promotions, a situation which would have resulted in AT&T providing only ~$3.00 to ~$7.00 on each $50 promotion

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4 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶939 (rel. Aug. 8, 1996) ("Local Competition Order").

involved (depending on the state involved.) The U.S. District Court enjoined AT&T from imposing such restrictions until it had secured state commission approval to do so. In its November 30, 2009, Order (attached as Appendix B), the court noted that:

> "... it would be bad policy to require Plaintiffs in this specific case to [first challenge the ILEC's restrictions at the state commissions] because it would allow Defendants to shift to Plaintiffs the duties imposed upon ILECs by the Act. The Act imposes on ILECs a duty to obtain state commission approval before placing restrictions on resale. 47 C.F.R. § 51.613(b). When an ILEC imposes a restriction on resale that is not permitted under 47 C.F.R. § 51.613(a), subsection (b) requires an ILEC "to prove to the state commission that the restriction is reasonable and nondiscriminatory" before imposing the restriction. Despite the regulation placing the duty of going to the state commission on ILECs, Defendants have asked the Court to require the Plaintiffs, CLECs, to go to the state commission before bringing a claim in federal court. Were the Court to oblige Defendants request it would allow them to contravene the requirements and intent of the Act." p. 13-14
>
> "... Congress passed the FTCA with the intent of "opening previously monopolistic local telephone markets to competition." *SWBT*, 208 F.3d at 477. Congress entrusted the FCC with the duty of promulgating regulations that would ensure the Act's purpose would be met, including regulations that prevented ILECs from placing restrictions on resale that are unreasonable or discriminatory. 47 U.S.C. § 251(c)(4)(B). To that end, 47 C.F.R. § 51.613(b) requires ILECs to prove that restrictions on resale are reasonable and nondiscriminatory before imposing such restrictions. Requiring ILECs to obtain state commission approval prior to placing restrictions on resale demonstrates a recognition that resale restrictions can have a devastating effect on a CLEC's ability to remain competitive. More importantly, it clearly places the duty to gain state commission approval on ILECs - not CLECs.... Defendants ignored their own duty to gain state commission approval before placing restrictions on resale." p. 14.

b. Following the FCC rules and federal precedent will neither unduly tax the resources of the Commission, nor stifle ILEC promotional offers.

There are no valid reasons for refusing to mandate an ILEC's seeking prior approval for imposing restrictions on resale. Imposing a mandated pre-approval process would not unnecessarily burden the Commission's resources; nor would requiring an ILEC to seek approval prior to imposing restrictions on the resale of its promotions have a chilling effect on the competitive offerings available to consumers because other carriers would have advanced notice of such offerings.

First, it is unlikely that a mandate requiring an ILEC to secure pre-approval prior would create an undue strain on Commission resources, because these proceedings should be few and infrequent, and uncontroversial restrictions would be unopposed. Remember, prior approval is necessary only where AT&T seeks to ***restrict*** its resale obligations – an occurrence which should be expected to be infrequent, since such restrictions are presumptively unreasonable and discriminatory. In any event, the pre-approval process need not be unduly burdensome even in those few instances in which it would be invoked. As in the tariff change filing process, the pre-approval process could be structured such that once the request for approval of a restriction is filed, there is time for objections, and, if none are made, the restrictions can be implemented.

Second, following the law by requiring ILECs to secure approval prior to imposing restrictions on the resale of promotional offerings will not produce a chilling effect on competition as a consequence of having to secure advance approval. This is because the law does not prevent the ILEC from instituting the promotion without notice; 47 C.F.R. § 51.613(b) and the *Restriction on Resale Order*, provide only that ***restrictions*** on resale of promotions lasting over 90 days are subject to prior Commission approval In other words, AT&T would have no need to seek Commission approval if AT&T were to offer its long-term promotions to resellers "subject to the same conditions" as AT&T offers these promotions to retail end-users.[5]

B. dPi's disputes were timely submitted and cannot be dismissed

In yet another attempt to excuse its rather blatant flouting of the law requiring it to make its cash back promotion offers available to CLECs, AT&T also claims that dPi has waived its right to the promotion credits by filing late under the contract. dPi pointed out at length why it is improper to apply terms from the ***second*** interconnection agreement to orders and service competed under the

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See 47 CFR § 51.603(b)

first interconnection agreement, and directs the reader back to those portions of its initial brief for further information.

However, it is worth pointing out that, even if the terms of the ***second*** interconnection agreement are allowed to control events which took place under the ***first*** interconnection agreement (notwithstanding the language from General Terms and Conditions sec. 2.1 which specifically provides that ***"the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date")***, dPi's claims were ***still*** timely submitted. The provision that AT&T contends forecloses dPi's claims simply provides that

> "A billing dispute means a reported dispute ***submitted*** pursuant to Section 2.1 above of a specific amount of money actually billed by BellSouth within twelve (12) months of the submission of such dispute. dPi agrees not to submit billing disputes for amounts billed more than twelve (12) months prior to submission of a billing dispute filed for amounts billed. " Attachment 7, p. 9, § 2.2

However, AT&T actually concedes that dPi submitted its disputes prior to the 12 month "limitations period" implemented by the second interconnection agreement, which went into effect in May 2007. For example, AT&T's witnesses admit, among other things, that disputes were submitted beginning in December 2005 (Seagle direct at 9, AT&T brief at 8), continued submitting them for more than a year, and reiterated in January 2007 that it disagreed with AT&T's denial of these requests (*id.*) In other words, these claims were filed ***even before the first 12 months had elapsed under the new interconnection agreement***.

The decision of the North Carolina Commission on this issue is again noteworthy:

> The filing was well within the 12 month limitation period in which dPi was required to resolve these matters with AT&T through formal or informal discussions or to file a complaint proceeding if its efforts to do so failed. Moreover, prior to the complaint being filed, it is uncontroverted that dPi provided AT&T with written requests detailing each claim in dispute. At the time the complaint was filed, none of the claims exceeded the six year statute of limitations that governed Georgia contract claims originating during ICA1 or the 12 month limitation period agreed to in ICA2. Further, as a result of the previously discussed submissions, AT&T was aware that dPi disputed each claim within 60 days of the

"obligations [being] owed for services provisioned or orders placed under [the prior agreement]." And, finally, none of the claims identified were resolved within 60 days. Thus, each claim identified is viable and can be resolved in these proceedings.[6]

In the event that AT&T is contending that dPi's claims should be denied because dPi did not follow the hyper-technical escalation matrix instituted by the new contract, this contention should also be rejected out of hand. dPi substantially complied with the dispute resolution rules by identifying in writing using AT&T's BAR forms those orders that it was submitting. Further "escalation" would have been pointless and futile because, as AT&T admits, AT&T, as a matter of policy, "did not provide the cashback promotional credits to any reseller during the time period at issue in this docket." Ferguson direct at 17; AT&T brief at 9; see also AT&T brief at 9-10. Again, the North Carolina Commission was astute on this subject:

> In its Brief and Proposed Order, AT&T argued that dPi failed to "pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed." (Exhibit PLF-2, Attachment 7, Section 2.1). AT&T further argued that the failure of dPi to comply with these escalation provisions would bar dPi from pursuing these claims in this Complaint proceeding. We do not agree.
>
> During the hearing, AT&T witness Scot Ferguson testified that to the best of his knowledge, dPi did not follow the escalation process required and defined by the 2007 interconnection agreement. We are not persuaded by this testimony. Rather, we find dPi's witness who offered testimony that Brian Bollinger, dPi's former in-house attorney, "escalated and attempted to resolve this issue" with an AT&T representative more persuasive on this point.
>
> Even if we did not find dPi's witness persuasive on this point, dPi's failure to escalate the disputes in compliance with the exact terms of ICA2 would not bar its claims in view of its substantial compliance with the agreement in general. Furthermore, it is black letter law in contract matters that performance of an act required by contract is not necessary where such performance would be an idle, useless or futile act. *Williston on Contracts,* 4th Ed. Section 47.4. This is the law in Georgia.
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> The uncontroverted facts of this case are that dPi has consistently submitted such

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NC Recommended Order p. 17.

claims to AT&T for credit since 2005 only to be "denied" by AT&T's inaction. Until July 2007, AT&T denied these claims because they contended that federal law and regulations did not require that these promotions be made available for resale. AT&T persisted in this denial despite being first told by this Commission in 2004 that promotions of this type that lasted more than 90 days were presumptively unreasonable, discriminatory and should be for resale unless AT&T could prove the promotions were reasonable and nondiscriminatory. BellSouth/AT&T, reluctantly it appears, changed its policy prospectively and began to accept requests to resale such promotions in July 2007 to align itself with pre-merger AT&T. Even then, as evidenced by its stance in this proceeding, AT&T has continued to deny that these promotions are required to be available for resale for bills that originated prior to its July 2007 change in policy.

We believe that the purpose of the escalation provision was to permit the parties, in good faith, to attempt to resolve disputes prior to resorting to a forum such as this Commission. To be effective, each party has to be open to a negotiated resolution of a disputed issue. Here, because of the unyielding position taken by BellSouth, there could be no negotiated resolution. BellSouth's position was that these cash back promotions were not available for resale. No matter how many times dPi asked BellSouth, the answer would always be the same: denial, because "AT&T did not offer cash back promotions for resale." (Tr. p. 165) Thus, any action taken by dPi to comply with the escalation process would have been futile. dPi's nonperformance in this regard is therefore deemed to have been excused.[7]

C. The narrow issue of the specific amount of cash back promotion to be awarded qualifying CLECs should be reserved until this issue has been decided by this Commission in the Consolidated Docket

With regard to the narrow issue the specific amount of a cash back promotion to be awarded to CLECs and whether the promotion should be discounted by the wholesale discount when dPi qualifies for the promotion, note that AT&T and dPi, together with other affected parties, requested that the Commission convene a consolidated proceeding (Consolidated Phase) specifically to resolve the issue of how cash-back credits to the resellers should be calculated.[8] As a consequence, this

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7 NC Recommended Order at 18.

8 *See* Joint Motion on Procedural Issues, filed May 20, 2010, *In the Matter of: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. BLC Management LLC d/b/a Angles Communications Solutions*, Case No. 2010-0023, *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. Budget Prepay, Inc. d/b/a Budget Phone*, Case No. 2010-00026, *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. LifeConnex Telecom, LLC f/k/a Swiftel LLC*, Case No. 2010-00026, and *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. dPi Teleconnect, LLC*, Case No. 2010-00029, before the Kentucky Public Service Commission.

question is one of the key issues currently pending before this Commission in the Consolidated Docket regarding Case Nos. 2010-0023, 2010-0026, and 2010-00029.[9] In the consolidated docket, which involves AT&T and dPi as well as numerous other parties, this issue it is being examined in great detail (with expert witness economist testimony and extensive briefing) – much more so than it has been here in this case. Thus, it is not appropriate to attempt to address this issue until the Commission has made its decision in the Consolidated case.

D. In the event the Commission proceeds on the pricing issue in this case instead of deferring to the Consolidated Docket, then AT&T's method of discounting the cash back promotions must be rejected because AT&T's method is inconsistent with core principles of the Federal Telecommunications Act of 1996

The FTA[10] and 47 C.F.R. § 51.607 set the resale rate for telecommunications services that an ILEC may charge at "the rate for the telecommunications service, less avoided retail costs, as described in section 51.609."[11] Thus, ***the "wholesale discount" must by law be calculated as the avoided cost***. So, wholesale price is based upon the effective retail rate, whatever it may be – whether a positive number, or when a promotion greater than the price of service is applied, a

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In the Matter of: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. BLC Management LLC d/b/a Angles Communications Solutions, Case No. 2010-0023, *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. LifeConnex Telecom, LLC f/k/a Swiftel LLC*, Case No. 2010-00026, and *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. dPi Teleconnect, LLC*, Case No. 2010-00029, before the Kentucky Public Service Commission.

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

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

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"Avoided retail costs shall be those costs that reasonably can be avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier." 47 C.F.R. § 51.609(b). Further, "the amount of avoided retail costs shall be determined on the basis of a cost study...." 47 C.F.R. § 51.609(a).

negative number. From this number is subtracted the avoided cost of providing the service, which avoided cost does not deviate from the avoided cost of providing the standard (regular retail) offering. Obviously, there will always be ***costs*** associated with providing service, regardless of the level of the ***sales price*** – even if the service is given away for free, of if the customer is given cash to take the service for one of the months that it is offered. Thus, the wholesale price is best calculated by subtracting the avoided cost for the service (arrived at by applying the discount factor to the standard retail price) from the effective retail rate – that is, the standard retail rate, or, if a promotion is in effect, the standard rate less the promotion. This is the one clear way to preserve the principle that the ***wholesale price should be less than the retail price***.

AT&T claims that its erroneous method of calculating the credit due to the Resellers for cash back promotions is consistent with applicable FCC rulings, State Commission rulings, and appellate court decisions. However, AT&T fails to recognize in its arguments and examples that in many cash back promotions at issue, AT&T offers a cash back promotion in an amount that exceeds the retail cost of the underlying telecommunications service. Applying AT&T's method to these promotions creates a wholesale price which is ***greater than*** the retail price to end-users, circumventing a core principle inherent in the FTA – namely, that wholesale prices should always be less than retail prices. [12] None of AT&T's arguments justify charging the Resellers, as wholesale customers of

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[12] AT&T equates the term "discount" with "percentage." However, the law does not define the wholesale discount in terms of a "percentage" reduction, but as a subtraction problem: the wholesale discount is determined by reducing the avoided costs from the retail rate. *See* 47 C.F.R. § 51.607: "The wholesale rate...shall equal the rate for the telecommunications service, ***less avoided retail costs*** ...." Under AT&T's method, applying the Commission's wholesale discount of 20.72% to an effective retail rate that is negative ***increases*** the wholesale rate (i.e., moves that rate toward zero)... As explained throughout this proceeding, nowhere in the FTA or FCC regulations is an ILEC allowed to use an avoided cost discount to increase the wholesale rate and charge a wholesaler *more than* a retail customer.

AT&T, a price in excess of what AT&T charges its retail customers, as such an arrangement would render CLECs unable to compete with AT&T's retail prices and would stifle the competition in the telecommunications market which is the foundation of the FTA.

AT&T claims that *Sanford* sanctions its proposed method of reducing the value of the cash back promotion by applying the Commission's wholesale discount percentage. Nothing could be further from the truth. The key lesson from *Sanford* is that ***wholesale must be less than retail.***[13] However, in cases where the promotion amount exceeds the retail price of the service (*e.g.*, a $25 service combined with a $50 cash back promotion), AT&T's methodology creates a higher price to the Resellers (through a smaller bill credit) than the price paid by AT&T's retail customers, which is ***exactly*** the outcome that *Sanford* found unreasonable.[14] In effect, AT&T turns *Sanford* on its head, by trying to use the Court's reasoning to achieve the very result – a wholesale rate above retail – that offended the Court and caused it to reject AT&T's policy of refusing to provide the value of cash back promotions to resellers altogether.

1. AT&T's argument that the negative effects of its illegal action are diluted over time is a red herring and does not justify overcharges in the short term

Interestingly, while AT&T recognizes that its method can produce a wholesale rate which

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Note that *Sanford* was not primarily involved with setting what the avoided cost discount should be, but rather was deciding the concept of whether promotions ***in general*** should be made available to resellers. The court concluded that promotions should be available to resellers, because otherwise resale would be pointless, as the wholesale rate would be higher than the net retail rate. The example from *Sanford* that AT&T attempts to exploit is a hypothetical where the *Sanford* court attempts to show how an ILEC could use promotions to undermine the resale provisions of the FTA – a hypothetical where the "normal" rate is $20, then through a series of machinations is raised to $120 per month each month but offset by a $100 monthly retail discount. In other words, the "real" rate for the service in such a hypothetical is still $20 per month. Consistent with Mr. Gillan's testimony, in such an outlandish situation it would be correct to assume the "real" monthly rate to be $20 and base the avoided cost calculation off that number.

14 As explained by the Court, "Because its position would not account for the promotional rebate check, BellSouth's position would obviously impede competition. The competitive LEC would have to pay BellSouth a wholesale rate of $96 for the telephone service for which BellSouth's retail customers would pay only $20." *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 451 (4th Cir. 2007). Although AT&T's method as applied in the case at bar results in a slight less stark example of the wholesale rate being higher than the retail rate, it violates the same core principal from *Sanford* that the wholesale rate *must be* less than the retail rate or competition would be harmed.

is higher than the retail rate, AT&T never provides justification for this illogical result. Instead, AT&T attempts to argue that over a period of months, the retail price to end-users will eventually exceed the wholesale price to the Resellers.[15] AT&T's argument is irrelevant and a red herring: the promotions at issue are not paid out over a series of months, but in a single month in a lump sum; furthermore, the end user is not required to maintain service for more than 30 days, so there is no guarantee that the service will last more than 30 days. As long as these are the terms under which the promotional offer is made to AT&T's retail customers, it is improper in include additional conditions or assumptions – such as that the end user will remain on the platform for an extended period -- when deciding how to extend the offer to resellers. As it is with the retail customer, so should it be with the Resellers. The cash back promotion is provided a single time in a lump sum in a single month, and it is the pricing in *this* month that must be examined for compliance with the rules; there is no dispute between the parties concerning the pricing in all other months. With a single month affected – and only a single month's price at issue – it is immaterial what is happening in other months that are, by definition, unrelated to the promotion. To comply with the rules, resellers must be able to secure the service at the net retail rate less the costs avoided with providing the service.

Condensed to its essentials, AT&T's argument here is that during this one month in question it is appropriate for AT&T to not extend the Resellers the service at the effective retail rate less the avoided costs associated with the service (even though doing so will result in a situation where the wholesale price is greater than the effective retail rate) because if one averages the effect of the Resellers' overpayment to AT&T out over time, it will eventually be diluted to the point where the total amounts paid at resale would be less than the total amount paid at retail. While it is

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[15] AT&T's Post-Hearing Brief, p. 16.

mathematically true in that the impact of paying an unlawfully higher price for the service in one month compared to the total amount paid for the service over the life of the account is increasingly diluted the longer the customer stays, this argument does not justify AT&T's violation of the law in the first instance.[16]

Further, applying AT&T's method results in a lower calculation of avoided costs in the promotional month as compared to the avoided costs calculated for the same service in all other months. But the estimated avoided costs are the same whether or not a promotion is offered with or applied to an AT&T telecommunications service offering.

2. The precedent AT&T cites errs on the method to be used to calculate the wholesale price of promotions

This is one issue upon which AT&T agrees with the North Carolina Commission, because on this pricing issue the North Carolina Commission made a mistake that favors AT&T. Of course, the primary issue before the NCUC was whether AT&T was justified in denying the promotions such as cash back offerings to CLECs altogether (*i.e.*, whether AT&T was required to offer such promotions to CLECs at all) – not so much what the appropriate methodology should be for calculating the wholesale price when promotions are in play. As a consequence, the NCUC did not have the same level of focused argument and evidence on the issues that this Commission will have before it in the Consolidated Cases that are focusing specifically on the pricing issue.

In any event, an important factor in the NCUC decision was the mistaken concern that adopting dPi's method would result in resellers receiving "a greater benefit" than they would receive

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[16] AT&T's dilution argument is no different than pointing out that adding cold water to a pot of boiling water will reduce the temperature, ultimately to the point where the water is no longer boiling. But if the relevant question is "is the pot boiling?," the fact that sufficient cold water can be added to hide the fact is simply not material. There is no difference here, where the sole question is "what is the wholesale price for the month the cash back is paid?" The fact that the competitive harm can be diluted by adding additional months where the correct price is *not* at issue does not help answer the question at hand.

had AT&T merely reduced the service's rate. But of course, the point here is that AT&T ***does not*** reduce its monthly rate. A cash back promotion is a price gimmick – a one-time deal designed to win business from competitors – that does ***not*** change the standard monthly rate and thus does ***not*** indicate a change in avoided costs. More importantly, the NCUC decision does not address the problem created when the wholesale price is greater than the effective retail price. Consequently, the NCUCs recommendation in that proceeding is currently on appeal to the U.S. District Court for the Eastern District of North Carolina.

E. dPi's claims should not be dismissed by BellSouth's "error rate"

At the time dPi first submitted it claims for promotional credits, dPi used the detailed billing records created by AT&T to verify order eligibility and create the requests for credit adjustment. When submitting requests for credit, dPi provided information all the way down to the telephone number and order, so that AT&T could verify dPi's requests for credit. When dPi's requests for credit were first submitted, AT&T had detailed order information on its own systems that would have allowed it to verify each order's eligibility for the promotion credit.

When dPi's request for credit were first made, AT&T declined none of those requests on the basis that the orders did not meet the underlying eligibility criteria. Any requests for promotional credits that were declined were declined solely on the basis that AT&T was not required to resell the promotions in question.

Since the credit requests at issue in this docket were first submitted, AT&T has, in the ordinary course of its business, destroyed the records that are needed to verify whether dPi met the promotion qualifications with regard to many of the credits it seeks in this docket. dPi does not have copies of these records either, because they were never in dPi's possession.[17] Again, however,

[17] The ordering arrangement is analogous to conducting a transaction at an Automated Teller Machine – an ATM. The ATM's user has limited access to the bank's systems for limited purposes, and the receipt

had AT&T raised these "qualification" defenses when these disputes were first raised, dPi could have requested and compelled the production of the documents that would have disproved (or verified) AT&T's contentions.

Again, until the hearing in this matter, AT&T never denied any request for credit on the theory that the underlying orders were ineligible; AT&T's reason for not making these credits was that AT&T did not have to provide the promotions at all; ***AT&T never made the argument that the specific requests did not meet eligibility requirements*** until ***years*** after it destroyed the records that it claims it needs to verify the requests for credit. It would be unjust to deny dPi credits to which they are entitled because AT&T has destroyed its records which would allow them to verify the claims. The equitable doctrine of laches bars such assertions. Furthermore, for just such reasons, the North Carolina Utilities Commission's Recommended Order refused to permit AT&T to deny paying promotion credits on such grounds:

> While it is undoubtedly true that the testimony in this proceeding indicates that AT&T no longer has records that are needed to determine whether dPi met the qualifications of the underlying promotions....it is also true that AT&T did not attempt to validate these requests when they were submitted because "AT&T did not offer cash back promotions for resale" (Tr. p. 162) and AT&T discarded or deleted information necessary to validate these requests. With regard to the latter facts, the Commission notes that AT&T took those actions even though it knew that the Commission had not pre-approved the restrictions; that the restrictions on resale were presumptively unreasonable and discriminatory; and, that the statute of limitations had not expired on the claims covered by the records.
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> ***
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> In any case, the Commission does not believe that the percentage of valid dPi claims since July 2007 should be used as a proxy in this case....Claims shall not be denied because AT&T no longer has the records to validate such claims.[18]

printed at the end of the transaction (showing account, amount debited, and new balance) is a limited record that does not contain all of the information transferred between the ATM unit and the bank's central system. In a similar way, dPi creates orders directly on AT&T systems (using the equivalent of a password to access the systems) but is unable to make electronic copies of the actual orders submitted on AT&T's systems.

18 NC Recommended Order at 19-20, 22-23.

Declaring that one out of every four cashback promotional credit requests submitted by dPi for the period ending July 2007 are invalid without any proof whatsoever is contrary to justice and fair play. AT&T had sufficient information to verify each and every request at the time the request was made, and it denied ***none*** on the grounds that the order did not meet the underlying eligibility requirements. Had AT&T done so, dPi could have asked for records or other documentation at that time to verify AT&T's claims. However, now that AT&T has destroyed the direct evidence data that might prove or disprove its affirmative defense, AT&T should not be allowed to even argue the questionable circumstantial evidence from otherwise unrelated orders as a basis to have this Commission deny 1 in 4 of dPi's credit requests out of hand.

The circumstantial evidence that AT&T advances in support of its affirmative defense is the claim that AT&T has refused to honor a certain percentage of the promotion requests dPi has made *since* July 2007. However, these credit requests were only recently denied by AT&T, and they have been escalated or resubmitted by dPi, ***and remain in dispute***.

III. CONCLUSION

dPi was and is entitled to the cash back promotions from prior to that time. Restricting CLECs from taking cash back promotions was unreasonable and discriminatory, and because in any event AT&T did not seek approval prior to imposing the restrictions, in violation of FCC rules, in general it must be recognized that dPi was and is entitled to be credited for the cash back promotions. Moreover, becaues dPi's claims were timely submitted and AT&T did not challenge their eligibility at or near the time they were submitted, it would be improper to dismiss those claims in their entirety.

The precise amount, however, and the method of determining how to calculate the wholesale price when a promotion is play, should be left until this Commission has made its decision in the Consolidated dockets that are addressing this specific issue in depth.

In the event the tribunal proceeds in this docket with determining how to calculate the wholesale price when a promotion is play is addressed in the determination of this case, dPi's proposed method should be adopted because it recognizes both that wholesale should be less than retail and that the costs avoided in performing a service do not change simply because some customers are eligible to claim a special promotion award in a particular month. AT&T's proposed method should be rejected because it results in wholesale prices being higher than retail prices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this the March 11, 2011, served a true and correct copy of the foregoing to the following via U.S. First Class Mail and electronic mail:

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1744

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
dPi Teleconnect, LLC,	)	
Complainant	)	
	)	ORDER DENYING
v.	)	EXCEPTIONS AND
	)	AFFIRMING THE
BellSouth Telecommunications, Inc.,	)	RECOMMENDED
d/b/a AT&T North Carolina,	)	ORDER
Respondent	)	

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Monday, July 12, 2010, at 2:00 p.m.

BEFORE: Commissioner William T. Culpepper, III, Presiding, Chairman Edward S. Finley, Jr., Commissioner Lorinzo L. Joyner, Commissioner Bryan E. Beatty, Commissioner Susan W. Rabon, Commissioner ToNola D. Brown-Bland and Commissioner Lucy T. Allen

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BY THE COMMISSION: On April 11, 2008, dPi Teleconnect, LLC (dPi) filed a complaint against BellSouth Telecommunications, Inc. dba AT&T North Carolina (BellSouth or AT&T) seeking to recover cashback promotional credits allegedly owed pursuant to the parties' interconnection agreements(ICAs). An evidentiary hearing was held on November 12, 2009 before a Panel consisting of Commissioners Culpepper, Finley and Beatty. On May 7, 2010, the Panel, with Chairman Finley dissenting in part, issued a Recommended Order holding, in pertinent part, that:

1. After fully considering the arguments, the evidence, the transcript and the record proper, AT&T failed to prove that the restrictions that it placed on the resale of the cashback promotions were narrowly tailored, reasonable, and nondiscriminatory.
2. AT&T may restrict resale of promotions that are offered in excess of 90 days without securing pre-approval from this Commission to do so.
3. As required by its ICA agreement with AT&T, dPi has filed its claims in a timely manner.
4. dPi's claims are not barred by the doctrine of laches.
5. AT&T is allowed to calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion.

In a written dissent, Chairman Finley articulated reasons for his disagreement with the majority holding that AT&T failed to prove that the resale restrictions were narrowly tailored, reasonable, nondiscriminatory and, thus, not harmful to competition. Chairman Finley concurred with the remaining conclusions of the Panel.

On June 24, 2010, dPi and AT&T each filed exceptions to the Recommended Order. dPi excepted to the Commission's determination that AT&T may restrict resale of promotions that are offered in excess of 90 days without securing pre-approval from this Commission and that AT&T is allowed to calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion. AT&T excepted to the Commission's determinations: that AT&T had not shown that its refusal to allow resale of the cashback promotions in question was narrowly tailored, reasonable and nondiscriminatory; that dPi filed its claims in a timely manner as required by the parties' ICAs; and, finally, that dPi's claims are not barred by the doctrine of laches.

On July 12, 2010, the Full Commission heard arguments from dPi, AT&T and the Public Staff regarding the exceptions filed by dPi and AT&T. After fully considering the exceptions, the arguments of the parties, the evidence, the transcript and the record proper, the Commission specifically rejects the individual exceptions to the Recommended Order filed by dPi and AT&T and affirms the finding of facts, conclusions, and rationale of the Recommended Order. The following is offered as additional support for the Recommended Order conclusion that AT&T failed to prove that its resale restrictions were reasonable, nondiscriminatory and, thus, not harmful to competition.

I. Duration of Promotions

In this case, BellSouth offered three cashback promotions as inducements for customers to subscribe to BellSouth telecommunications service instead of choosing a competitor. The promotions offered one time financial inducements of $50 or $100 respectively. Two of the promotions were offered for 16 months and the third was offered for 48 months.[1] BellSouth refused to offer those promotions to competitors at the wholesale rate for resale. AT&T attempted to justify its refusal to allow its competitors to purchase those promotions for resale at wholesale rates by contending that its decision to do so was reasonable and nondiscriminatory.

Pursuant to 47 USC 251(c)(4), an incumbent local exchange company (ILEC) such as BellSouth has a duty to offer <u>any</u> telecommunications service that it offers to its retail customers to competing local providers (CLPs) at wholesale rates. In doing so, the ILEC may not prohibit or impose unreasonable or discriminatory limitations on the resale of such telecommunications service. 47 USC 251(c)(4)(B). The Federal Communication Commission (FCC) has concluded "that resale restrictions [imposed by an ILEC] are presumptively unreasonable." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶939 (1996)(*Local Competition Order*). Further, the FCC and this Commission have interpreted this legislation to require ILECs to offer any discount promotion that lasts for more than 90 days to CLPs for resale at the wholesale discount unless the ILEC proves to the state commission that the restricted resale of the promotion in question is reasonable and nondiscriminatory. 47 C.F.R. 51.613(b).

Discount promotions that last for more than 90 days are subject to this scrutiny because Congress and the FCC have devised a carefully constructed statutory and regulatory scheme to foster competitive alternatives to the ILECs. At its core, this scheme requires ILECs to sell telecommunications services to CLPs at wholesale rates, so that CLPs could then offer the services to consumers at retail on a competitive basis. 47 U.S.C. 251(c)(4). The wholesale rate calculation, which was determined by subtracting an ILEC's avoided costs from the ILEC's "retail rates charged to subscribers for the telecommunications service," is totally dependent upon the establishment of the retail rate. 47 U.S.C. 252(d)(3). Because the wholesale rate calculation is dependent on the retail rate determination, ILECs might undermine this carefully crafted scheme to foster competitive alternatives by manipulating the retail rate, by refusing to allow the resale of discount promotions, or by placing onerous restrictions on the resale of these promotions, particularly when the discount promotion being offered is offered on a long term basis.

[1] For purposes of this discussion, promotions offered for 91 days or more are characterized as long term promotions. Promotions offered for 90 days or less are characterized as short term promotions.

The FCC was particularly concerned that ILECs would use long-term discount promotions "to avoid the statutory resale obligation by shifting customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." *Local Competition Order* ¶948. Or, as the Commission stated: "[t]he FCC was concerned that ILEC promotions could become *de facto* standard offerings that would not be made available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates." *Restriction on Resale Order I*, p. 9. Later, in the same Order the Commission stated: "that the longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the real retail rate available in the marketplace." *Restriction on Resale Order I*, p. 11. Further, the Commission stated that:

> The promotion reduces the subscriber's cost for the service by the value received in the form of a giftcard or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the real "retail" rate. Thus, the ILEC could use the promotion as a *de facto* rate change without changing its tariff pricing. The FCC hoped to avoid this situation, where the promotional rate competes with the tariffed price for a long or indefinite period of time, by defining the point at which the promotional rate would become a retail rate to be discounted for resale as the 91st day the promotion is available to end-users purchasing a particular telecommunications service. In other words, the FCC decided that after 90 days, resellers are entitled to the promotional rate (the "real" retail rate) minus the wholesale discount.
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> *Restriction on Resale Order I*, p. 11.

It is evident from the above quoted passages that the FCC had three primary concerns. First, the FCC was concerned that ILECs would use long term discount promotions to undercut the retail rate. Second, the FCC was concerned that ILECs would use the long term availability of these discount promotions as a nonstandard offering thereby changing the retail rate without changing the tariff or standard pricing. Third, and finally, the FCC was concerned that ILECs could utilize the same discount promotions to avoid its statutory resale obligations. In the FCC's opinion, neither of these alternatives was desirable and indeed, neither of these alternatives is permitted. After carefully reviewing the evidence presented in this proceeding and the arguments presented, the Commission concludes that the FCC's concerns were well warranted.

In the present case, AT&T designed and implemented long term discount promotions which were intended to: (1) undercut the retail rate; (2) allow it to move customers to a nonstandard offering at a price lower than its regular retail or tariffed rate; and, (3) permit it to avoid its statutory obligation to resell telecommunications services to CLPs for the promotional price minus the wholesale discount.[2] As a direct result of the design and the implementation of these promotions, the tariffed price for

[2] "[W]hen a promotional price ceases to be short-term...[it] must be treated as the retail rate to be used in calculating the wholesale rate." Restriction on *Resale Order I*, p.11.

local service is meaningless. The promotional price, not the tariff price, is the *de facto* retail price to purchase local service. AT&T can and does provide service to customers that have left AT&T and are searching for a telecommunications service provider for a price that is lower than its tariffed price. And, AT&T has refused to sell local service to CLPs at the statutorily required price, i.e. the discount price minus the wholesale discount by contending that it does not have to offer the promotion for resale.

Thus, the promotions as designed and implemented provide AT&T with substantial competitive advantages when it competes for customers in the residential telecommunications services market. By contrast, CLPs are saddled with significant financial disadvantages. By the design and implementation of these long term promotions, AT&T has eviscerated the carefully crafted resale scheme which was created by the FCC to permit ILECs and CLPs to compete on a fairly equal basis for customers. [3] For these reasons, the Commission concludes that the resale restrictions imposed by AT&T are unreasonable and discriminatory.[4]

II. Residential Market Examination

At trial and during the subsequent oral argument, AT&T suggested that the Commission's inquiry to determine whether AT&T's restriction on resale of these cashback promotions is reasonable and nondiscriminatory should focus on dPi and the sub-residential market that it serves rather than pursue a more broadly based inquiry based upon the residential market as a whole. If the examination is limited in such a manner, the pertinent evidence quite clearly indicates that dPi primarily serves the credit challenged residential market while AT&T generally does not. dPi charges substantially more for service than AT&T. Because dPi focused primarily on the credit challenged market and charged substantially more for retail service, AT&T argued that its refusal to allow the resale of the promotions by dPi was reasonable and nondiscriminatory. Based on the evidence, the Panel Majority found this evidence and argument unpersuasive. We concur with this conclusion in this Order for the reasons given in the Recommended Order.

In doing so, the Commission notes that during the July 12, 2010, oral argument, the Public Staff argued for the first time that it was appropriate for the Commission to

[3] In its brief, dPi suggested that the AT&T's resale restrictions on these cashback promotions were predatory and resulted in a price squeeze. Typically, these terms are associated with an antitrust action and have a specific meaning in that context. During oral argument, dPi's counsel clarified that dPi was not contending that AT&T had violated the federal antitrust laws. Instead, dPi contended that AT&T's promotional pricing scheme violated the Telecommunications Act. Because the Act has much more ambitious goals than the antitrust statutes, we agree with dPi and decide this case under the Act rather than the antitrust statutes. See *Verizon v. Trinko*, 540 U.S. 398, 415, 124 S.Ct. 872 (2004).

[4] Although the harm inflicted by AT&T's refusal to sell the telecommunications service at the proper rate is diminished somewhat by AT&T's voluntary decision to offer only one-time incentives rather than monthly reductions of the bill as inducements to purchase, the use of one-time inducements does not completely mitigate the anticompetitive effects of the promotion particularly when the one-time nature of the inducement is balanced against the amount of the one-time award combined with the length of time the inducements are offered to potential customers.

consider the broader residential market rather than the smaller credit challenged segment of the residential market served by dPi and other prepay providers when determining whether the resale restrictions on these cashback promotions were reasonable and nondiscriminatory. In our view, the broader based inquiry is completely appropriate. That is, the Commission's inquiry, in the context of dPi's complaint, should focus on whether AT&T's refusal to allow any CLP serving the residential market to resell these cashback promotions is reasonable and nondiscriminatory and not just its refusal to provide the benefits of these promotions to dPi alone.

Prior to 2007, AT&T's policy stated that it would not offer the cashback promotions that are the subject of these proceedings to CLPs for resale. The policy applied across the board and was not limited to any particular segment of the residential market.[5] It applied to CLPs such as dPi that served the credit challenged market as well as CLPs that served or desired to serve the exact same clientele served by AT&T. Because AT&T's restrictions on resale apply to any CLP serving the residential market and is not confined to CLPs such as dPi that serve the credit challenged sub-market, the Commission's inquiry into the reasonableness of AT&T's restrictions on cashback promotions is not appropriately limited to the impact of the restriction on dPi alone merely because dPi is the Complainant.

Instead, the Commission's inquiry is broader and focuses on the reasonableness of AT&T's restrictions on the promotions as they apply to all CLPs in the residential market. Once a complaint was filed (whether by one or more resellers or whether by any other party with standing) it was incumbent upon AT&T to prove that its promotions, as they were designed and implemented in the residential market, were reasonable and nondiscriminatory. The promotions challenged by dPi were designed and implemented not to be offered to competing residential resellers and so the Commission's inquiry must focus on this broad restriction of the promotion—not on the narrow question of the promotion's effect on dPi alone. Of course, any examination of this sort must, however, be conducted in light of the pro-competition policies of the Telecommunications Act. *Local Competition Order,* ¶949.

When the resale restrictions are examined based upon this perspective, it is clear that AT&T gains short and long term competitive advantages in the residential market from its ability to restrict resale of a promotion that offers discount pricing to prospective purchasers of local service. The converse of that proposition is also clear. That is, AT&T's competitors in the residential market are greatly disadvantaged in the short <u>and</u> long term by AT&T's restrictions prohibiting the resale of this discount pricing promotion. While the FCC permits AT&T's competitors to be disadvantaged in the short term by discount pricing because it believes that, "if promotions are of limited duration, their pro-competitive effects will outweigh any potential anticompetitive effects," *Local Competition Order,* ¶949, the FCC does not permit AT&T's competitors to be disadvantaged over the long term unless AT&T proves to this Commission that its resale restrictions are reasonable and nondiscriminatory. In that situation, the FCC

[5] If AT&T's resale restrictions are limited to CLPs serving particular segments of the residential market, AT&T must prove that such limitations are not discriminatory.

presumes that the anticompetitive effects of restricting resale of long term promotions will outweigh the pro-competitive effects. For the reasons stated in Section I of this Order, the Commission finds that AT&T failed to overcome the presumption that these resale restrictions were unreasonable or to prove that that the pro-competitive attributes of these long term cashback promotions outweighs the anticompetitive effects. For these reasons and the reasons and rationale set forth in the Recommended Order, the Commission affirms the Recommended Order's conclusion that AT&T failed to prove that its resale restrictions were reasonable and nondiscriminatory.

IT IS, THEREFORE, ORDERED that the exceptions filed by dPI and AT&T respectively are denied and the Recommended Order is Affirmed.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of October, 2010.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Chairman Edward S. Finley, Jr., dissenting.

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DOCKET NO. P-55, SUB 1744

Chairman Edward S. Finley, Jr., dissenting in part:

For reasons stated in my May 7, 2010 dissent from the Recommended Order, as elaborated upon below, I dissent from that portion of the Order Denying Exceptions and Affirming Recommended Order that would provide complainant dPi any monetary relief in this docket.

The promotional offerings at issue in this complaint docket are one time checks AT&T delivers to its retail customers upon their subscription to residential rate schedule 1FR + 2 (at least one access line plus two features, such as call waiting or call forwarding). AT&T gives the subscribers the check upon sign up without a requirement of continued subscription to the underlying service thereafter. The subscriber need not use the check to purchase any service from AT&T. The obligation to provide the check is not set forth on any rate schedule or tariff. During the 2003-2007 period in question AT&T left the program, a part of which made the subscription check available, in place for many months.

In 2004 in generic Docket No. P-100, Sub 72, the Commission addressed and resolved the issue of whether it had authority in given situations to require AT&T and other ILECs to resell the subscription incentives to CLPs as part of the resale of telecommunications services required to be resold by TA-96. The Commission determined that it indeed possessed such authority because the promotion was an "item of value" that affected the price of the underlying service the subscriber received. The Commission classified this promotional facet of the offering as a "de facto" offering as contrasted from a "per se" or "de jure" offering because the offering was not a tariffed rate discount that appeared as an offset to the standard service offering on the tariff or on the customer's bill and was not used to purchase telecommunications services. Significantly, the Commission concluded that this distinction meant that the potential anticompetitive harm to the wholesale customers from the de facto offering was less than had the promotion been a de jure one.

Although the Commission concluded that the promotional facet of the offering was not de jure, the Commission nevertheless proceeded to look to the FCC orders and regulations, which the federal agency adopted exclusively for de jure offerings, to determine how the Commission should exercise its authority in a given case to determine whether to require or not require the ILEC to resell the promotion as part of the resale of the underlying standard offering.

I.
A.

In this complaint docket dPi seeks recovery in the form of monetary relief for an identified level of alleged overcharges during 2003-2007. In granting a portion of this monetary relief, the Commission determines that AT&T must resell the one-time check promotion to dPi primarily because it concludes, without expressly stating why, that the duration of the promotion exceeds ninety days as it (presumably) interprets the FCC's orders and rules. In so doing the Commission looks solely to the duration of the 1FR + 2 standard rate portion of the offering to the exclusion of the length of the one time delivery of the check. Under the Commission's ruling the Commission requires resale of the one-time de facto promotion even though if the promotion were a de jure one set forth in tariff and charged on the retail subscriber's bill, under the FCC's rules and orders, no resell requirement exists whatsoever. In stark contrast to its conclusion that these de facto promotions are of lesser potential anticompetitive harm to the wholesale reseller, the Commission has required resale when the FCC would have allowed the ILEC to restrict resale of a de jure promotional rate discount. In so doing the Commission has committed a significant error.

Moreover, the Commission relies heavily upon presumptions that the promotions at issue are anticompetitive through reference to FCC pronouncements addressing longer term recurring de jure promotions. Again, however, if the one-time checks were instead one-time rate discounts, or even three month rate discounts, under the FCC orders and rules, the ILEC either can restrict resale through reference to language classifying the rate discount as completely exempt from the resale obligation or through reference to other language stating that the restriction is presumptively permissible. The Commission has relied on the wrong presumptions and, in so doing, compounded its error.

B.

The pertinent FCC pronouncements occur in ¶¶ 949 and 950 of the August 1996 Local Competition Order and 47 C.F.R § 51.613(a) of the FCC's regulations issued at the same time. These pronouncements address the duration of promotions, which the FCC determined to be of paramount significance in determining whether a restriction on their resale was pro or anti competitive and consequently whether a restriction on resale was permissible or not. Generally speaking, the FCC determined that promotions of ninety days or less are procompetitive and may be restricted, while longer ones are anticompetitive and may not be restricted.

The FCC pronouncements address exclusively rates and rate discounts, or de jure as opposed to de facto offerings, so the pronouncements address separately "standard rate offerings", which in the case of 1FR + 2 Cash Back are the access line and two features, and in contrast "non standard rate offerings", which in this case would be the standard offering less the one-time check (if the check were a de jure rate discount). Non standard offerings encompass, among other offerings, "temporary" promotional offerings. The temporary offerings are further divided into "short term" temporary offerings and (by implication) long term temporary offerings. Short term temporary promotional rate offerings are more specifically defined as those lasting for ninety days or less.

In particular, in paragraph 949 of the Local Competition Order the FCC states "We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." The discussion continues in paragraph 950: "We believe promotions of up to 90 days, when subjected to the conditions outlined below, will have significantly lower anticompetitive potential, especially as compared to the potential procompetitive marketing uses of such promotions. We therefore establish a presumption that promotional prices offered for a period of ninety days or less need not be offered at a discount to resellers."

These FCC conclusions from the Local Competition Order are codified in FCC Rule § 51.613(a):

> (a) Notwithstanding § 51.605(b), the following types of restrictions on resale may be imposed:
>
> 2. Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate[6] for a retail service rather than the special promotional rate[7] only if:
>   (i) Such promotions involve rates that will be in effect for no more than 90 days, and
>   (ii) The incumbent LEC does not use such promotional offerings to avoid the wholesale rate obligation, for example, by making available a sequential series of 90-day promotional rates.

The Commission has misread and misinterpreted these FCC pronouncements. The FCC is unconcerned with how long promotional offerings such as 1FR + 2 Cash Back (if it had been a de jure offering) remain in place so that new retail customers can subscribe. Instead, the FCC is concerned with how long any particular subscriber must continue to receive service under the standard rate schedule while the promotional price discount to that subscriber remains available. It makes no difference to the FCC how many subscribers sign up for the rate offering and receive the promotional price discounts. Rather, the FCC is concerned with how long any one of the subscribers must remain on the schedule while it continues to receive the benefit from the promotion. The durational discussion is directed only to the "temporary short term rate" not to the underlying "standard rate offerings." The temporary rate must last for greater than ninety days (and become long-term temporary) before the restriction on resale comes into effect. The hypothetical rate schedules and rate offerings and illustrations of their impact on retail and wholesale customers' bills attached as an appendix illustrate these points.

[6] The "ordinary" rate in the rule is synonymous with the "standard" rate in the Local Competition Order.
[7] The "special promotional" rate in the rule is synonymous with the "short term temporary" rate in the Local Competition Order.

II.

A.

Because the one-time checks would have been short term promotions not subject to the resale requirement under § 51.613(a),[8] had they been de jure promotions at all, there was no need for the Commission to analyze the promotions under the "reasonable and nondiscriminatory" test of § 51.613(b):

> (b) With respect to any restrictions on resale not permitted under paragraph(a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and non discriminatory.

Nevertheless, because the Commission misreads the FCC pronouncements by assuming without addressing the distinction between the standard and temporary short term rate under the FCC's rules, its order addresses in its entirety only the reasonable and non discriminatory test and assumes that the burden rests on AT&T to rebut a presumption of unreasonableness and discriminatoriness. Even if this were the appropriate test, the order is still erroneous.

B.

The Commission lists six criteria against which it assesses AT&T's conduct in determining whether AT&T has met the reasonable and nondiscriminatory test. An appropriate assessment of these criteria reveals that five show that AT&T's actions are indeed reasonable and nondiscriminatory and the sixth is irrelevant.

The first criterion is the length of the promotion. As addressed at length above, the promotion is for less than ninety days and presumed reasonable. The second criterion is reseller interest. Only dPi complains. The Commission excuses the disinterest of all other resellers on the basis of pure speculation. The third criterion is lack of causal relationship between AT&T's resale of the promotions and the number of dPi customers. Accurate assessment of this criterion underscores that because AT&T and dPi do not compete, dPi is unaffected by AT&T's providing the promotion to AT&T retail customers and not to dPi so there is no anticompetitive effect.

The fourth factor addresses the extent to which AT&T and dPi compete. Here, the Commission's factual determinations that competition exists are completely at odds with the record evidence and, moreover, as discussed below, display a misunderstanding of the concept of competition. The fifth criterion is whether resale of the promotion to dPi would be discriminatory against all other resellers for whom resale has been restricted. The Commission dismisses the fact that no other reseller would receive money dPi gets by asserting that "there is no evidence that any other CLPs in

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[8] dPi presented its case on the assumption that the promotion exceeds ninety days. dPi made no effort to show that AT&T was attempting to avoid its wholesale obligation through the restriction of a short-term promotion by, for example, making available a sequential series of ninety-day promotional rates.

North Carolina are seeking such credits," a determination completely at odds with the Commission's excusing this lack of interest in addressing criterion two. The sixth criterion is that AT&T before its merger with BellSouth and after the merger voluntarily resold the promotions to resellers. This fact is irrelevant.

In its Order Denying Exceptions and Affirming Recommended Order, the Commission majority tacitly acknowledges the illogic of the earlier discussion of these six criteria and employs yet a different tact. Reduced to its essence the majority says the duration of the "promotion" exceeds ninety days and therefore it is ipso facto unreasonable and discriminatory. Assuming the promotional offering exceeds ninety days, under the FCC's Order and Rules, this is not the end of the inquiry into reasonableness and discriminatoriness, only the beginning. Under the Commission majority's logic, the only way an ILEC could show reasonableness and nondiscriminatoriness for a promotion exceeding ninety days would be to show that it lasted for less than ninety days. Obviously, such is not the test.

C.

Assuming the one time subscription incentives are promotions and discount prices in excess of ninety days under the FCC's order and rules, the issue is still whether AT&T's provision of the subscription incentives to its retail subscribers and not to dPi is procompetitive or anticompetitive. Crucial evidence in resolving this issue is that during the period in question, 2003-2007, AT&T did not possess market power, so even if the complainant were not dPi but a traditional post paid CLP, the outcome would be the same. Also, the undisputed testimony of record is that dPi serves a niche market of subscribers that are poor credit risks and are only served by prepaid wireline carriers, like dPi. They are a class of subscribers a postpaid carrier like AT&T is unwilling to serve.

dPi maintains that the subscription incentive programs at issue were in effect for greater than ninety days and that AT&T's restriction on their resale is therefore presumptively unreasonable and discriminatory under the FCC's Local Competition Order and FCC rules implemented thereunder, specifically 47 C.F.R. § 51.613(b). dPi maintains that AT&T has not overcome its presumptive burden by showing reasonableness and nondiscrimination. dPi maintains that AT&T's restrictions on the resale of the subscription incentives constitute predatory pricing and result in a price squeeze against dPi. These are the two anticompetitive practices dPi alleges constitute AT&T's unreasonable and discriminatory practices under the § 51.613(b) analysis.

AT&T's provision of the subscription incentives to its retail subscribers to entice them to sign up with AT&T rather than another carrier gives the subscribers a price break in a competitive market and is the essence of how competition is supposed to work. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S.Ct. 1884, 1892 (1990). Before AT&T's restriction on the resale of the subscription incentives to dPi or any reseller can be anticompetitive, the restriction must unfairly, unreasonably, or unlawfully harm dPi's competitive position. "But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the savings clause's mandate that nothing in the Act 'modify, impair, or supercede the applicability' of the antitrust laws." Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004).

Whether an ILEC's restriction on the resale of promotional offerings is reasonable and nondiscriminatory is measured by the FCC, this Commission in all of its orders on this issue, dPi's complaint and other reported disputes[9] with reference to its pro or anti competitive effect, not some broader metric. While CLPs are customers of the ILEC, they are only wholesale customers and at the same time therefore potential competitors in some retail market. AT&T has resold the standard telecommunications service less the wholesale discount without restriction. AT&T thus has complied with its resale obligations as established by the "more ambitious goals" of TA 96, and the Commission must assess the narrower reasonableness and discriminatoriness test for this particular restriction on more discrete pro or anti-competitive economic principles. dPi itself has identified the economic principles as predatory pricing and price squeeze.

Congress and the federal courts have established the point where a business rival's practices and motives cross the line from procompetitive ones beneficial to consumers to unlawfully anticompetitive ones destructive to competition and therefore proscribed by the antitrust laws. These rulings and pronouncements arise primarily within the context of the Sherman and similar acts. Nevertheless, the rulings and pronouncements address the underlying economic principles descriptive of competition in other contexts, including those at issue in interpreting the FCC's Local Competition Order and FCC rules like 47 C.F.R. § 51.613(b). A rival's conduct that is procompetitive when measured against the proscriptions of the Sherman Act does not become anticompetitive when measured against these FCC pronouncements.

Before any competitor alleging anticompetitive harm can prevail, the competitor must show that it competes with its rival in the same geographic and product market. "A relevant product market is composed of 'commodities reasonably interchangeable by consumers for the same purposes.'" United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 1007 (2004). The undisputed evidence is that dPi and AT&T do not compete in the same product market.

The consumers of dPi's products cannot reasonably interchange them with AT&T's products. AT&T refuses to sell to them. dPi's products have peculiar characteristics and uses in distinction from AT&T's. dPi serves customers distinct from

[9] In re Petition of Image Access, Inc. d/b/a/ NewPhone for Declatory Ruling Regarding Incumbant Local Exchange Carrier Promotions Available for Resale, Joint Comments of ABC Telecom, et al., FCC Docket No. 06-129 filed July 31, 2006 at 5-10; Budget Prepay Inc. et. al., v. AT&T Inc., f/k/a SBC Communications, Inc., et al. Case No. 3:09-cv-1494-p in the US Distric Court, Northern Distric of Texas, Dallas Division.

those of AT&T. The prices of the two carriers are distinct. dPi is a specialized vendor. dPi's customers are not sensitive to AT&T's price changes.

> A market "must include all products reasonably interchangeable by consumers for the same purposes" (citation omitted). Whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so . . . but also on the cost of substitution, which depends most sensitively on the price of the products. A broad market may also contain relevant submarkets which themselves "constitute product markets for antitrust purposes" (citation omitted). "The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors" (citation omitted).

Federal Trade Commission v. Whole Foods Market, Inc. 548 F.3d 1028, 1037-1038 (D.C. Cir. 2008).

The undisputed evidence that the two carriers serve different product markets overcomes any presumption established by the FCC. Also, AT&T does not possess market power. dPi asserts that AT&T engages in predatory pricing and is exerting a price squeeze.[10] The burden shifts to dPi to support these claims. dPi's claims of anticompetitive practices fail for any number of reasons. While dPi competes in the prepaid submarket of North Carolina wireline local exchange carriers, AT&T competes in a substantially broader product market served by numerous postpaid CLPs, wireless carriers, VoIP providers, cable providers and internet providers. This pervasive competition constrains AT&T's ability to adjust its retail prices. It is a matter of widespread industry knowledge that AT&T and other North Carolina ILECs have lost significant market share to these competitors over the years and specifically during the 2003 through 2007 timeframe.[11]

On July 9, 2002 in Docket No. P-55, Sub 1022, BellSouth's proceeding to obtain 271 authority to reenter the interLATA long distance business, the Commission found and concluded that BellSouth faced substantial competition in the local exchange

[10] At oral argument dPi back peddled from the claims in its written exceptions. "We are not making a technical legal case of predatory pricing here." However, unless the economic activity in which a rival engages meets some definition of anticompetitive conduct, its activity is lawful, procompetitive and permissible. There is no such thing as a non-technical case of predatory pricing.

[11] dPi's assertions as to appropriate product markets are inconsistent and contradictory. In contrast to record evidence to the contrary dPi asserts that it competes with AT&T in the entire North Carolina wireline local exchange market irrespective of its very high inelastic prices and prepayment requirements. On the other hand, it alleges that AT&T does not compete with wireless, VoIP, internet or cable providers due to price differences and in disregard of this Commission's, the FCC's and the North Carolina General Assembly's determinations to the contrary.

market. July 9, 2002 Order at 252-257. Such competition has only increased thereafter. The 2009 North Carolina General Assembly determined that this local exchange competition had become so pervasive that nearly all of this Commission's regulatory oversight over local exchange carriers could be withdrawn. Consumer Choice and Investment Act of 2009, 2009 N.C. Sess. Law Ch. 238. The inescapable conclusion to be drawn from this is that during 2003-2007 and thereafter AT&T lacked market power in the North Carolina local exchange market so as to enable it to exert sufficient economic control as to effectuate any of the anticompetitive practices alleged by dPi or any other such practices that dPi or another CLP might list.

The Telecommunications Act of 1996 did not create any new claims for relief based on anticompetitive conduct that did not already exist. The elements of assertions of predatory pricing and price squeeze are well established. dPi fails in supporting these elements in a number of ways.

With respect to predatory pricing, a complainant alleging injury from a rival's low prices must prove that the prices complained of are below an appropriate measure of the rival's costs. Brooke Group Ltd. v. Brown Williamson Tobacco Corporation, 509 U.S. 209, 223 (1993). Secondly, the claimant must prove that the competitor had a dangerous probability of recouping its investment in below cost pricing. Id. at 226; Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 590-591 (1986). The predatory scheme must cause a rise in prices above the competitive level that would be sufficient to compensate the amounts expended in the predation. Id.

No evidence exists that during 2003–2007 while AT&T was providing subscription incentives to its retail subscribers while withholding them from dPi, AT&T was serving its retail subscribers below AT&T's costs. dPi concedes this. July 12, 2010 transcript, p. 66. dPi claims that AT&T charges low prices only in the first month. Id. at 18, 64. AT&T stresses that it provides the one time subscription incentive with the objective of retaining the customer and profiting from its continued business. Id. at 39, 40.

Likewise, there is no evidence that, thereafter, AT&T raised its prices to its retail customers above competitive levels to recoup any previous losses. Without market power in the local exchange market, AT&T had no ability to do so. "In order to recoup their losses, [predators] must obtain enough market power to set higher competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices." Matsushita, 475 U.S. at 590-591.

As with predatory pricing, the courts have identified the elements of an actionable claim for the harmful anticompetitive practice whereby one competitor exercises a price squeeze against another. "A firm with market power in the upstream market can squeeze its downstream competitor by raising its wholesale price of inputs while cutting its own retail prices. This raises the competitor's costs (because they will have to pay more for the inputs) and lower their revenues (because they have to match a dominant firm's low retail price)." Pacific Bell Telephone Co. v. Linkline Communications, Inc., 124 S. Ct. 1109, 1118 (2009).

dPi claims that AT&T left its wholesale price at the level existing before providing the subscription incentives to AT&T's retail subscribers and lowered its retail price one time each for some of AT&T's retail subscribers. For AT&T to be subject to a dPi claim for a price squeeze because AT&T raised its wholesale price to dPi, AT&T must have a duty to deal with dPi on terms established by the federal courts. However, the U.S. Supreme Court has determined that in the business relationship that exists between dPi and AT&T whereby AT&T's provision of service to dPi arises from statutory and regulatory requirements, AT&T has no duty to deal with dPi as that requirement exists for purposes of fulfilling this element of an actionable anticompetitive claim. Pacific Bell Telephone Company v. Linkline Communications, Inc., 124 S. Ct. 1109 (2009); Verizon Communications, Inc. v. Trinko, 540 U.S. 398 (2004). AT&T's initial provision of service to dPi was not voluntary. Accordingly, AT&T's failure to lower its wholesale prices to CLPs like dPi cannot qualify as conduct violative of the first element of a price squeeze prohibition.

Additionally, dPi is not required to and does not lower its prices to dPi's retail customers to match AT&T's retail price reductions. AT&T and dPi serve different retail markets where dPi's subscribers cannot qualify for AT&T's retail services with or without the subscription discount.

dPi's claim is that it is damaged from AT&T's alleged anticompetitive conduct through loss of net revenues or profits because AT&T has not reduced dPi's inputs to dPi's business of providing local exchange service, not from conduct causing dPi to lower its prices to its customers. The harm dPi claims is that arising from lawful competition not from actionable anticompetitive harm. The U.S. Supreme Court's admonition in Linkline is instructive: "For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market." Linkline, 129 S. Ct. at 1123.

III.

A.

The issue has arisen of whether the Commission in Docket No. P-100, Sub 72 ruled that the subscription incentive portion of the 1FR + 2 Cash Back offering was in fact a promotion addressed by the Local Competition Order and the FCC rules and whether the Fourth Circuit's affirmance of the Commission's orders in Sanford[12] makes such Commission rulings binding on the Commission in this docket. The short answer is that whether the Commission ruled the offerings promotions and the Fourth Circuit affirmed this specific determination makes no difference. If the offerings are promotions under the Local Competition Order and FCC rules, as discussed in detail above, they are for less than ninety days and AT&T is free to restrict their resale to CLPs. If they

[12] BellSouth Telecommunications Inc. v. Sanford, 494 F.3d 439 (2007).

are not promotions as so defined, they are of even less potential anticompetitive harm to resellers, and the case for AT&T's ability to restrict their resale becomes even stronger.

B.

The longer answer is that the Fourth Circuit's holding in Sanford is limited to affirmance of the Commission's authority to require resale of promotions as items of value affecting the price of the telecommunications services. It is correct that at one point in P-100, Sub 72 the Commission concludes that the offerings are promotions under the Local Competition Order and FCC rules. Docket No. P-100, Sub 72b, Order of December 22, 2004, p. 9. In addition, however, the Commission clearly concludes that the offerings are only de facto offerings and not de jure ones. The promotions cannot be covered by the FCC's pronouncements and not covered at the same time. To the extent the majority in Sanford would have affirmed the Commission in its entirety it would have affirmed both conclusions, inconsistent though they be.

In my view the Commission significantly misread and misinterpreted the FCC's pronouncements in Docket No. P-100, Sub 72 on the topic of promotional offerings, and the Fourth Circuit did not condone this error.[13] The FCC's pronouncements issued in 1996 are limited exclusively to tariffed rates or de jure offerings. This conclusion arises from careful reading of the Local Competition Order and becomes even clearer upon review of FCC rule 51.613. The term "rate" is used six times. The Commission was 180 degrees off line when it concluded that when the FCC addressed promotional offerings in its pronouncements, the FCC was addressing de facto offerings.

The FCC contrasted standard offerings from several categories of nonstandard offerings such as temporary offerings and customer specific offerings. Nowhere does

[13] The Local Competition Order and 47 C.F.R. § 51.613 address exclusively tariffed rates. The Commission in Docket No. P-100, Sub 72 misinterpreted the FCC pronouncements, mischaracterizing "nonstandard" for "de facto". "The Commission interprets ¶ 948 of the FCC's Local Competition Order to mean that an ILEC's duty to resell telecommunications services it offers at retail does not exclude promotional offerings ... The FCC was concerned that ILEC promotions could be de facto offerings that would not be available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates." P-100, Sub 72b, Order of December 22, 2004, p. 9. The Fourth Circuit majority sidestepped this erroneous Commission conclusion: "[T]he NC Commission did not decide how to treat any particular incentive or promotion. Rather it established guidelines similar to those given by the FCC in the Local Competition Order." Sanford at 453.

Chief Judge Williams in her concurrence called the majority on this point: "I respectfully disagree with the portion of the majority opinion suggesting that the NCUC did not resolve whether the special offers at issue in this case are 'promotions' within the meaning of 47 C.F.R. § 51.613(a)(2)(2006) but rather independently 'established guidelines similar to those given by the FCC in its Local Competition Order.'" Id. at 454. She addressed the issue directly: "I agree with the district court that the FCC's Local Competition Order limits the scope of the term 'promotions' and therefore forecloses the interpretation adopted by the NCUC." Id. at 455-56. The concurrence directly addresses the Commission's conclusion and rejects it. The majority avoids addressing the conclusion. The Sanford case does not affirm the Commission's conclusion that the FCC treats promotions like 1FR + 2 Cash Back as promotions subject to resale.

the FCC refer to de facto offerings, nor does it contrast standard offerings with any off tariff offering. De facto offerings did not exist in 1996, and the FCC did not address them.

The Commission's logic in Docket No. P-100, Sub 72 is contradictory and circular. On the one hand the Commission concludes that the promotions are not part of the standard or de jure telecommunications services over which it has jurisdiction but only a de facto item of value giving the Commission indirect jurisdiction or jurisdiction by implication. On the other hand, the Commission concludes that the FCC's pronouncements directly address the promotions and provide binding authority over whether the ILEC can restrict their resale. These determinations are completely inconsistent. If the FCC's pronouncements constitute binding authority, this is all the authority the Commission needs, and discussion of de facto telecommunications services is surplusage and unnecessary.

The correct analysis is that the FCC was not addressing de facto, off tariff offerings like the promotions at issue, and the Commission was required to establish its jurisdiction over the offerings by its discussion of the indirect effect of the offerings on the price of the telecommunications services.

Then the issue arises as to whether the Fourth Circuit majority's affirmance of the Commission's determinations affirmed as a matter of law or as the law of the case that the FCC's pronouncements address de facto promotional offerings because the Commission arrived at this conclusion in the orders affirmed. I conclude that the Fourth Circuit majority affirmed no such erroneous conclusion. The Commission's orders contain illogical and inconsistent determinations. The federal district court found both conclusions erroneous as a matter of law. The district court found that the promotional offerings did not constitute telecommunications services.[14] Likewise, the district court found that the FCC's pronouncements did not address the de facto promotional offerings at issue before the Commission.

The Fourth Circuit majority listed both of the district court's holdings but proceeded to address only the first. Sanford at 444. The majority in Sanford never directly addresses the issue of whether the offerings are promotions as addressed by the FCC. Sanford at 449-454, §§ IV – V. Its discussion supports its conclusion that the offerings are "items of value" and part of the price paid for the underlying telecommunications services. Id. In the majority's view it is unclear what the FCC specifically intended in its pronouncements. Id. at 452. The majority classifies the Commission' guidance in P-100, Sub 72 to be only within "the parameters of" or "in harmony with" the FCC's objectives. Id. The majority states that the Commission's guidance is only "similar to" the FCC's pronouncements. Sanford at 453.

In my view, what the majority had in mind here was the fact that having classified the offerings only de facto, the Commission could not at the same time conclude that in every other respect the Commission was attempting to follow the FCC's guidance to the

[14] BellSouth Telecommunications Inc. v. Sanford, 2006 WL 1367379 (W.D.N.C.).

letter. Another possibility is that the majority was acknowledging that the Commission in P-100, Sub 72 gave guidance as to factors it would consider in addition to those listed by the FCC in assessing whether ILEC restriction on resale of promotions was reasonable and non-discriminatory under 47 C.F.R. § 51.613(b). It is erroneous to conclude that the Fourth Circuit majority was affirming Commission conclusions that the subscription incentives were promotions as defined by the FCC. Resolution of this issue was unnecessary to affirm the Commission's determination that it possessed the authority to require resale. The Commission's order under review was a generic, rulemaking or legislative one without any specific wholesale customer dispute at issue.

Careful reading of Chief Judge William's decision concurring in part helps to clarify what the majority intended. Judge Williams is of the unequivocal opinion that the offerings are not promotions as defined by the FCC and explains her reasoning in detail. Sanford at 455-457. Nevertheless, she describes the majority's discussion of this issue to the extent inconsistent with hers to be no more than a "suggestion" (Sanford at 454), which of course, is several degrees inferior to and less binding than a holding. Judge Williams has only a majority suggestion from which to disagree, not a holding from which to dissent. All this to support the conclusion that the Fourth Circuit majority did not by its ruling intend to establish as precedent that the 1FR + 2 Cash Back offerings are promotions addressed by the FCC.

Up until this point in this long running dispute, the issue of whether the subscription incentive portion of 1FR + 2 Cash Back offering is a de jure promotional offering lasting for longer than ninety days has only been directly addressed by Judge Mullen of the District Court, Judge Williams of the Circuit Court and by my dissenting opinions. Each of those opinions concludes that the subscription incentive aspect of the offering is not a promotion as defined by the FCC and/or is available to subscribers for less than ninety days. In this case the Commission no longer is in the generic, legislative realm where it provides guidance as to how it will resolve discrete disputes in future adjudicatory dockets. In this docket the Commission has a concrete controversy between two litigants, and the outcome of their dispute over compensation depends in large measure on how to classify the subscription incentive and whether it lasts for ninety days or less or not. In my view the majority has failed to fulfill its responsibility by failing fully to address this issue. It would seem that if there were merit in an opinion that the promotions exceed ninety days, those in support of that view could undertake to address these conclusions head on instead of assuming without addressing the issue or arguing that the issue has been decided by implication or by default. The repeated need to describe the subscription incentives as "one time incentives for more than ninety days" or "when the one-time nature of the inducement is balanced against ... the length of time the inducements are offered to potential customers" to stretch a one-time payment into a recurring benefit exceeding ninety days is a telling indication that something is amiss.

\s\ Edward S. Finley, Jr.
Chairman Edward S. Finley, Jr.

Illustrative Rate Schedules

Scenario 1

AT&T rate schedule – 1FR + 2 Features Rate Discount (3 month price discount)

Requirements:
Subscriber must sign up for one residential access line and two features such as voice mail, call waiting or call forwarding.

Rate:
$50 per month flat rate.

Rate discount:
$30 per month for months 1-3 of service under this rate schedule.

Term of rate schedule:
AT&T commits to maintain schedule's availability for 3 years.

Availability:
Any subscriber who establishes credit worthiness.

Question:
Can AT&T restrict resale of the rate discount to dPi (or any reseller) and refuse to pay dPi any portion of the $90 ($30/month x 3 months) for dPi customers who sign up for a dPi rate schedule with comparable requirements?

Answer:
Yes. Pursuant to FCC rule 51.613(a)(2) the duration of the rate discount is for ninety days or less (short term promotions). "We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." ¶949 FCC's Local Competition Order.

Length of the term of the rate schedule (i.e., 3 years) immaterial in determining whether resale of rate discount can be restricted. Length of time customer receives the special promotional rate (i.e., 3 months or 90 days) is the determinative factor.

Scenario 2

AT&T rate schedule – 1FR + 2 Features Rate Discount (4 month price discount)

Requirements:

Subscriber must sign up for one residential access line and two features such as voice mail, call waiting or call forwarding.

Rate:

$50 per month flat rate.

Rate discount:

$30 per month for months 1-4 of service under this rate schedule.

Term of rate schedule:

AT&T commits to maintain schedule's availability for 3 years.

Availability:

Any subscriber who establishes credit worthiness.

Question:

Can AT&T restrict resale of the rate discount to dPi (or any reseller) and refuse to pay dPi up to $120 ($30/month x 4 months) for dPi customers who sign up for a dPi rate schedule with comparable requirements?

Answer:

No. Pursuant to FCC rule 51.613(a)(2), because the duration of the rate discount is for more than ninety days, AT&T cannot restrict resale unless AT&T demonstrates that the restriction is reasonable and nondiscriminatory pursuant to 51.613(b).

Length of the term of the rate schedule (i.e., 3 years) immaterial in determining whether resale of rate discount can be restricted. Length of time customer receives the special promotional rate (i.e., for 4 months or 120 days) is the determinative factor.

Scenario 3

AT&T rate schedule – 1FR + 2 Cash Back

Requirements:

Subscriber must sign up for one residential access line and two features such as voice mail, call waiting or call forwarding.

Rate:

$50 per month flat rate.

De Facto subscription incentive:

$30 check upon subscription.

Term of rate schedule:

AT&T commits to maintain schedule's availability for 3 years.

Availability:

Any subscriber who establishes credit worthiness.

Question:

Can AT&T restrict resale of the $30 check (or the value thereof) to dPi (or any reseller) and refuse to pay dPi any portion of the $30 for dPi customers who sign up for a dPi rate schedule with comparable requirements?

Answer:

Yes. Pursuant to the NCUC's reliance upon FCC rule 51.613(a)(2) the duration of the subscription incentive is for ninety days or less. "We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation." ¶949 FCC's Local Competition Order.

Length of the term of the rate schedule (i.e., 3 years) immaterial in determining whether resale of rate discount can be restricted. Length of time the customer receives the special promotional "item of economic value" (i.e., 3 months or 90 days) is the determinative factor.

Scenario 1
(3 month discount that is not available for resale)

	Month 1	Month 2	Month 3	Month 4	Month 5	...	Month 36
Standard retail rate	$50	$50	$50	$50	$50		$50
Rate discount	$30	$30	$30	-	-		-
Temporary (nonstandard) short term rate – to ATT retail customer	$20	$20	$20	-	-		-
Wholesale discount factor 80% x $50	$40	$40	$40	$40	$40		$40
Rate to wholesale customer	$40	$40	$40	$40	$40		$40

Scenario 2
(4 month discount that is available for resale)

	Month 1	Month 2	Month 3	Month 4	Month 5	...	Month 36
Standard retail rate	$50	$50	$50	$50	$50		$50
Rate discount	$30	$30	$30	$30	-		-
Temporary (nonstandard) long term rate – to ATT retail customer	$20	$20	$20	$20	-		-
Wholesale discount factor 80% x $20	$16	$16	$16	$16	$40		$40
Rate to wholesale customer	$16	$16	$16	$16	$40		$40

Scenario 3
(One-time Cash Back)

	Month 1	Month 2	Month 3	Month 4	Month 5	... Month 36
Standard retail rate	$50	$50	$50	$50	$50	$50
One-time check	$30	-	-	-	-	-
Temporary (nonstandard) short / long term rate – to AT&T retail customer	-	-	-	-	-	-
Net rate to AT&T retail customer	$20	$50	$50	$50	$50	$50
Appropriate wholesale rate paid to AT&T by reseller or net price for reseller	$40	$40	$40	$40	$40	$40
not						
Wholesale rate paid to AT&T by reseller or net price for reseller as argued by dPi	$16	$40	$40	$40	$40	$40

One-time checks are not per se or de jure offerings because not a reduction to the tariffed rate. (NCUC Order P-100, Sub 72). Only an item of "economic value." Have lesser degree of anti-competitive effect.

Section 51.613(a)(2) & Local Competition Order do not broadly encompass "anything of economic value, but instead contemplate only "temporary price discounts" giving rise to special promotional rates." Sanford Concurrence, p. 456.

NORTH CAROLINA UTILITIES COMMISSION

NOTICE TO PARTIES

Docket No. P-55, Sub 1744 Exceptions Due on or Before May 24, 2010

Parties to the above proceeding may file exceptions to the report and Recommended Order hereto attached on or before the day above shown as provided in G.S. 62-78. Exceptions, if any, must be filed (original and thirty (30) copies) with the North Carolina Utilities Commission, Raleigh, North Carolina, and a copy thereof mailed or delivered to each party of record, or to the attorney for such party, as shown by appearances noted. Each exception must be numbered and clearly and specifically stated in one paragraph without argument. The grounds for each exception must be stated in one or more paragraphs, immediately following the statement of the exception, and may include any argument, explanation, or citations the party filing same desires to make. In the event exceptions are filed, as herein provided, a time will be fixed for oral argument before the Commission upon the exceptions so filed, and due notice given to all parties of the time so fixed; provided, oral argument will be deemed waived unless written request is made therefore at the time exceptions are filed. If exceptions are not filed, as herein provided, the attached report and recommended decision will become effective and final on May 25, 2010 unless the Commission, upon its own initiative, with notice to parties of record modifies or changes said Order or decision or postpones the effective date thereof.

The report and Recommended Order attached shall be construed as tentative only until the same becomes final in the manner hereinabove set out.

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1744

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of dPi Teleconnect, LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina, Respondent	))))))))	RECOMMENDED ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Thursday, November 12, 2009, at 10:00 a.m.

BEFORE: Commissioner William T. Culpepper, III, Presiding, Chairman Edward S. Finley, Jr., and Commissioner Bryan E. Beatty

APPEARANCES:

For dPi Teleconnect, LLC:

Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh, North Carolina 27602-1351

Christopher Malish, Foster, Malish & Blair, PLLC, 1403 West Sixth Street, Austin, Texas 78703

For BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina:

Edward L. Rankin, III, Post Office Box 30188, Charlotte, North Carolina 28230

Patrick W. Turner, 1600 Williams Street, Suite 5200, Columbia, South Carolina 29201

For the Using and Consuming Public:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On April 11, 2008, dPi Teleconnect, LLC (dPi or Complainant) filed a complaint against BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina (AT&T or Respondent)[1] seeking to recover cashback promotional credits allegedly owed pursuant to the parties' interconnection agreements. On May 2, 2008, Respondent filed its answer in which it denies that Complainant is entitled to the promotional credits sought in the complaint. On May 23, 2008, Complainant filed a response indicating that Respondent's answer is not satisfactory and requesting an evidentiary hearing.

On September 10, 2008, the Commission issued an Order Scheduling Docket for Hearing and Prefiling of Testimony. Pursuant to this Order, this docket was originally scheduled for hearing on December 9, 2008.

On November 5, 2008, Respondent prefiled the direct testimony and exhibits of Nicole Bracy, Kristy Seagle, and P.L. (Scot) Ferguson. On this same date Complainant prefiled the direct testimony and exhibits of Brian Bolinger.

On November 12, 2008, Respondent filed its Motion to Compel and Motion to Suspend Procedural Schedule. On November 19, 2008, Complainant filed its Response to Respondent's Motion to Compel and the rebuttal testimony of Brian Bolinger. On November 20, 2008, Respondent filed the rebuttal testimony of Nicole Bracy and P.L. (Scot) Ferguson.

On November 21, 2008, the Commission issued its Order Canceling Hearing, Suspending Procedural Schedule, and Ruling on Data Requests. Pursuant to this Order, the procedural schedule that had previously been set in this docket was suspended pending further Order and Complainant was directed to answer certain discovery requests previously made upon it by Respondent.

On August 27, 2009, the Commission issued its Order Scheduling Hearing. By separate Order issued October 28, 2009, the starting time for the hearing was changed to 10:00 a.m.

On November 6, 2009, Respondent filed a Motion to Compel requesting the Commission to enter an Order compelling Complainant to respond to certain

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[1] The Commission takes judicial notice that the merger of AT&T Inc. and BellSouth Corporation became effective on December 29, 2006. Generally, within this Order, AT&T Inc. will be designated as "pre-merger AT&T," BellSouth Corporation and BellSouth Telecommunications, Inc. prior to the merger will be designated as "BellSouth", and the post-merger entity BellSouth Telecommunications, Inc. d/b/a/ AT&T North Carolina will be designated as "AT&T".

interrogatories. On November 12, 2009, Complainant filed a Response to this Motion to Compel.

An evidentiary hearing was held on November 12, 2009 in Raleigh. Tom O'Roark adopted the prefiled direct and rebuttal testimony and exhibits of Brian Bolinger. For AT&T, Kristy Seagle presented direct testimony and exhibits, and Nicole Bracy and P.L. (Scot) Ferguson presented direct and rebuttal testimony and exhibits.

On December 7, 2009, AT&T filed a Reply to Complainant's Response to the Motion to Compel. On December 15, 2009, the Commission entered an Order Requiring Answers to Interrogatories.

On January 5, 2010, the Commission issued an Order Requesting Proposed Orders. On February 3, 2010, the Public Staff requested an extension of the deadline for proposed orders, and the Commission granted such request on the same date.

On February 19, 2010, dPi, AT&T and the Public Staff, respectively, filed Proposed Orders and/or Post-hearing Briefs.

On March 15, 2010, dPi filed a Motion for Leave to File Reply Comments. In its Motion, dPi requested that the Commission allow dPi to comment further on issues that were raised but not fully addressed during the hearing, i.e., the billing dispute limitation period, the application of the wholesale discount to promotional amounts and verification of amounts in dispute. On April 1, 2010, AT&T responded to dPi's Motion by filing its Reply in Opposition to dPi's Motion. By Order dated April 9, 2010, the Commission granted dPi's Motion to File Reply Comments.

On March 23, 2010, Affordable Phone Services, Inc., and LBC Management, LLC d/b/a Angles Communications Solution (Amici) filed a Motion for Leave to File Amicus Curiae Brief. On April 1, 2010, AT&T responded to the Amici's Motion by filing its Reply in Opposition. The Commission Denied Amici's Motion on April 9, 2010.

Based on the foregoing, the evidence presented at the hearing, and the entire record in this matter, the Commission now makes the following

FINDINGS OF FACT

1. AT&T is duly certified as an incumbent local exchange carrier (ILEC) providing retail and wholesale telecommunications service in its North Carolina service area. Pursuant to federal law, AT&T has a duty to offer any telecommunications service that it offers to its retail customers to competing local providers (CLPs) at wholesale rates. 47 USC 251(c)(4). Pursuant to this obligation, AT&T permits CLPs to resell discount promotional plans that AT&T offers to its retail customers.

2. dPi is duly certified as a CLP and purchases telephone service from AT&T for resale to its end user customers in North Carolina on a prepaid basis.

3. During the period from late-2003 through July 2007, BellSouth and then post-merger, AT&T, offered three cashback promotions under which an end user who subscribed to a particular service or bundle of services for a particular term would apply to the ILEC for a coupon which could be redeemed for cash.

4. BellSouth did not make these cashback promotions available to CLPs for resale through mid-June of 2007. Pre-merger AT&T allowed CLPs to resell such cashback promotions. In July 2007, AT&T standardized the conflicting practices of BellSouth and pre-merger AT&T and adopted pre-merger AT&T's policy of allowing CLPs to resell cashback promotions.

5. During the period at issue in the complaint, two interconnection agreements between the parties were in effect, the first effective April 19, 2003 (ICA1), and the second effective May 12, 2007 (ICA2).

6. Section 2.1 of Attachment 7 to ICA1 required each party to notify the other party in writing upon the discovery of a billing dispute. dPi was required to report all billing disputes to BellSouth using a specified form provided by BellSouth. If a billing dispute arose, the parties agreed to try to resolve such dispute in 60 days, after which they could pursue dispute resolution under other provisions of ICA1.

7. Section 2.2 of Attachment 7 to ICA1 defined a "billing dispute" as a reported dispute of a specific amount of money actually billed by either party. The dispute was required to be clearly explained by the disputing party and supported by written documentation.

8. Although ICA1 does not specify a time in which a party must discover and notify the other of a billing dispute, Section 18 of its Terms and Conditions specifies that the Agreement will be governed by federal and state substantive telecommunications law, but in all other respects the "Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles."

9. In Georgia, the limitations period for a breach of contract is six years. O.C.G.A. 9-3-24.

10. In August 2004, AT&T witness Seagle, then a BellSouth employee, met with a representative for Lost Key Telecom, Inc. (Lost Key), which acted in an agency capacity for dPi. Witness Seagle informed the Lost Key representative that BellSouth did not make available for resale cashback promotional offers.

11. On July 21, 2005, dPi submitted a request for promotional credits for a cashback promotion. On August 2, 2005, witness Seagle informed the dPi representative that the cashback promotion was not available for resale.

12. dPi first disputed AT&T's denial of the requested credits in January 2007.

13. The table attached as Appendix A sets out the various claims at issue in this complaint and the pertinent dates and periods relating to such claims. [2]

14. ICA2 became effective on May 12, 2007.

15. Section 30.1 of the General Terms and Conditions (GTC) of ICA2 indicates that ICA2 supersedes ICA1 and that any orders placed under ICA1 will be governed by the terms of ICA2. In ICA2, dPi acknowledges and agrees that all amounts and obligations owed for services provisioned or orders placed under ICA1 shall, as of May 12, 2007, be due and owing under ICA2 and be governed by ICA2's terms and conditions as if such services or orders were provisioned or placed under ICA2.

16. Pursuant to Section 2.1 of Attachment 7 of ICA2, after a denial of a billing dispute or the passage of 60 days after submission of a billing dispute to AT&T, dPi is required to pursue a specific escalation process or the billing dispute is considered denied and closed. Only after completion of the escalation process is dPi permitted to invoke the dispute resolution process provided under the General Terms and Conditions.

17. Section 2.1 of Attachment 7 of ICA2 also provides that dPi agrees not to submit billing disputes for amounts billed more than twelve months prior to submission of a billing dispute filed for amounts billed.

18. BellSouth and post-merger AT&T were aware that dPi disputed AT&T's denial of its claim for promotional credits within 60 days of the effective date of ICA2.

19. On May 12, 2007, the effective date of ICA2, AT&T's official position was that the cashback promotion was not available for resale. Consistent with this policy, AT&T denied dPi's cashback requests associated with service orders submitted from September 2003 to June 2007.

20. AT&T changed its position and made the cashback promotion available for resale prospectively in July 2007.

21. All claims were pending and subject to dispute on the date that ICA2 became effective and on the date when the Complaint in this proceeding was filed.

22. All claims were disputed within the 12 month limitation period established in ICA2.

[2] For identification purposes, the Commission will refer to a particular Claim No. by the row on which it appears as set out in Appendix A. Thus, Claim No. C2-NC-704-20031108 will be referred to in this Order as Claim 1.

23. dPi has reasonably complied with the terms of Sections 2.1 and 2.2 of Attachment 7 of ICA2 in regard to each claim, and AT&T's contention that these sections of ICA2 bar these claims is without justification.

24. AT&T has not shown that its and BellSouth's refusal to allow resale of the cashback promotions in question was reasonable and nondiscriminatory.

25. dPi's claims for these amounts are not barred by the equitable doctrine of laches.

26. AT&T should calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion.

27. Subject to validation as provided by this Order, dPi is entitled to receive credit for claims submitted minus the wholesale discount.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 1 AND 2

These findings of fact are essentially informational, procedural, and jurisdictional in nature, and the matters which they involve are uncontroversial. They are supported by information contained in the parties' pleadings and testimony and the Commission files and records regarding this proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 3

This finding of fact is supported by the pleadings and the testimony of dPi witness O'Roark and AT&T witness Ferguson. It also appears that the finding of fact is essentially informational in nature and uncontroverted by the parties.

According to AT&T witness Ferguson, BellSouth or AT&T, as applicable, offered three promotions under which dPi claims it should have received credits: $100 Cashback for IFR + 2 Custom Calling or TouchStar Features; $100 Cashback for Complete Choice, Area Plus with Complete Choice and Preferred Pack; and $50 Cashback 2-Pack Bundle Plan. The $100 Cashback for IFR + 2 Custom Calling or TouchStar Features promotion was available from August 25, 2003 to January 31, 2005 to new residential subscribers to AT&T's local service who purchased basic residential service plus at least two qualifying Custom Calling or TouchStar features. When an end user qualified for this promotion, AT&T would mail a $100 Cashback coupon. The end user had to redeem the coupon within 90 days of receipt to receive a $100 check.

The $100 Cashback for Complete Choice, Area Plus with Complete Choice and Preferred Pack promotion was available to qualifying AT&T end users from June 1, 2003, and continued through the period involved in the complaint. The promotion was available to returning AT&T end users not currently subscribed to AT&T's local service for at least ten days prior to their service request. In addition, the end user qualified for the promotion by purchasing AT&T's Complete Choice, Area Plus with Complete Choice, or Preferred Pack Plan service offerings. When an end user qualified for this promotion, AT&T would mail a coupon for $100 Cashback. The end user had to mail in the completed coupon, along with the first month's bill showing the purchase of eligible services, to receive a check for $100.

The $50 Cashback 2-Pack Bundle Plan promotion was available from December 15, 2005 to April 30, 2007. On May 1, 2007, and continuing through the period involved in this Complaint, the cashback reward was reduced to $25. The promotion was offered to reacquisition end users who purchased AT&T's 2-Pack service offering with an affiliate service such as long-distance, DirecTV, DSL, or wireless service. Customers received a cashback coupon and optional voicemail service. When an end user qualified for this promotion, AT&T mailed the customer a coupon that the customer would redeem to receive a $50 check, or after April 30, 2007, a $25 check.

The description of the promotions in question in this matter by AT&T witness Ferguson was uncontroverted by dPi.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 4

This finding of fact is supported by the pleadings, the testimony of dPi witness O'Roark, the testimony of AT&T witness Seagle and her Exhibit KAS-1, and the testimony of AT&T witnesses Bracy and Ferguson.

As AT&T witness Ferguson explained, BellSouth's policy was that 47 USC 251(c)(4) did not require the cashback portion of a promotion to be made available for resale, but only the telecommunications service associated with such promotion. As of July 2007, AT&T began making available the cashback portion of a promotion to CLPs, whose end users met the eligibility requirements, which was the policy of the pre-merger AT&T and post-merger AT&T except in the former BellSouth region. According to witness Ferguson, this reversal in policy was not coincidental with the issuance of the Fourth Circuit Court of Appeals' decision in *BellSouth Telecom, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007), where BellSouth failed to prevail in its appeal of two decisions of this Commission regarding promotions. Instead, witness Ferguson testified that the change in policy was based on a business decision to standardize post-merger AT&T's policies on the issue across its 22-state region.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 5, 6, 7 AND 8

These findings of fact are based on portions of the parties' interconnection agreements contained in Exhibits PLF-1 and PLF-2 and attached to the testimony of AT&T witness Ferguson. They are informational in nature.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 9

This finding of fact is supported by the stipulation of counsel and Georgia state law, O.C.G.A. 9-3-24.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 10

This finding of fact is supported by the testimony of dPi witness O'Roark and the testimony and Exhibit of AT&T witness Seagle.

The record indicates that BellSouth informed dPi of its policy that cashback promotions were not available for resale in August 2004. According to AT&T witness Seagle, she met with a representative from Lost Key, dPi's billing and collections agent for promotional credits and in the course of the conversation informed him of the company's position on resale of such promotions. She then followed up her conversation by restating this policy in an August 26, 2004 e-mail contained in Exhibit KAS-1. At the hearing, dPi stipulated that BellSouth specifically told Lost Key that cashback promotions were not available for resale in the August 2004 time frame. Thus, it is clear that BellSouth had given dPi notice of its policy regarding resale of promotions as of August 26, 2004.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 11

This finding of fact is supported by the testimony and exhibits of AT&T witness Seagle.

AT&T witness Seagle testified that on July 21, 2005, the Lost Key representative submitted a request on behalf of dPi for promotional credits for a cashback promotion. On August 2, 2005, witness Seagle responded that the cashback promotion was not available for resale. The representative of Lost Key then acknowledged witness Seagle's response.[3] Witness Seagle's testimony was not controverted. AT&T has shown that it again made dPi aware of its policy regarding resale of cashback promotions in August 2005.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 12

This finding of fact is based on information stipulated to by the Complainant.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 13

This finding of fact is supported by information contained in Exhibit NWB-1, attached to the testimony of AT&T witness Bracy. This information was uncontroverted by any party.

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[3] These claims denied on August 2, 2005 do not appear to be part of the claims included in the complaint as Complainant stipulated that Lost Key did not submit any requests for promotional credits to AT&T on behalf of dPi until December of 2005.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 AND 25

These findings of fact are based on the evidence, the transcripts and exhibits and the record proper.

Beginning in 2004, dPi began to make inquiry to BellSouth about the availability of BellSouth's cashback promotion resale. First, in August 2004 and again in August 2005, BellSouth informed dPi that the cashback promotions at issue in this proceeding were not available for resale. dPi continued to submit written requests to BellSouth to be given credit for the cashback promotions. *See* dPi Exhibit I. BellSouth failed to accept or deny dPi's repeated requests for credits. This conduct persisted until July 2007 when post-merger AT&T decided to honor appropriate requests that dPi made for cashback promotion resale credit for orders that were submitted from June 2007 forward. AT&T, however, denied any requests made by dPi for cashback promotion resale credits for orders that were submitted prior to June 2007. dPi filed this Complaint alleging that AT&T violated federal law and the explicit terms of their interconnection agreements in refusing to provide the benefits of these cashback promotions to dPi for orders that originated prior to the July 2007 policy change.

In its answer and defense, AT&T now contends that BellSouth/AT&T was not and is not required by federal law or FCC regulations to offer these particular cashback promotions to dPi for resale because these restricted offerings are reasonable, nondiscriminatory and, thus, not harmful to competition. In the alternative, AT&T contends that dPi is not entitled to the credits that it now seeks because dPi did not dispute and/or escalate in a timely manner as required by its interconnection agreement and is therefore barred from any recovery or, to the extent that dPi did dispute and/or escalate these disputes in a timely manner, the amounts that dPi seeks must be reduced by the applicable residential resale and error rate discounts.

Ordinarily, when resolving complaint proceedings, this Commission would first resolve the issues raised by the Complainant since the Complainant has alleged injury and has the burden of proof. However, in this instance, the Commission, in its discretion, will first resolve AT&T's contention that dPi is not entitled to such pre-policy change credits because, as a matter of federal law, these restricted offerings are reasonable, non-discriminatory and, thus, not harmful to competition. We choose to resolve this issue first because a determination that the cashback offerings are reasonable, nondiscriminatory and, thus, not harmful to competition would obviate the need to inquire further into this case to determine if both parties have complied with contractual obligations which, when applicable, would determine whether dPi is entitled to credits.

At the outset, the Commission notes, as did AT&T, that the federal Act does not absolutely prohibit restrictions on resale. Instead, it imposes on ILECs a duty "not to prohibit, and not to impose *unreasonable or discriminatory* conditions or limitations on, the resale of such telecommunications service . . . ." 47 U.S.C. 251(c)(4)(B) (emphasis added). In light of this statutory language, the FCC established a presumption that restrictions on resale that are not expressly permitted in its *Local Competition Order* are unreasonable and discriminatory, but it expressly provided that ILECs "can rebut this presumption, but only if the restrictions are narrowly tailored." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶939 (1996)(*Local Competition Order*). In its rules, the FCC further explained that "an incumbent LEC may impose a restriction" on resale if it "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 CFR 51.613(b).

Consistent with FCC policy, this Commission stated on December 22, 2004 in Docket No. P-100, Sub 72(b), *(Restriction on Resale Order I)*, a decision interpreting federal law and regulations, that the "benefit of a ... promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the regulated service(s) associated with the promotion at the promotional rate minus the wholesale discount, unless the ILEC proves to the Commission (per 47 C.F.R. 51.613(b)) that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." In that same Order, the Commission refused to establish a bright line rule that promotions that exceed 90 days in length must be offered to resellers in addition to the reseller discount in favor of an approach where the ILEC may, on a case-by-case basis, prove that a promotion that is offered for more than 90 days may not be subject to mandatory resale at the additional discounted rate because the restricted offering is reasonable, nondiscriminatory and thus, not harmful to competition. The Commission ruling in this regard was clarified further in our subsequent Order of June 3, 2005 (*Restriction on Resale Order II)* in the same docket and affirmed in *BellSouth v. Sanford et al*, 494 F.3d 439(4th Cir., 2007).

During the hearing, dPi argued that FCC regulations require AT&T to obtain a state Commission ruling that its proposed restriction of the resale of these promotions is reasonable and nondiscriminatory before imposing such restrictions on promotions resale that are offered for more than 90 days. The Commission disagrees.

While an ILEC may voluntarily seek pre-approval for promotions containing restrictions on resale that are intended to last more than 90 days, it is not mandated to apply for and receive prior Commission approval before implementing such restrictions. Imposing a mandated pre-approval process would unnecessarily burden the Commission's resources because it would have to convene a proceeding to address *all* such offerings instead of only addressing those to which affected parties actually object. Moreover, such a requirement would also have a chilling effect on the competitive offerings available to consumers, because ILECs would be reluctant to provide their wireline, wireless, cable, and VoIP competitors so much advanced notice of their upcoming offerings.

Given that, the Commission concludes that the post-implementation approval process being employed is permissible and is in accord with our prior orders interpreting

FCC regulations.[4] Under this process, an ILEC may restrict resale of these presumptively unreasonable and discriminatory promotions that are offered in excess of 90 days without securing pre-approval from this Commission to do so. If challenged, however, the ILEC must rebut this presumption and "prov[e] to the state commission that the restrictions on resale are reasonable and nondiscriminatory. *BellSouth v. Sanford et al*, 494 F.3d 439, 453 (4th Cir., 2007). If the ILEC does not produce sufficient evidence to overcome the burden, the Commission must, because of the presumption, find that the restrictions on resale are unreasonable and discriminatory and, when appropriate, retroactively provide the party the benefit to which it was entitled but for the unreasonable and discriminatory restriction placed on the resale of the promotion by the ILEC. This is consistent with the North Carolina courts' treatment of presumptions in other contexts.

In the *Restriction on Resale Orders*, the Commission stated that we would consider such key factors as the length of the promotion and resellers' interest in the promotion to determine if the proposed/implemented restrictions were reasonable and nondiscriminatory.[5] Further, in those same Orders, we stated that the listing of key factors was not exhaustive nor dispositive; and, that while promotions that exceed 90 days must be analyzed individually for their anticompetitive effects, "ILECs should be mindful that resale restrictions on unreasonably long, unlimited or permanent promotions that compete with and undercut the tariffed retail price for service would gut the resale obligation of TA96 and will be held unreasonable." *Restriction on Resale Order I*, p. 13. The Commission now examines the cashback promotions with these and other factors in mind.

With regard to the first factor, i.e., the length of the promotion, the Commission finds that the two shortest promotions lasted approximately 16 months and the longest lasted approximately 48 months.[6] The length of those promotions far exceeded the threshold that the FCC presumed to be unreasonable and discriminatory by a minimum order of magnitude of 4 and a maximum of 16. Further, these periods were considerably longer than the nine month promotional period that the Commission, in dicta, indicated

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[4] See also fn 12 in the *Restriction on Resale Order I.* In that footnote the Commission allowed ILECs to implement gift card promotions associated with mixed bundled offerings of regulated and non-regulated services on one day notice without running afoul of the ILECs' right to offer the promotion without obtaining the Commission's approval. In that instance, the Commission noted that, similar to this case, the issue was not so much the approval of the promotion, but rather, determining what the discounted rate should be after the promotion has been placed into effect.

[5] The Commission later clarified that: "The Commission's discussion of factors that an ILEC may present to establish that a restriction is reasonable and nondiscriminatory was not intended to be exhaustive nor meant to suggest that the presence of any one or all of the factors would be sufficient to prove that a given restriction is permissible under FCC rules. Rather, the Commission's opinion stressed that each 90-day-plus promotion, including 1FR + 2 Cash Back promotion, would have to be examined on a promotion-by-promotion basis, and that, in the absence of an objection by a reseller, the stated factors could be considered and could have some persuasive value to the Commission in determining whether a particular restriction on resale is reasonable and nondiscriminatory." *Restriction on Resale Order II*, p. 3.

[6] There is no evidence in the record to suggest that the latter promotion has been discontinued.

that it might find reasonable and non-discriminatory based upon the facts of that particular proceeding.

The length of these promotions are of particular concern to the Commission because, as we noted in the *Restriction on Resale Order I*, on pp. 10-11, "[i]f a promotion is offered for an indefinite extended period of time, at some point it starts to become or look more like a standard retail offering that should be subject to resell at the wholesale rate." Were it not for TA96 and the FCC regulations, the Commission would be hard-pressed not to conclude based on these facts alone that these "resale restrictions [are]...unreasonably long, unlimited [and]...permanent promotions that compete with and undercut the tariffed retail price for service [that] would gut the resale obligation of TA96 and [are, therefore] unreasonable." *Restriction on Resale Order I*, p. 13. The Commission has not succumbed to this temptation. Instead, as we are required to do, we have considered this evidence in conjunction with all other evidence in making the determination required by TA96 and FCC regulations.

With regard to the second key factor, i.e., resellers' interest in the promotion, the evidence is clear that within nine months after dPi began purchasing the telecommunications services that were subject to the retail promotions at issue, and within one month of dPi's hiring of an outside agent to identify and submit promotional credits that dPi was entitled to receive, dPi expressed interest in reselling the promotion. To date, no other reseller, however, has expressed an interest in reselling the promotion. AT&T witness Ferguson contends that since dPi is the only reseller that has brought this matter before the Commission, this indicates disinterest in the promotion by resellers. While the Commission agrees that this fact supports an inference that some resellers are not interested in this promotion, the Commission is reluctant in the current economic climate to conclude that CLPs generally are disinterested in reselling the cashback promotion. Rather, the Commission views this "disinterest" as recognition by CLPs that these promotions would not be made available by BellSouth without CLPs incurring the expense involved in a legal proceeding.[7]

AT&T also attempted to show that its refusal to pay the credits for the cashback promotion did not have an anti-competitive effect based on dPi's number of customers in North Carolina. Witness O'Roark testified that while BellSouth or AT&T was not paying the cashback credits, dPi's number of customers in North Carolina increased, but when AT&T began paying such credits, dPi's number of North Carolina customers declined. Mr. O'Roark explained on redirect that the customer numbers declined substantially due to a program offered by MCI and then rose after dPi acquired another company. AT&T has not demonstrated any causal relationship between its payment of promotional credits and dPi's customer losses. Nor is the Commission convinced that there is a relationship between dPi's number of customers in North Carolina and the change in policy on the payment for resale of cashback promotions.

[7] As highlighted by this proceeding, BellSouth has consistently maintained the position that promotions were not available for resale to CLPs in proceedings before this Commission and federal courts prior to the prospective policy change in July 2007 which harmonized BellSouth's promotion resale policy with that of post-merger AT&T.

AT&T contends that it would be discriminatory against other CLPs if it paid dPi for the cashback promotions in question. dPi, however, argues that this claim is illogical. The Commission agrees with dPi. First, there is no evidence that any other CLPs in North Carolina are seeking such credits. Finally, if AT&T's denial of such credit is unreasonable in this matter, it would be unreasonable to deny another CLP's claim that was otherwise valid as well.

AT&T also argues that these restrictions on resale do not stifle competition between dPi and AT&T because dPi does not compete directly with AT&T for the same customer. To support its contention, AT&T cites testimony that dPi witness O'Roark gave in a proceeding in Georgia in which he stated that "essentially every one of dPi's new customers is someone who was formerly a customer of BellSouth or another provider and who left after getting into trouble over their phone bill." AT&T Post Hearing Brief, p. 2. In this proceeding, however, when asked if it was fair and accurate to say that "essentially every single one of dPi's new customers is someone who was formerly a customer of AT&T or another provider and who left after getting into trouble over their phone bill," dPi witness O'Roark would only state that the statement "would be true about a large percentage of our customers", "not 100 percent." (Tr. p. 84) Thus, contrary, to AT&T's assertion, dPi and AT&T do compete directly for the same customers in a small percentage of cases. In those cases, limited though they may be, AT&T's restriction on resale provides it with a significant advantage over dPi and stifles competition. [8]

Moreover, even if the Commission assumes that AT&T and dPi do not directly compete for the same customers, we simply are not persuaded that dPi's decision to pursue credit-challenged customers overcomes the presumption that these restrictions on resale are unreasonable, discriminatory and harmful to competition. TA96 encouraged CLPs to distinguish themselves from ILECs by offering consumers different options than those provided by ILECs in the hope that overall competition would be increased. To do so, Congress encouraged and permitted CLPs to exploit these distinctions by mandating that the ILECs provide CLPs with access to the ILEC's network and that the ILEC permit CLPs to resale ILEC services on a reduced basis. Within this framework, dPi identified and exploited a market niche that was not being served by BellSouth. Thus, it is antithetical to suggest that a CLP that distinguished itself in a way that is encouraged by TA96 is not competitively stifled by an ILEC's refusal to resale a promotion that will allow the CLP to be a more financially viable competitor.

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[8] The Commission takes judicial notice that, as of August 28, 2009, there were 185 certified CLPs in North Carolina. *Report of the North Carolina Utilities Commission to the Joint Legislative Utility Review Committee*. p. 7. While we have no way of knowing with any certainty, it is reasonable to presume that one or more of these CLPs would compete with or would like to compete with AT&T for the same core customers that AT&T has identified as its customer of choice. In those instances, AT&T's long-term restricted resale policy discourages rather than encourages entry into the market by conferring an unfair advantage upon AT&T over any CLP that chooses to or might choose to compete directly against AT&T but *cannot* offer a similar cashback bonus. As a result, competition is stifled and these core customers are left with fewer choices for telecommunications services.

Similarly, we are not persuaded that dPi's decision to retain the proceeds of the promotion rather than pass those proceeds directly to the customer overcomes the presumption that these restrictions on resale are unreasonable, discriminatory and harmful to competition. As we noted in *Restriction on Resale Order II*, p. 7, " [t]he resale obligation of TA96 permits a CLP to use the wholesale discount in a way that is beneficial to it without requiring the benefit to be passed directly to the end user..." As we stated before, this was done in the hope that overall competition would be increased and, in our view, it would be antithetical to suggest that dPi is not competitively stifled by AT&T's refusal to provide dPi with the benefits of these long-term promotions because dPi exercised an option permitted by TA96.

Finally, the most telling evidence in the record as to the reasonableness of AT&T's refusal to offer the cashback promotion for resale is its own conduct. The Commission acknowledges AT&T witness Ferguson's explanation that AT&T changed the BellSouth policy of denying resale of these promotions to standardize its policy across its 22-state region. The fact remains, however, that this change in policy reflected a pre-merger AT&T position, a more legally defensible position under the *Sanford* decision and, as witness Ferguson conceded on cross-examination, has resulted in AT&T paying millions of dollars to resellers. Thus, it is difficult to conclude that AT&T changed the BellSouth policy solely for purposes of standardization.

AT&T has the burden of showing that its denial of the resale of the cashback promotion was reasonable and nondiscriminatory. After fully considering the aforementioned arguments, the evidence, the transcript of this proceeding and the record proper, the Commission finds that AT&T has failed to meet its burden of proving that the restrictions that it placed on the resale of the cashback promotions were narrowly tailored, reasonable, nondiscriminatory and, thus, not harmful to competition. Stated more simply, we find that AT&T's restriction on resale of the cashback promotions was unreasonable, discriminatory and harmful to competition.

Having determined that AT&T's resale restrictions were unreasonable and discriminatory, we now must determine what, if any, recompense dPi is entitled to receive because of AT&T's refusal to provide the cashback promotions in question to dPi for resale. In this phase of the determination, both parties agree that dPi, as the Complainant, has the burden of proof and that dPi's right to recompense is governed primarily by the two voluntarily negotiated ICAs.

For the most part, the parties are in agreement as to the facts surrounding this dispute. That is, the parties are in agreement as to when and by what manner dPi expressed its interest in reselling the cashback promotions. Similarly, the parties are in agreement as to when and in what manner BellSouth responded to dPi's interest. The parties' central disagreement in this proceeding is not about the facts; instead, the core disagreement between the parties is about the meaning of the terms and conditions contained in both ICAs and the applicability of the terms and conditions of ICA1 to ICA2 to the undisputed facts of this case. Thus, to resolve this dispute, we begin our analysis by examining key components of the ICAs and interpreting and applying those provisions in accordance with Georgia contract law.[9]

Although the parties acknowledge the number and the nature of the ICAs in this case, they differ markedly on the effect that the ICAs have on the issues in this proceeding. For instance, although both parties agree that the initial ICA and the second ICA contain different limitation periods for submitting and resolving billing dispute claims, they strongly disagree on which limitation period governs unresolved claims that arose during the period while ICA1 was effective. ICA1 implicitly establishes a six year limitation period in which disputes are to be identified, submitted and either resolved or a complaint proceeding initiated; whereas, in ICA2, dPi agreed "not to submit billing disputes for amounts billed more than twelve (12) months prior to the submission of a billing dispute filed for amounts billed."

AT&T argues that ICA2 bars dPi from collecting on claims that arose while ICA 1 was effective if those claims were submitted more than 12 months after they were billed; or, in the alternative, AT&T argues that dPi is barred from collecting on those same claims because dPi did not escalate or resolve those claims as required by ICA2. dPi argues that the claims were timely under either ICA1 or ICA2. The Public Staff argues that since ICA1 did not explicitly establish a period in which dPi was required to discover and notify AT&T of disputed billings, it is reasonable to infer that dPi was required to discover and notify AT&T of billing disputes within 12 months of the billing period. Because Claim numbers 1, 2, 3, 21, and 23 were not discovered and reported by dPi to AT&T within 12 months of billing, the Public Staff argues that AT&T was reasonable in denying dPi's request and dPi was barred from seeking recovery for the denial. With the exceptions of Claim Numbers 34, 35 and 36 which, as of the date of the Complaint, had not been submitted to AT&T, the Public Staff asserted that dPi was entitled to credit for those claims remaining since they had been discovered and reported to AT&T within 12 months of the billing date. As to Claim Nos. 34, 35 and 36, the Public Staff recommended that the Commission order dPi and AT&T to work together to resolve the status of those claims.

Under Georgia law, an existing contract will be replaced and discharged when the parties enter into a subsequent agreement that covers the subject matter addressed by the original contract.[10] ICA2, Section 30.1 clearly and unambiguously states that the

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[9] Pursuant to Georgia law, the construction of a contract is a question of law for the court to determine, O.C.G.A. 13-2-1 *et seq.*

[10] See, e.g., *Munson v. Strategis Asset Valuation & Mgmt.*, 363 F. Supp. 2d 1377 (N.D. Ga. 2005) (applying the doctrine of novation to find that a contract was superseded by a subsequent agreement). A novation occurs when the parties to a contract substitute a new agreement for the old one. An effective novation has four elements: (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) a mutual intention by the parties to substitute the new contract for the old one; and (4) a valid new contract. *Munson*, 363 F. Supp. 2d 1377, 1381-82 (holding that the parties' relationship was governed by the latter agreement, rather than the original contract because the terms of the latter agreement indicated that it was intended to supersede the original contract); see also, e.g., *Rentokil, Inc. v. Creative Plantscapes, Inc.*, 1999 U.S. App. LEXIS 31587 (4th Cir. Dec. 3, 1999) (finding

agreement "sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions between them." The evidence is uncontroverted that the subject matter of both agreements is indeed the same. Thus, it is clear from the language in ICA2 and Georgia contract law that billing disputes that existed prior to the effective date of ICA2 are, to the extent possible, to be resolved in accordance with the terms and conditions mutually agreed to in ICA2 instead of the terms and conditions in ICA1.

The plain language of the 2007 interconnection agreement provides that "the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date."[11] Further, in ICA2 dPi expressly agrees that "any orders placed under [the prior agreement]" and "any and all amounts and obligations owed for services provisioned or orders placed under [the prior agreement]" will be "due and owing" and "governed by the terms and conditions" of the 2007 interconnection agreement. dPi further unequivocally "agrees not to submit billing disputes for amounts billed more than twelve (12) months prior to submission of a billing dispute filed for amounts billed." (*Id.*, Section 2.2). Finally, dPi agreed to "pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed." (Exhibit PLF-2, Attachment 7, Section 2.1). Because of the merger clause, these are the key provisions that dPi must comply with in order to pursue a disputed billing claim for promotional credits that arose before and after the effective date of ICA2.

AT&T contends that the evidence in this proceeding conclusively demonstrates that dPi has failed to comply with these contractual provisions and that dPi is therefore not entitled to receive any of the credits that it now seeks. In the alternative, AT&T contends that the evidence suggests that the credit amount that dPi is entitled to receive should be greatly reduced.

After carefully reviewing the evidence, the Commission finds that dPi has substantially complied with the pertinent provisions of ICA2. To reach this conclusion, we find that these disputed bills were "obligations owed for services provisioned or

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sufficient evidence to show the parties' intent in a new employment agreement that included a superseding clause as to all other agreements between the parties to novate and extinguish the old agreement). Under the doctrine of contractual merger, when parties enter into a final contract, all prior negotiations, understandings, and agreements "on the same subject matter" are merged into the final contract and are accordingly extinguished. *Health Svc. Centers v. Boddy*, 257 Ga. 378, 380 (359 S.E. 2d 659) (Ga. 1987) (citing *Holmes v. Worthey*, 159 Ga. App. 262, 267, 282 S.E. 2d 919 (Ga. App. 1981).

[11] Exhibit PLF-2, General Terms and Conditions, Section 30.1.

orders placed under [the prior agreement]" which dPi, by agreement[12], was required to resolve within 12 months of the effective date of ICA2[13] or those claims would be forever extinguished.[14] Attachment 7, Section 2.2.

The evidence is uncontroverted that dPi filed this Complaint on April 11, 2008. The filing was well within the 12 month limitation period in which dPi was required to resolve these matters with AT&T through formal or informal discussions or to file a complaint proceeding if its efforts to do so failed. Moreover, prior to the complaint being filed, it is uncontroverted that dPi provided AT&T with written requests detailing each claim in dispute.[15] At the time the complaint was filed, none of the claims exceeded the six year statute of limitations that governed Georgia contract claims originating during ICA1 or the 12 month limitation period agreed to in ICA2. Further, as a result of the previously discussed submissions, AT&T was aware that dPi disputed each claim within 60 days of the "obligations [being] owed for services provisioned or orders placed under [the prior agreement]." And, finally, none of the claims identified were resolved within 60 days. Thus, each claim identified is viable and can be resolved in these proceedings.

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[12] Controlling Georgia law allows parties to contractually agree to a limitation period shorter than that provided by general statutes. *See Bullington v. Blakely Crop Hail, Inc.*, 294 Ga. App. 147, 668 S.E.2d 732, 735 (2008), *cert. denied* (2009) (Bullington contends that this action is subject to the six-year statute of limitation for actions on simple contracts in writing, set out in OCGA § 9-3-24, and, therefore, that the trial court erred in applying a one-year limitation period. We disagree. The insurance contract plainly established a one-year period of limitation. It is well established that an insurance policy provision that places a one-year limitation upon the right of the insured to sue the insurer is valid and enforceable even though it shortens the period allowed by statute.). This is consistent with North Carolina law. *See Thigpen v. East Carolina Railway,* 184 N.C. 33, 113 S.E. 562, 563 (1922) (holding consistent with "clear weight of authority" that parties could fix given time, shorter than general statute of limitations, within which suit for breach of contract must be brought).

[13] For billing disputes that arose prior to the effective date of ICA2, we expressly reject AT&T's suggestion that the expiration of the limitation or escalation period is determined by reference to the date that the original order was placed under the ICA1, the prior interconnection agreement. The Commission believes that to impose a retroactive requirement that dPi escalate and resolve these claims when the period for such escalation and resolution had long expired would place an impossible condition on dPi and would lead to an absurd result. Moreover, imposition of such a suggestion is inconsistent with Section 2.1 that states that "the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date. ICA2 can only be given prospective effect if the submission date is viewed as being the effective date of the contract.

[14] We also reject the Public Staff's contention that dPi was required to discover and notify AT&T of billing disputes within 12 months of the bill being provided while ICA1 was in effect. Based upon this reading, the Public Staff essentially extinguished a number of claims that arose during ICA1 that dPi submitted which were not submitted within the 12 months. There is no evidence in the record that either party believed that dPi's failure to discover and notify AT&T within 12 months extinguished the claim during the period in which their relations were governed by ICA1. Quite the contrary, the evidence is that the claims submitted by dPi during that period that were more than "12 months old" were denied, to the extent that they were denied, solely because the promotion was not available for resale.

[15] See dPi Exhibit 1 and NWB-1 which indicates the date that dPi submitted each request for credit and the acknowledgement of receipt of the request by AT&T.

In its Brief and Proposed Order, AT&T argued that dPi failed to "pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed." (Exhibit PLF-2, Attachment 7, Section 2.1). AT&T further argued that the failure of dPi to comply with these escalation provisions would bar dPi from pursuing these claims in this Complaint proceeding. We do not agree.

During the hearing, AT&T witness Scot Ferguson testified that to the best of his knowledge, dPi did not follow the escalation process required and defined by the 2007 interconnection agreement. We are not persuaded by this testimony. Rather, we find dPi's witness who offered testimony that Brian Bollinger, dPi's former in-house attorney, "escalated and attempted to resolve this issue" with an AT&T representative more persuasive on this point.

Even if we did not find dPi's witness persuasive on this point, dPi's failure to escalate the disputes in compliance with the exact terms of ICA2 would not bar its claims in view of its substantial compliance with the agreement in general. Furthermore, it is black letter law in contract matters that performance of an act required by contract is not necessary where such performance would be an idle, useless or futile act. *Williston on Contracts*, 4th Ed. Section 47.4. This is the law in Georgia.[16]

The uncontroverted facts of this case are that dPi has consistently submitted such claims to AT&T for credit since 2005 only to be "denied" by AT&T's inaction. Until July 2007, AT&T denied these claims because they contended that federal law and regulations did not require that these promotions be made available for resale. AT&T persisted in this denial despite being first told by this Commission in 2004 that promotions of this type that lasted more than 90 days were presumptively unreasonable, discriminatory and should be for resale unless AT&T could prove the promotions were reasonable and nondiscriminatory. BellSouth/AT&T, reluctantly it appears, changed its policy prospectively and began to accept requests to resale such promotions in July 2007 to align itself with pre-merger AT&T. Even then, as evidenced by its stance in this proceeding, AT&T has continued to deny that these promotions are required to be available for resale for bills that originated prior to its July 2007 change in policy.

We believe that the purpose of the escalation provision was to permit the parties, in good faith, to attempt to resolve disputes prior to resorting to a forum such as this Commission. To be effective, each party has to be open to a negotiated resolution of a disputed issue. Here, because of the unyielding position taken by BellSouth, there could be no negotiated resolution. BellSouth's position was that these cashback promotions were not available for resale. No matter how many times dPi asked BellSouth, the answer would always be the same: denial, because "AT&T did not offer cashback promotions for resale." (Tr. p. 165) Thus, any action taken by dPi to comply with the

[16] See O.C.G.A. 13-4-23 which states: "If the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance."

escalation process would have been futile. dPi's nonperformance in this regard is therefore deemed to have been excused.

Finally, in this proceeding, AT&T has contended that "[a]s a result of dPi's delay in bringing these claims, AT&T no longer has the records that are needed to determine whether dPi met the qualifications of the underlying promotions with regard to many of the credits", and "that dPi's delay was prejudicial to AT&T..." Further, AT&T contends that dPi is barred from pursuing these claims as a result of the equitable doctrine of laches. Under controlling Georgia law:

> Courts of equity may impose an equitable bar to a complaint when the lapse of time and a claimant's neglect in asserting rights causes prejudice to the adverse party. In determining whether laches should apply, courts consider the length of the delay, the sufficiency of the excuse, the loss of evidence on disputed matters, [and] the opportunity for the claimant to have acted sooner . . . . The defendant must show prejudice from the delay.

Troup v. Loden, 469 S.E.2d 664, 665-66 (Ga. 1996).[17]

As we have previously stated, for the most part, the facts of this case are not in dispute. Briefly summarized, they are: dPi stipulated that in 2004, AT&T told dPi's billing agent it would not provide the cashback credits dPi seeks in this docket. (Exhibit KAS-1). Although it seeks cashback credits for billing periods as far back as November 2003 (Exhibit NWB-1), dPi stipulated that it was not until two years later that dPi's billing agent first asked AT&T for cashback promotional credits on behalf of dPi (Exhibit KAS-4). When AT&T denied those requests, dPi stipulated that its billing agent waited another year before informing AT&T that it disagreed with AT&T's denial of these requests. Further, dPi waited another year to file its Complaint with the Commission—although dPi had ample opportunity to file a complaint for its claims earlier.

While it is undoubtedly true that the testimony in this proceeding indicates that AT&T no longer has records that are needed to determine whether dPi met the qualifications of the underlying promotions with regard to approximately $34,000 of the $156,000 in credit amounts that dPi now seeks in this docket, and that these disputed credits arose from bills that were associated with the billing periods between November 2003 through November 2005, it is also true that AT&T did not attempt to validate these requests when they were submitted because "AT&T did not offer cashback promotions for resale" (Tr. p. 162) and AT&T discarded or deleted[18]

[17] This is consistent with North Carolina law. *See Harris & Gurganus, Inc. v. Williams,* 37 N.C. App. 585, 246 S.E.2d 791, 794 (1978)(the doctrine of laches is "a rule of equity by which equitable relief is denied to one who had been guilty of unconscionable delay, as shown by surrounding facts and circumstances.")

[18] There is no evidence in the record that these records were inadvertently discarded or deleted. From the testimony, one could infer that AT&T discarded or deleted these records in accordance with its record retention policy or its quest to modernize its procedures. If that is so, AT&T's retention and

information necessary to validate these requests. With regard to the latter facts, the Commission notes that AT&T took those actions even though it knew that the Commission had not pre-approved the restrictions; that the restrictions on resale were presumptively unreasonable and discriminatory; and, that the statute of limitations had not expired on the claims covered by the records.

Given those facts and after carefully reviewing the testimony and the record proper in this proceeding, the Commission concludes that the equitable doctrine of laches does not bar dPi from pursuing these claims for promotion resale credits. Further, the Commission concludes that dPi's delay in bringing this action was neither unconscionable nor prejudicial to AT&T.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 26

This finding of fact is supported by the testimony and cross-examination exhibits of dPi witness O'Roark. In its Complaint, during the hearing, in its Brief and Proposed Order and in its Post-Brief and Proposed Order submission, dPi asserted that it was entitled to a credit for the full face value of a promotional offering. AT&T's contention was that the promotional offering should be reduced by the wholesale discount. O'Roark Cross-Examination Exhibit No. 4 demonstrated, however, that dPi would receive the same benefit of a price reduction equal to a promotional credit only if the wholesale discount were applied to the promotional credits. Table 1 below shows a synopsis of this cross-examination exhibit.

Table 1

Telecommunications Service A with Resale Discount Rate of 21.5%	
Without $25.00 Reduction in Rate	
Retail Rate	$75.00
Wholesale Rate	$58.88
With $25.00 Reduction in Rate	
Retail Rate	$50.00
Wholesale Rate	$39.25
Change in Wholesale Rate	$19.63

In its Proposed Order, the Public Staff supported AT&T's position that dPi would receive the same benefit of a price reduction equal to a promotional credit only if the wholesale discount were applied to the promotional credit. The Public Staff stated that it

modernization practices contravene its ICA1 commitment to consider and resolve billing disputes within six years after the bill was submitted. As a result, AT&T may not use the unavailability of these records as an excuse to invalidate claims that predate November 2005.

supported AT&T's position because AT&T calculated the discount in a manner that was consistent with the Fourth Circuit's analysis in the *Sanford* decision.

The Commission agrees with AT&T and the Public Staff. If the Commission were to adopt dPi's position regarding promotional credits, then dPi would receive a greater benefit than it otherwise would be entitled to receive had AT&T merely reduced the telecommunications service's rate. The example in O'Roark Cross-Examination Exhibit No. 4 demonstrated that the only way a CLP could obtain an equal benefit from rate reduction such as a promotional credit was to reduce the promotional credit by the wholesale discount rate.

dPi's calculation would allow it to receive benefits that reflect the promotions' retail or face value. AT&T's calculation takes the promotion's retail value and deducts the wholesale discount. This is the proper way to calculate the amount of credits owed to dPi. Further, this is consistent with the analysis of the Commission's decision in the *Sanford* decision. (*See Sanford* at pp. 450-51)

The Commission is aware that dPi is strongly opposed to the promotion value being calculated in this manner. In dPi's March 15, 2010, Reply to Public Staff's Proposed Findings and Conclusions (Reply), dPi asserts that it is entitled to "the full amount of the promotions" instead of the amount less the discount. Reply p. 9. Stated more simply, dPi contends that for every $100 coupon offered to AT&T's customers, AT&T would have to provide dPi with a $100 cash payment for each of its customers. The Commission considered and rejected this exact promotion valuation method in *Restriction on Resale Order II*. We stated:

> Moreover, BellSouth's argument seems to contemplate that a gift would be provided directly to the CLP, e.g., if a coupon was offered to BellSouth's customers, BellSouth would have to provide resellers with a $100 cash payment for each of its customers. However, as discussed above, the *benefit* (not the gift itself) would be delivered to the reseller through the wholesale price charged to the reseller, thus, further reducing the likelihood of undue windfall as described by BellSouth. (Emphasis in Original)

Restriction on Resale Order II, p. 7.

This, as well as other passages in the *Restriction on Resale Orders*, makes clear that the face value of the promotion is not required to be passed through to the CLP. Rather, the Order requires only "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." *Restriction on Resale Order II*, p. 6. The credit calculation formula that we have here adopted accomplishes that purpose.

For the reasons stated above, the Commission concludes that the retail amount of the promotional credits due dPi should be reduced by the wholesale discount rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 27

This finding of fact is supported by the testimony of dPi witness O'Roark and AT&T witness Bracy.

The Commission has determined that dPi's claims are not barred by the billing dispute provisions of ICA2. In Finding of Fact Nos. 21 thru 25, the Commission determined that BellSouth or AT&T, as applicable, unreasonably refused to offer the promotions in question for resale. In Finding of Fact 26, the Commission set out the proper method for calculation of the wholesale rate for these promotions. Before any amounts due can be calculated based on those Findings, there remains one issue outstanding, the validation of the claims.

In its Answer, AT&T demanded that dPi "strictly" prove the amount of the credits that dPi was due. AT&T Answer, ¶9. The law does not require dPi to prove the amount due with absolute certainty. Instead, dPi is only required to introduce evidence to prove the amount due with sufficient completeness and certainty as to permit the finder of fact to arrive at a reasonable conclusion. *Crankshaw v. Stanley Homes, Inc.*, 131 Ga. App. 840, 207 S.E.2d 241(1974). The Commission finds that, in general, dPi has met this burden.

However, it is not clear from the record whether all of dPi's claims are valid. AT&T witness Bracy testified that approximately 33% of dPi's claims had been denied because dPi had either requested the retail value of the promotion or because the end user did not meet the eligibility requirements.[19] Witness Bracy did not break out what portion of the 33% was attributable to incorrect calculation of the value of the promotion and what portion was due to the ineligibility of the end user. Nor did witness Bracy indicate if AT&T denied the claim in total if dPi submitted what the Commission would characterize as a valid claim with an incorrect credit request amount, i.e., dPi requested the retail value of the promotion rather than a credit which reflected the wholesale discount. Similarly, dPi's evidence on this issue was also less than precise. For instance, dPi witness O'Roark admitted that some of dPi's claims may not have reflected the wholesale discount and that "the parties should be able to reach agreement as to the true numbers at issue" in this proceeding. (Tr. p. 56) In any case, the Commission does not believe that the percentage of valid dPi claims since July 2007 should be used as a proxy in this case.

Accordingly, the Commission will order AT&T and dPi to work cooperatively with the Public Staff to determine the "validity" of the claims. Specifically, the parties are to

[19] In ICA1 and ICA2, dPi and AT&T agreed that "[w]here available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." See http://cpr.bellsouth.com/clec/docs/all_states/800f53.pdf at p. 40 or http://cpr.bellsouth.com/clec/docs/all_states/80296813.pdf at p. 38, respectively.

determine which claims are invalid because dPi's end user did not meet the eligibility requirements, to determine which claims submitted meet all eligibility requirements and are per se valid, and finally, to determine which claims are valid but failed to reflect the wholesale discount or some other financial factor that would reduce the amount due dPi. Claims shall not be denied because AT&T no longer has the records to validate such claims. After engaging in this process, the parties shall file a joint report with the Commission within 60 days of this order reporting their progress on validation of these claims. As claims are validated, AT&T should make payment to dPi.

IT IS, THEREFORE, ORDERED as follows:

1. That dPi's Complaint is allowed subject to validation of claims.

2. That AT&T and dPi shall work cooperatively with the Public Staff to determine the validity of the claims.

3. That AT&T and dPi shall file a joint report with the Commission within 60 days of this order reporting their progress on validation of these claims.

4. That as claims are validated, AT&T shall make payment to dPi.

ISSUED BY ORDER OF THE COMMISSION.

This the 7th day of May, 2010.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner William T. Culpepper, III, concurs.
Chairman Edward S. Finley, Jr., dissenting in part.

Lh050710.01

Appendix A

Row	Claim No.	Billing Period	Request for Credit	Days between Billing Period and Request for Credit
1	C2-NC-704-20031108	11/8/2003	1/2/2006	786
2	C2-NC-704-20031208	12/8/2003	1/2/2006	756
3	C2-NC-704-20040108	1/8/2004	1/2/2006	725
4	C2-NC-704-20050108	1/8/2005	1/3/2006	360
5	C2-NC-704-20050208	2/8/2005	12/9/2005	304
6	C2-NC-704-20050308	3/8/2005	12/9/2005	276
7	C2-NC-704-20050408	4/8/2005	1/3/2006	270
8	C3-NC-704-20050408	4/8/2005	4/20/2006	377
9	C3-NC-704-20060108	1/8/2006	12/26/2006	352
10	C3-NC-704-20060208	2/8/2006	12/26/2006	321
11	C3-NC-704-20060308	3/8/2006	12/26/2006	293
12	C3-NC-704-20060408	4/8/2006	12/26/2006	262
13	C3-NC-704-20060508	5/8/2006	12/26/2006	232
14	C3-NC-704-20060608	6/8/2006	12/26/2006	201
15	C3-NC-704-20060708	7/8/2006	8/9/2006	32
16	C3-NC-704-20060808	8/8/2006	12/26/2006	140
17	C3-NC-704-20060908	9/8/2006	12/26/2006	109
18	C3-NC-704-20061008	10/8/2006	12/26/2006	79
19	C3-NC-704-20061108	11/8/2006	12/26/2006	48
20	C3-NC-704-20061208	12/8/2006	12/26/2006	18
21	CB-NC-704-20040908	9/8/2004	12/29/2005	477
22	CB-NC-704-20041108	11/8/2004	12/29/2005	416
23	CB-NC-704-20041208	12/8/2004	12/29/2005	386
24	CB-NC-704-20050108	1/8/2005	12/28/2005	354
25	CB-NC-704-20050208	2/8/2005	12/29/2005	324
26	CB-NC-704-20050408	4/8/2005	12/26/2005	262
27	CB-NC-704-20050508	5/8/2005	12/26/2005	232
28	CB-NC-704-20050608	6/8/2005	12/26/2005	201
29	CB-NC-704-20050708	7/8/2005	3/30/2006	265
30	CB-NC-704-20050808	8/8/2005	12/26/2005	140
31	CB-NC-704-20050908	9/8/2005	12/26/2005	109
32	CB-NC-704-20051008	10/8/2005	12/24/2005	77
33	CB-NC-704-20051108	11/8/2005	12/23/2005	45
34	CB-NC-704-20070408	4/8/2007	NA	NA
35	CB-NC-704-20070508	5/8/2007	NA	NA
36	CB-NC-704-20070608	6/8/2007	NA	NA

DOCKET NO. P-55, Sub 1744

Commissioner William T. Culpepper, III, concurring:

Chairman Finley, at page 4 of his dissent, states that "...the cash payments subscribers receive under AT&T's 1 FR + 2 Cash Back program ... are not 'promotions' under the Local Competition Order and FCC rules." Based upon this Commission's prior *Restriction on Resale Orders*, which specifically addressed this issue as to this same offering and which orders were fully affirmed by the majority in *Sanford*,[1] I disagree.

I premise my difference of opinion in this regard on the following *Restriction on Resale Order I* language at pp. 9-10:

> While gift cards, check coupons and other similar promotions or incentives offered for the purchase of a regulated telecommunications service are not themselves services that ILECs offer at retail from their tariffs, they are promotional offerings for telecommunications services. Promotional offerings are subject to the limitations and conditions set forth by the FCC. In ¶ 948 of its Local Competition Order, the FCC stated that Section 251(c)(4)'s requirement that ILECs resell retail telecommunications services
>
>> makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for *all promotional or discount service offerings* made by incumbent LECs. [Emphasis added.] A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale of wholesale rates, *i.e.*, temporary price discounts.

[1] "Accordingly, we reverse the judgment of the district court and remand with instructions to enter summary judgment in favor of the Commissioners of the NC Commission." Sanford at 442.

> The Commission interprets ¶ 948 of the FCC's Local Competition Order to mean that an ILEC's duty to resell telecommunications services it offers at retail does not exclude an ILEC's promotional offerings. The FCC clearly stated that any other conclusion would allow ILECs routinely to create promotions or nonstandard offerings just to avoid their resale obligation. The FCC was concerned that ILEC promotions could become *de facto* standard offerings that would not be made available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates. **The FCC's statement that the subject of its discussion on promotions referred to "price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.* temporary price discounts," does not define or limit the term "promotion," as used by the FCC in its Order, to a reduction from the retail price of a tariffed service**. Rather, the FCC was speaking to the temporary nature of a promotion. The term "promotion" in the context of a sale or advertising campaign usually refers to an opportunity or offer that is temporary or short-term, rather than one that is more permanent or long-lasting. The FCC distinguished a promotional price discount from a "standard offering" that would remain available for sale at retail and therefore available for resale at the wholesale rate. Contrasted with a promotional offering, a standard offering is one that is of a more permanent, long-lasting nature. **When the reference to a promotion as a price discount is read in context, the Commission believes it is clear that the FCC was not stating that a promotion exists only when there is a reduction or discount of the retail price of a telecommunications service**.

(Emphasis supplied)

\s\ William T. Culpepper, III

Commissioner William T. Culpepper, III

DOCKET NO. P-55, SUB 1744

Chairman Edward S. Finley, Jr., dissenting in part:

I dissent from Finding of Fact 24 and from the discussion within the Evidence and Conclusions in support thereof set forth on pages 11 through 14.

The issue of whether AT&T or its predecessor BellSouth should make payments under its promotional offerings such as 1FR + 2 Cash Back to CLPs such as dPi has a substantial history in North Carolina. In 2004 the Commission opened a generic docket (P-100, Sub 72) to address issues arising from promotional offerings such as 1FR + 2 Cash Back, give aways such as toasters and gifts such as Wal-Mart gift cards. BellSouth argued that its promotional offerings were not telecommunications services so that under the pertinent federal statutes, orders and rules (47 U.S.C. § 251(c)(4), the FCC's Local Competition Order[1] and 47 C.F.R. § 51.605 et seq.) the Commission lacked the authority to compel BellSouth to make these promotional offerings BellSouth made available to its retail customers to its wholesale customers like dPi. BellSouth argued that the promotional offerings were marketing costs, not reductions in BellSouth's tariffed rate and therefore not the type of promotional rates addressed by § 251(c)(4) and the FCC rules.

In its December 22, 2004, order in the generic docket the Commission determined that it had the authority to compel BellSouth to make the economic value of the promotional offerings available to wholesale resellers unless BellSouth could show that the offerings were reasonable and nondiscriminatory. In response to BellSouth's arguments that the Commission lacked this authority, the Commission reasoned that while the promotional offerings were not reductions in the retail tariff rates per se, they nevertheless had "economic value" that affected de facto the value of service the retail consumer received and therefore the Commission was authorized to require BellSouth to make the promotional offerings available to BellSouth's wholesale customers. Each promotion should be considered on a promotion by promotion basis.

One of the criteria the Commission indicated it would use to determine whether the promotional offering should be given to CLPs was the offering's duration. Relying on ¶¶ 448 and 449 of the Local Competition Order and 47 C.F.R. § 51.613(a)(2)(i), the Commission would look to see whether the promotional offering was or was not limited to 90 days in duration. In its discussion the Commission did not address the issue of whether in applying this durational criterion a distinction should be made between programs that affected the ILEC's tariffed rates each month for fewer or more than 90 days or programs that lasted for 90 days or more but had an economic value that only affected the benefits the retail customer received once, i.e., one time promotions.

The Commission recognized that the promotional offerings could have both pro and anti competitive consequences. Promotional offerings benefit retail consumers and

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[1] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15, 499 (1996).

in that sense are procompetitive.[2] However, if the promotional offering reduces the ILEC's retail rate for a significant period of time, the CLP reselling BellSouth's services receives insufficient margin between the wholesale rate (absent the value of the promotional offering) it pays BellSouth and the retail rate it must charge its subscribers to compete and becomes the victim of a price squeeze. See BellSouth Telecom, Inc. v. Sanford, 494 F.3d 439, 451 (4th Cir. 2007).

Significantly, the Commission addressed BellSouth's 1FR + 2 Cash Back promotion in detail:

> With respect to BellSouth's 1FR + 2 Cash Back promotion, based on the Commission's current knowledge, the Commission would be inclined to find that a restriction on resale is reasonable and nondiscriminatory. Resellers have not complained or asked the Commission to find the restriction unreasonable or harmful to competition.[3] Resellers have not been precluded from reselling the regulated service and are able to purchase the service at the tariffed rate minus the wholesale discount. The wholesale discount was, in part, set by deducting the ILEC marketing expense from the ILEC's cost for the regulated service – at least in part in recognition that resellers have their own marketing expenses. Resellers remain free to offer, at their own expense, promotional discounts to customers who purchase the tariffed service(s) from them. Although the Commission would ordinarily be concerned about a promotion in competition with the tariffed offering for a nine-month period (from June to March), BellSouth's promotion will be offered for a limited time, and the resellers' apparent disinterest or indifference would tend to persuade the Commission that, at least with respect to 1FR + 2 Cash Back, the anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the procompetitive effects.

Docket No. P-100, Sub 72(b), December 22, 2004, Order, p. 13.

BellSouth challenged the Commission's orders in Federal District Court. The District Court held that because the promotional offerings, such as gift cards, were not "telecommunications services" under 47 U.S.C. § 251(c)(4), they were not subject to BellSouth's resale duty. The Court also concluded that the promotional offerings were not "price discounts" under the FCC requirements that BellSouth pass on discounts and promotions to competing providers.

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[2] The FCC also recognized that short term promotions serve pro-competitive ends through enhanced marketing and sales based competition. Local Competition Order, ¶¶ 948, 949.

[3] Even now, only one reseller, dPi, complains. dPi's complaint arises from the efforts of dPi's billing agent, Lost Key, to collect promotions. dPi paid Lost Key substantial fees in return for its successful promotion collection efforts. Tr. pp. 68-70. Of course, the Commission's guidance would have been unnecessary if its anticipation was that no CLP would ever complain.

Upon appeal to the Fourth Circuit, that Court reversed the District Court. The Fourth Circuit held that the incentives offered for longer than 90 days affected the fees subscribers pay for the tariffed services and therefore change the actual retail rate.

The Fourth Circuit issued a majority and a concurring opinion. The majority opinion, like the Commission's, does not address the distinction between a promotional program offered for greater than 90 days providing any single consumer a one-time economic benefit and a promotional offering that affects the tariffed rate for each month for more than three months. In fact the majority describes the promotional offerings at issue differently at varying points in its decision. At one point the majority used the oxymoronic "one-time incentives for more than 90 days." Sanford, at 444, 450. "Accordingly, the North Carolina Commission concluded that telecommunications . . . must be resold to competing LECs 'at rates that give the resellers the benefit of the change in rates brought about by offering one-time incentives for more than 90 days.'" (emphasis in the original). Id. at 444, 450. Elsewhere, the majority describes the incentives in terms of recurring monthly rate reductions. "Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, . . . BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to compete with BellSouth's . . . retail fee. Now suppose BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100." Id. at 450-51. Of course, one-time offerings, in contrast to the majority's hypothetical, cannot reduce any consumer's bill more than in the first month. See, Id. at 457 (Chief Judge Williams concurring).

Chief Judge Williams, concurring in the result that in a given case the Commission had authority to order an ILEC to make the promotional offering at issue available to competing resellers, determined as had the District Court that one-time promotional offerings such as 1FR + 2 Cash Back were not tariffed rate discounts per se and therefore not "promotions" as referred to in ¶¶ 48 and 49 of the FCC's Local Competition Order and FCC Rule 47 C.F.R. § 51.613(a)(2)(i). Chief Judge Williams determined that for one-time promotional offerings the shorter than, longer than 90 day analysis did not apply. "... the FCC's Local Competition Order limits the scope of the term 'promotions' and therefore forecloses the interpretation adopted by the NCUC." Sanford at 455-56. "The FCC (in the Local Competition Order) was 'only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.'" Id. at 456. "Section 51.613(a)(2)(i) and the Local Competition Order . . . do not broadly encompass 'something of economic value' . . ., but instead contemplate only 'temporary price discounts' giving rise to 'special promotional rates.'" Id. Chief Judge Williams classified the offerings as inducements to subscription (Id. at 457), not promotions as addressed by the FCC. He concluded that restrictions on the gift offers had lesser anti-competitive effect than promotions. Id. at 456, 458.

> Consideration of the one-time gift offers addressed by the NCUC's orders reveals an important distinction between such offers and price discounts.

> A customer must continue to subscribe to an incumbent LEC's services to receive a discounted rate for these services. Customers receiving one-time gifts with no corresponding obligation to commit to a particular term of service, in contrast, may attempt to take advantage of the special offer by signing up for the gift benefit and cancelling the service soon or shortly thereafter. Moreover, the time period during which the incumbent LEC makes a one-time gift offer available does not affect the value of the gift. With a direct price discount (or a recurring gift benefit), the longer the discount is offered, the more savings a customer receives. With a one-time gift offer, in contrast, the customer receives the same gift regardless the duration of the offer, thus, whether the offer extends for more than 90 days would have a minimal impact on the anticompetitive effects of the special offer.

Id. at 457-58.

In spite of the Commission's statements in P-100, Sub 72 that 1FR + 2 Cash Back, even though the program lasts for more than 90 days, appears reasonable and procompetitive, the panel majority renders just the opposite conclusion in this case and gives as its first and primary justification the fact that the program lasts for more than 90 days. Also, in spite of the extensive discussion in Sanford as to whether duration of a program consisting of one-time promotional offerings has any effect on the ability of CLPs to compete, the majority does not address this issue. In defining the burden by which the ILEC's evidence is to be judged, the majority makes no distinction between one-time inducements to subscription and recurring promotions as addressed by the FCC. Significantly, no party in this docket raises this issue or discusses it at all.

I am persuaded by the uncontradicted analysis of Chief Judge Williams that the cash payments subscribers receive under AT&T's 1FR + 2 Cash Back program, while providing value to the subscriber, are not "promotions" under the Local Competition Order and FCC rules.[4] The subscriber receives a one-time benefit or sign up bonus that does not recur from month to month, and the duration of the program has minimal effect on competitors like dPi. I also agree with the Commission's conclusion in P-100, Sub 72 that the procompetitive features of 1FR + 2 Cash Back outweigh any anticompetitive ones, especially with respect to AT&T's competitive posture vis-à-vis dPi.

I likewise conclude that AT&T does not compete with dPi for the same retail customers. I disagree with the majority that the record before us supports the conclusion that the two carriers compete for any retail customers. AT&T's witnesses testified that they did not compete. Tr. p. 147. dPi witness O'Roark testified at length in his unscripted summary that dPi serves a niche market of "working poor" that conventional carriers like AT&T seek to avoid. Tr. pp. 58-59. ". . . we feel like we

[4] While Chief Judge Williams' analysis occurs in a concurrence, this is the only place in Sanford where the issue is directly addressed. Nowhere in the majority opinion is there any rebuttal to Chief Judge Williams' analysis and conclusions.

provide a valuable and needed service in our prepaid niche that's not served by BellSouth and it's not served by any . . . post paid provider." Tr. p. 59. dPi serves subscribers with poor credit or a history of nonpayment who are forced to pay in advance for monthly telephone service. AT&T, in contrast, provides service in advance, charges in arrears, requires deposits to assure payment, and rejects customers with a poor credit record. AT&T's basic retail price is $19.95, dPi's is $39.99, $20 higher. Tr. pp. 80-83, AT&T O'Roark cross Ex. 2. It defies logic to suggest that any customer would pay in advance $20 more per month for service from dPi if the customer were one AT&T or other conventional carriers sought or were willing to serve.

The anticompetitive harm the FCC and the federal courts identify in preventing restrictions on the resale of promotional rates is a price squeeze. dPi charges what the market it serves will bear. dPi's success in its market appears independent of AT&T's promotion practices and responsive instead on actions of other carriers. Tr. pp. 85-86, 109-10. Its market consists of subscribers conventional carriers actively seek to avoid. dPi's retail prices do not change in reaction to fluctuations in the retail rates AT&T charges or else they would not be $20 higher.

Significantly, dPi forcefully resisted AT&T's efforts to discover whether dPi passes the economic value of the promotions it receives from AT&T to dPi's customers. The inference to be drawn from this resistance is that dPi does not, thus further supporting the evidence that dPi's competitive position is not diminished by AT&T's restriction. If dPi does not provide the incentive to its subscribers, forcing AT&T to make the incentive payment to dPi results in the harm ILECs complain of where they "pay[ ] for those incentives twice -- once in paying for the incentives and again in reducing [their] retail rates for [their] competitor." The harm CLPs complain of is not present: "they would have to pay for the incentives twice in order to compete – once when they pay for the service at a wholesale rate that is not adjusted for the incentives and again when they pay for similar marketing incentives to offer their own customers." Sanford at 452. Therefore, it is unreasonable to assume that a restriction on AT&T's 1FR + 2 Cash Back offering (a one time payment) will impose a price squeeze on dPi, reducing dPi's ability to compete with AT&T.

AT&T has the burden of showing that restrictions on resale are not unreasonable and discriminatory. 47 C.F.R. § 51.613(b)[5] AT&T presented through direct and cross examination testimony, exhibits and post hearing arguments substantial evidence and persuasive argumentation to make this showing. AT&T's evidence and position support the Commission's 2004 conclusion that the one-time offerings are reasonable and procompetitive. dPi did not address the evidence, arguing instead against a nonexistent AT&T argument that the incentives were not telecommunications service. The Public

[5] Even if the 90 day durational threshold set forth in 47 C.F.R. § 52.613(a)(2)(i) applied, and a recurring month to month promotion exceeded 90 days, the ILEC may still demonstrate that the restriction on resale is reasonable and nondiscriminatory and avoid the requirement that the promotion go to the resellers. "(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose restrictions only if it proves to the state Commission that the restriction is reasonable and nondiscriminatory ." (emphasis added)

Staff mentioned the issue only briefly and for the most part avoided its merits.[6] AT&T's unaddressed and unrebutted evidence and arguments satisfy its burden.

One time incentives, not part of any ILEC tariff, qualify for pass through treatment to resellers under 47 U.S.C. § 251(c)(4), but only just. Both the Commission and the Fourth Circuit agree that they do not rise to the level of recurring per se tariffed rate discounts as contemplated and addressed by the FCC. Sanford at 457-58. Their "economic value" is of a lesser brand. By definition their potential anti-competitive harm to resellers is less than that of "promotions" as defined by the FCC. As only inducements to subscription, the duration of the program of which they are a part is not a negative factor in determining the reasonableness and discriminatoriness of ILEC restrictions on them. This case, unlike the 2004 generic docket, requires the Commission to articulate in greater specificity the justification of the legal standard it will apply in weighing ILEC evidence. In my view the majority has misapplied the standard from the FCC's orders and rules and has penalized the ILEC impermissibly through its emphasis on the duration of the 1FR + 2 Cash Back and similar programs. Disregarding the Commission's own guidance in Docket No. P-100, Sub 72 that these offerings are of lesser value than recurring tariffed offerings and are presumptively reasonable and nondiscriminatory, the majority has imposed a standard on AT&T that assumes just the opposite. dPi, serving a niche market, must do more to receive the diminished "economic value" of the one-time incentive than it has done in this case.

\s\ Edward S. Finley, Jr.
Chairman, Edward S. Finley, Jr.

[6] The Public Staff relies primarily on the post merger (2007) change in policy. What AT&T's policy was with respect to wholesale restrictions on offerings such as 1FR + 2 Cash Back before its merger with BellSouth or thereafter sheds no light on the merits of the reasonableness or competitive nature of the incentives at issue. This issue has been addressed extensively by this Commission, the United States District Court for the Western District of North Carolina and the Fourth Circuit. This precedent along with the 96 Act and FCC rules and orders are the proper reference, not AT&T's business decisions or policy decisions at other times and in other jurisdictions. Moreover, pre-merger AT&T's legal position before the FCC was that the one-time offerings were not telecommunications services or promotional discounts subject to resale obligations. Attachment C – AT&T's post hearing brief.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BUDGET PREPAY, INC. et al.,	§	
	§	
Plaintiffs	§	
	§	
v.	§	No. 3:09-CV-1494-P
	§	
AT&T INC. F/K/A SBC	§	
COMMUNICATIONS, INC. et al.,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is

1. Defendants'[1] Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) filed on August 24, 2009.
2. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) filed on August 24, 2009.
3. Defendants Motion to Dismiss for Failure to State a Claim Upon which Relief may be Granted pursuant to Fed. R. Civ. P. 12(b)(6) filed on August 24, 2009.

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[1] AT&T, Inc., f/k/a SBC Communications, Inc. and its subsidiaries, including AT&T Operations, Inc., f/ka SBC Operations, Inc., Illinois Bell Telephone Company d/b/a AT&T Illinois, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Indiana Bell Telephone Company d/b/a AT&T Indiana, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc., which is in turn wholly owned by AT&T Inc.; Michigan Bell Telephone Company d/b/a AT&T Michigan, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Wisconsin Bell Telephone Company d/b/a AT&T Wisconsin, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Southwestern Bell Telephone L.P. d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas; and AT&T Southeast Inc. f/k/a BellSouth Telecommunications, Inc. d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, A&T South Carolina, and AT&T Tennessee (collectively, "AT&T" or "Defendants").

4. Plaintiffs'[2] Application and Motion for a Preliminary Injunction filed on August 12, 2009.

5. Defendants' Motion to Increase Bond filed on October 16, 2009.

After careful consideration of the law and the parties arguments for the reasons stated below Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED; Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED; Defendants' Motion to Dismiss for Failure to State a Claim is DENIED; Plaintiffs' Motion for a Preliminary Injunction is GRANTED; Defendants' Motion to Increase Bond is GRANTED; Defendants' Motion to Dismiss Plaintiffs' anti-trust and fraud claims is GRANTED, but Plaintiffs are GRANTED leave to amend their complaint to re-plead these claims; and Defendants' Motion to Dismiss Plaintiffs state law claims is DENIED.

I. Background

Plaintiff are Competitive Local Exchange Carriers ("CLECs"). A CLEC is a small telephone company that buys telephone service from Incumbent Local Exchange Carriers ("ILECs") large telephone companies with existing telecommunications infrastructure. ILECs sell telephone service to CLECs for the retail rate minus a wholesale discount. CLECs then re-sell that telephone service to individual consumers

These type of arrangements are made possible by the Federal Telecommunications Act of 1996 (FTCA). Under the FTCA, ILECs are required to enter into an Interconnection Agreement ("ICA") which must then be approved by a state commission. In this case, there is an approved ICA between the parties in each individual state. Additionally, Plaintiffs fully acknowledge that prior to this dispute Defendants have always complied with the ICA, laws, and regulations.

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[2] Budget Prepay, Inc., Global Connection Inc. of America, Mextel Corporation LLC d/b/a Liftel, Nexus Communications, Inc., and Terracom, Inc. (collectively "Plaintiffs").

About July 1, 2009, AT&T alerted CLECs that as of September 1, 2009, they would no longer be eligible for promotional discounts such as the "Win-back Cash Promotion."[3] Instead CLECs would only be entitled to a small fraction of the $50 cash-back that retail customers are entitled to receive. The amount that CLECs are entitled to receive back varies from $3.73 - $5.54 depending on the location. AT&T has imposed this new method of calculating the amount CLECs can receive under the promotion in an attempt to make the resale rate reflect consumers' failure to properly submit their rebate coupon. AT&T's reasoning for placing this restriction on resale is that only 33.33% of customers actually take the steps necessary- i.e. submitting the coupon - to receive the $50 cash back.

Though 47 C.F.R. 51.613(b) requires ILECs to obtain state approval before imposing restrictions like this on resale, Defendants began implementing this resale restriction on September 1, 2009 without the approval of any state commissions. Plaintiffs have brought claims for Defendants' failure to obtain state approval. Plaintiffs also claim that the new methodology used by AT&T to calculate credits available to CLECs under the Win-back Cash Back promotion (hereinafter "new calculation method") violates the ICA, and the Act. Further, Plaintiffs have sought an injunction claiming that without one they will lose customers, market share, and good will as a result of not being able to compete with AT&T's offer. The end result - according to Plaintiffs - is that each and every one of them will go out of business within a short period.

II. Request for Declaratory Judgment

Plaintiffs first cause of action is for Declaratory Judgment pursuant to 28 U.S.C. § 2201. Specifically, Plaintiffs ask the Court to issue a judgment declaring that the new calculation

[3] The Win-back Cash Promotion seeks to attract new customers away from another carrier or wireless provider by offering no connection fees and $50 cash back.

method is a restriction on resale that is unreasonable and discriminatory in violation of 47 U.S.C. § 251(c)(4), 47 C.F.R. § 51.605(a), 47 C.F.R. § 51.613(b), and the ICA. (Pls.' Am. Compl. ¶ 44.) Defendants have sought to dismiss this claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), lack of personal jurisdiction pursuant to Rule 12(b)(2), and failure to state a claim pursuant to rule 12(b)(6).

A. Subject Matter Jurisdiction

Whether the Court has subject matter jurisdiction over Plaintiffs' claims is the first issue that the Court must address. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."). Rule 12(b)(1) provides that an action must be dismissed when the court does not possess subject matter jurisdiction over the plaintiff's claims. Fed. R. Civ. P. 12(b)(1). A court may decide a Rule 12(b)(1) motion to dismiss "on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990). A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Ramming*, 281 F.3d at 161.

Defendants argue that this Court lacks subject matter jurisdiction because Plaintiffs must bring their claims to a state commission before bringing those claims in district court. It appears that Defendants rely on two separate but overlapping arguments for why this claim must be heard by a state commission in the first instance. The first argument Defendants make is that

Plaintiffs have failed to exhaust administrative remedies. The Court can easily dispense with this argument because failure to exhaust administrative remedies is not required by the FTCA.

A case may only be dismissed for lack of subject matter jurisdiction based on a Plaintiffs failure to exhaust administrative remedies when exhaustion is required by statute. *Premiere Network Servs., Inc.* v. *SBC Commc 'ns, Inc.*, 440 F.3d 683, 687 n. 5 (5th Cir. 2006) ("'Whenever the Congress statutorily mandates that a claimant exhaust administrative remedies the exhaustion requirement is jurisdictional.'") (quoting *Taylor v. United States Treasury Dep't*, 127 F.3d 470, 475 (5th Cir. 1997)). "But where a statute does not textually require exhaustion, only the jurisprudential doctrine of exhaustion controls [subjecting a claim to dismissal under Rule 12(b)(6)], which is not jurisdictional in nature." *Id.* Nothing in the FTCA textually requires exhaustion. *Id.* Plaintiffs failure to exhaust administrative remedies therefore has no bearing on whether the Court has subject matter jurisdiction over Plaintiffs' FTCA claims.

Defendants' however, also argue that the Court lacks subject matter jurisdiction because section 252(e)(6) only gives district courts the power to review "determinations" made by a state commission. Section 252(e)(6) states:

> In any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). It is true that section 252(e)(6) explicitly gives district courts the power to review state commission determinations. But section 252(e)(6)'s grant of jurisdiction to review state commission determinations plays no role in determining whether the Court has subject matter jurisdiction in this case.

Section 252(e)(6) does not play a role in determining whether the Court has subject matter jurisdiction in this case because the Court has jurisdiction under 28 U.S.C. § 1331- or what is more commonly known as federal question jurisdiction. District courts have federal question jurisdiction "if 'the right of the [plaintiff] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 643 (2002) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). Though a statute may divest a district court of federal question jurisdiction, neither section 252(e)(6) nor any other part of the Act has divested district courts of this jurisdiction. *Verizon Md.*, 535 U.S. at 643-44 ("Nothing in 47 U.S.C. § 252(e)(6) purports to strip [federal question jurisdiction]. . . .Indeed, it does not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action."). The Supreme Court's holding in *Verizon Md.* has consistently been interpreted to mean that district courts need not look any further than 28 U.S.C. § 1331 to determine whether the court has subject matter jurisdiction over FTCA claims.[4]

Here, the Court has federal question jurisdiction because Plaintiffs' right to recover is based almost exclusively on the interpretation of federal law. Specifically, Plaintiff has asked this Court to declare that Defendants have violated 47 U.S.C. § 251(c)(4), 47 C.F.R. § 51.605(a), and 47 C.F.R. § 51.613(b). Accordingly, the Court finds it has federal question jurisdiction over

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[4] *Verizon Md. Inc. v. Global Naps, Inc.*, 377 F.3d 355, 362-63 (4th Cir. 2004), *on remand by* 535 U.S. 83 (2002) (addressing subject matter jurisdiction over FTCA claims the court only looked to whether the plaintiffs claims were substantially based on federal law); *Mich. Bell Tel. Co. v. MCIMetro Access Transm.Servs., Inc.*, 323 F.3d 348, 355 (6th Cir. 2003) ("[F]ederal courts have jurisdiction to review state commission orders for compliance with federal law, because provisions of the Act do not preclude jurisdiction under 28 U.S.C. § 1331."); *Core Commc 'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007) (to determine whether federal question jurisdiction over an ICA dispute existed the court examined the complaint to determine whether the claims were substantially based on federal law); *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008) (We conclude that . . . whatever finality or exhaustion requirement § 256(e)(6) might impose does not affect the subject matter jurisdiction of the district court in this case. Rather, the district court has general federal question jurisdiction under 28 U.S.C. § 1331 . . . ."); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 317 F3d 1270 (11th Cir.2003) (where plaintiffs challenged the state commissions interpretation of an ICA the district court had jurisdiction over the case pursuant to 28 U.S.C. § 1331).

Plaintiffs' cause of action for declaratory judgment and now turns to Defendants argument that the case should be dismissed pursuant to Rule 12(b)(2).

B. Personal Jurisdiction

The plaintiff bears the burden of establishing a district court's personal jurisdiction over a nonresident defendant. *See Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). The Court must accept as true all uncontroverted allegations in the complaint, and all factual conflicts presented by the parties must be resolved in favor of the plaintiff. *See id.* To exercise personal jurisdiction over a nonresident defendant, the Court must determine that due process standards are satisfied by engaging in a two-pronged analysis. First, the Court determines whether the defendant has purposefully established "minimum contacts" in the state. If so, the Court must then assess whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-75, 476 (1985); *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990).

Sufficient minimum contacts can be established through a showing of the existence of general or specific jurisdiction. *See Freudensprung v. Offshore Technical Serv. Inc.*, 379 F.3d 327, 343 (5th Cir. 2003). "A court may exercise specific jurisdiction over a nonresident defendant if the lawsuit arises from or relates to the defendant's contact with the forum state." *Icee Distribs. Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 591 (5th Cir. 2003). Specific jurisdiction exists where a defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475. The "purposeful availment" necessary for specific jurisdiction protects a defendant from being brought into a jurisdiction based solely on "random," "fortuitous," or "attenuated" contacts. *Id.* A single act may form a sufficient basis for personal jurisdiction if the claim arises from that single act, and the defendant can reasonably foresee being brought into court in the forum state. *See Icee Distribs.*, 325 F.3d at 591.

Defendants argue that Plaintiff has failed to show that the Non-Resident ILEC Defendants (hereinafter "Non-Resident Defendants") have sufficient minimum contacts with Texas to establish personal jurisdiction. But Defendants arguments have all but ignored the pervasive contacts relating to the ICAs and the new calculation method. Instead, the Non-Resident Defendants would like the Court to look at all of the contacts the Non-Resident Defendants do not have with Texas. But in making this argument Defendants have essentially asked this Court to "pay no attention to the man behind the curtain." AT&T is the proverbial man behind the ICAs- the proverbial curtain. More importantly, AT&T is behind the new calculation method which is at the center of this dispute. Defendants do not deny these facts which in themselves assure the Court that personal jurisdiction exists over the Non-Resident Defendants. The Court finds that by completely relying on AT&T for the execution of ICAs, as well as support and advice relating to ICAs that the Non-Resident Defendants have purposefully availed themselves of Texas law. Both through the Acts of their agent, AT&T, and through their own actions.

C. Rule 12(b)(6) - Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint when a defendant shows that the plaintiff has failed to state a claim for which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Iqbal v. Ashcroft*, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual matter contained in the complaint must allege actual facts not legal conclusions masquerading as facts. *Id.* at 1949-50 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Twombly*, 550 U.S. at 555). Additionally, the factual allegations of the complaint must state a plausible claim for relief. *Id.* A complaint states a "plausible claim for relief" when the factual allegations contained therein infer actual misconduct on the part of the defendant, not a "mere possibility of misconduct." *Id.*; *see also Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986). Determining whether a complaint states a plausible claim for relief necessarily requires looking to the elements a plaintiff must plead to state a claim implicated by the complaint. *Iqbal*, 129 S. Ct. at 1947 (citing *Twombly*, 550 U.S. at 553-557).

Plaintiffs claim that they are entitled to a declaration that Defendants breached the ICA and that Defendants have violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605, and 47 C.F.R. 51.613(b). Defendants argue that Plaintiffs have failed to state a claim for relief based on the jurisprudential doctrine of exhaustion. As discussed above, where exhaustion is not required by statute failure to exhaust administrative remedies may subject a claim to dismissal under Rule 12(b)(6). *Premiere Network Servs., Inc.*, 440 F.3d at 687 n. 5 (citing *Taylor*, 127 F.3d at 475). When a plaintiff is required to exhaust administrative remedies under the jurisprudential exhaustion doctrine the plaintiff is not entitled to judicial relief. *Taylor*, 127 F.3d at 476 (" '[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' ") (quoting *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). Accordingly, dismissal pursuant to Rule 12(b)(6) is appropriate when the jurisprudential exhaustion doctrine is applied.

Sections 251 and 252 of the Act provide many requirements and procedures for ICAs. Generally, section 251 provides the obligations of local exchange carriers under the Act. *See generally* 47 U.S.C. § 251. In conjunction with the obligations of section 251, Section 252 provides the procedures for negotiation, arbitration, and approval of ICAs. *See generally* 47 U.S.C. § 252. The procedures of section 252 relate to the initial formation of an ICA. *See id.* But nothing in sections 251 or 252 of the Act statutorily grants state commissions the authority to resolve disputes between parties after the parties have entered into an ICA. *Core Commc'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007) ("Beyond [the state commissions role in approving an ICA] there is no real indication of what role the state commissions are to play, and the Act is simply silent as to the procedure for post-formation disputes."); *see also W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1184-99 (9th Cir. 2008) (discussing the absence of procedural requirements once an ICA has been formed). Noting the absence of any post-ICA formation dispute resolution procedures the Fifth Circuit, along with the other circuit courts, has interpreted the Act as whole to grant state commissions jurisdiction "to decide intermediation and enforcement disputes that arise after the approval procedures are complete." *Sw. Bell Tel. Co.* v. *Pub. Utils. Comm'n*, 208 F.3d 475, 476 (5th Cir. 2000) (hereinafter "*SWBT*"); *see also Illinois Bell Tel. Co. v. Global NAPS Illinois, Inc.*, 551 F.3d 587, 593-94 (7th 2008) ("[T]he Telecommunications Act does not expressly authorize a state commission, after it approves an interconnection agreement, to resolve disputes arising under it. . . . But such authority is a sensible corollary to the allocation of state and federal responsibilities made by the Act.").

SWBT did not, however, address whether the state commission had exclusive jurisdiction over disputes between parties that are bound by a previously formed ICA. Rather, *SWBT* addressed the narrow question of whether the state commission may intermediate and resolve disputes between parties to an already existing ICA. Defendants argue that because *SWBT* holds state commissions have authority to intermediate and resolve disputes between parties to an already existing ICA in the first instance that state commissions have exclusive jurisdiction over such disputes. Further, Defendants argue that the FCC has spoken directly to this issue.

Defendants rely on *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 (2000) for this proposition. The relevant part of *In re Starpower* states:

> [A]t least two federal courts [*SWBT* and *Ill. Bell Tele. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566 (7th Cir. 1999)] of appeal have held that inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements. These court opinions implicitly recognize that, due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements. Thus, we conclude that a state commission's failure to "act to carry out its responsibility" under section 252 *can in some circumstances* include the failure to interpret and enforce existing interconnection agreements.

In re Starpower, 15 F.C.C.R. at 11279-80 (emphasis added). Like Defendants, the Third Circuit has taken this part of *In re Starpower* to stand for the proposition that state commissions have exclusive jurisdiction over disputes that arise between parties to an already existing ICA.

In *Core Commc 'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007), the Court of Appeals for the Third Circuit upheld a district court's dismissal of the plaintiff's claims for breach of an ICA and violations of the FTCA because the plaintiff had not taken the claims to the state commission in the first instance. On appeal, the court interpreted *In re Starpower* to mean that state commissions have exclusive jurisdiction over disputes between parties to an existing ICA. *Core Commc 'ns*, 493 F.3d at 344 ("Pursuant to FCC guidance, we hold that interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission."). In reaching this conclusion, the court noted that *In re Starpower* could be read to mean more than one thing. *Id.* at 342. Nonetheless, the court determined that FCC's *In re Starpower* decision, as interpreted by the court, was entitled to *Chevron* deference.

This Court declines to read *In re Starpower* in this manner. *In re Starpower* does not give any indication that state commissions are the exclusive forum for resolving disputes over already existing ICAs. *See generally, In re Starpower, 15 F.C.C.R. at 11278-79.* As the *Core Communications* court recognized, *In re Starpower* can be read to mean more than one thing. More simply stated: *In re Starpower* is ambiguous. And an ambiguous agency decision is not the type of decision that is meant to fill gaps in a statute under *Cheveron.* Second, *In re Starpower* explicitly indicates that there are circumstances in which a state commission would not be shirking its responsibilities by failing to interpret and enforce existing ICAs. Based on this statement, the Court finds that if *In re Starpower* unambiguously stands for anything, it is that there are circumstances in which parties to an existing ICA need not bring their claims to a state commission in the first instance.

The facts and claims in this case provide exactly the type of circumstances in which a plaintiff should not be compelled to take their claims to a state commission in the first instance. Here, the Court is not being asked to interpret the ICA. Rather, the Court is being asked to interpret federal law. The Court recognizes that without the ICA Plaintiffs would not have standing to challenge Defendants actions. But the fact that the ICA gives Plaintiffs standing does not in itself mean that the Court must interpret the ICA to grant relief to Plaintiffs. Nor does the ability of an ICA to negate the requirements and responsibilities imposed by the Act mean that the Court must 'interpret' the ICA to grant relief to Plaintiffs.[5] Where an ICA adopts federal law

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[5] *See* 47 U.S.C. § 252(a)(1) ("An incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.") 47 U.S.C. § 252(a)(1); *see also* 47 C.F.R. § 51.3 ("To the extent provided in

as controlling the parties contractual resale obligations for resale the Court need not interpret the ICA to determine whether the plaintiff is entitled to relief.[6] Rather, the Court must interpret federal law to determine if the plaintiff is entitled to relief.

Here, the ICA requires resale restrictions to be "consistent with regulations prescribed by the Commission under Section 251(c)(4) of the Act." (Defs' App. 57.) Additionally, the ICA provides that "[a]ll federal rules and regulations . . . also apply." (Id.) When a court is being asked to interpret federal law the policy of allowing the state commission to interpret the agreement it approved because it knows the interpretation it intended when approving the agreement does not apply.

Conversely, it would be bad policy to require Plaintiffs in this specific case to exhaust administrative remedies because it would allow Defendants to shift to Plaintiffs the duties imposed upon ILECs by the Act. The Act imposes on ILECs a duty to obtain state commission approval before placing restrictions on resale. 47 C.F.R. § 51.613(b). When an ILEC imposes a restriction on resale that is not permitted under 47 C.F.R. § 51.613(a), subsection (b) requires an ILEC "to prove to the state commission that the restriction is reasonable and nondiscriminatory" before imposing the restriction. Despite the regulation placing the duty of going to the state commission on ILECs, Defendants have asked the Court to require the Plaintiffs, CLECs, to go to the state commission before bringing a claim in federal court. Were the Court to oblige Defendants request it would allow them to contravene the requirements and

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section 252(e)(2)(A) of the Act, a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.").

[6] Though one could argue that merely determining federal law controls resale restrictions constitutes "interpreting' the ICA, this is not the type of interpretation that courts finding that exhaustion is required have been called upon to interpret. *See e.g. Express Tel. Servs., Inc.* v. *Sw. Bell Tel. Co.*, No. 3:02-CV-1082-M, 2002 U.S. Dist. Lexis 19645 (N.D. Tex. Oct. 16,2002).

intent of the Act. The facts of this case demonstrate how the requirements and intent of the Act would be contravened by forcing Plaintiffs to go to the state commission first when Plaintiffs' claims are predicated on Defendants failure to go to the state commission.

As previously discussed, Congress passed the FTCA with the intent of "opening previously monopolistic local telephone markets to competition." *SWBT*, 208 F.3d at 477. Congress entrusted the FCC with the duty of promulgating regulations that would ensure the Act's purpose would be met, including regulations that prevented ILECs from placing restrictions on resale that are unreasonable or discriminatory. 47 U.S.C. § 251(c)(4)(B). To that end, 47 C.F.R. § 51.613(b) requires ILECs to prove that restrictions on resale are reasonable and nondiscriminatory before imposing such restrictions. Requiring ILECs to obtain state commission approval prior to placing restrictions on resale demonstrates a recognition that resale restrictions can have a devastating effect on a CLEC's ability to remain competitive. More importantly, it clearly places the duty to gain state commission approval on ILECs – not CLECs.

Defendants did not gain state commission approval before implementing the new calculation methodology. Instead, Defendants notified Plaintiffs that the new methodology would go into effect on September 1, 2009. Plaintiffs, fearful that this restriction on resale would devastate their companies, sought refuge in federal court. Defendants ignored their own duty to gain state commission approval before placing restrictions on resale. Then after being hailed into court Defendants vehemently argue that Plaintiffs should be required to go to seventeen different state commissions before bringing any claims to one federal court. Where the jurisprudential exhaustion doctrine is policy motivated, the Court cannot allow Defendants to invoke the doctrine in this instance.

Finding that the jurisprudential doctrine of exhaustion is inapplicable to this case, the Court turns to the factual allegations of Plaintiffs' Complaint to determine if they have stated a claim for relief.

Plaintiffs have alleged factual allegations that, taken as true, infer actual misconduct on the part of Defendants. For example, Plaintiffs have alleged that they were notified by Defendants of a new method that would be used to calculate the rates at which telecommunication services would be resold to Plaintiffs under certain promotional plans. This new method provided retail customers who switched to Defendants telephone company from a different telephone company with fifty dollars cash-back and a waiver of all nonrecurring charges associated with adding service. Plaintiffs that resold service to customers switching companies however, would not be entitled to offer the same fifty dollars cash-back or a waiver of nonrecurring charges to its customers. Though the complaint provides more factual allegations, these allegations alone indicate that Defendants may have violated the requirements of 47 U.S.C. § 251(c)(4) and 47 C.F.R. § 51.605. Moreover, as previously discussed, Plaintiffs allege that Defendants failed to obtain state commission approval before implementing the new calculation method in violation of 47 C.F.R. § 51.613(b).

Accordingly, the Court finds that Plaintiffs have stated a claim for relief and Defendants Rule 12(b)(6) motion is denied. Defendants however, have argued that another jurisprudential doctrine, the primary jurisdiction doctrine, warrants dismissal of Plaintiffs claims. Because the primary jurisdiction doctrine would only warrant staying these proceedings the Court addresses this argument separately from Defendants' Rule 12(b)(6) motion.

D. Primary Jurisdiction

"[P]rimary jurisdiction 'comes into play whenever enforcement of the claim requires the resolution of issues [which, under a regulatory scheme, have been placed] within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Penny v. Sw. Bell Tele. Co.*, 906 F.2d 183, 187 (5th Cir. 1990) (quoting *Sw. Bell Tel. v. P.U.C.*, 735 S.W. 2d 663, 669 (Tex. App. – Austin 1987, no writ); *see also ASAP Paging, Inc. v. CenturyTel of San Marcos Inc., 137 Fed. Appx. 694, 697 (5th Cir. 2005)*("The doctrine of primary jurisdiction applies . . . when a court having jurisdiction wishes to defer to an agency's superior expertise.") (citing *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001)). Since '[n]o fixed formula exists for applying the doctrine of primary jurisdiction,' each case must be examined individually to determine whether it would be aided by the doctrine's application." *Penny*, 906 F.2d at 187 (quoting *Sw. Bell v. P.U.C.*, 735 S.W. 2d at 670).

Courts faced with the task of determining whether primary jurisdiction applies when a dispute arises between parties to an already existing ICA have noted that the statutory scheme complicates the issue. The statutory scheme complicates the issue because the appropriate agency to which the court would refer the issue is not one agency entrusted with carrying out this regulatory scheme, but multiple state commissions. *See W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1200 (9th Cir. 2008) ("The doctrine of primary jurisdiction . . . is . . . not a perfect fit for the statute before us. For one thing, the agency with 'regulatory authority' in this context, in the sense of having the authority to promulgate regulations, is the F.C.C., not the state commissions.") Additionally, the statutory scheme does not provide a procedural mechanism for referring issues to a state commission. *See Illinois Bell Tel. Co. v. Global NAPS Illinois, Inc.*, 551 F.3d 587 (7th 2008) ("The Act [does not] expressly authorize a federal court to refer such a dispute, if the dispute arises in a suit in federal court, to the state commission . . .."). Despite these complications, courts have routinely determined that issues may be referred to state commissions when appropriate. *Id.* (finding that a federal court's authority to refer issues to the state commission "is a sensible corollary to the allocation of state and federal responsibilities"); *see also Penny*, 906 F.2d at 187-88 (referral to state commission was procedurally proper where the state commission and district court had concurrent jurisdiction to determine whether rates where discriminatory under the FTCA).

Plaintiffs' FTCA claims bring forth two distinct issues. First, whether Defendants were required to obtain state commission approval before implementing the new calculation method. This issue is one that does not require agency expertise and therefore the Court need not refer it to the state commissions.

The second issue is whether the resale restriction is reasonable and nondiscriminatory. Determining whether a resale restriction is reasonable and nondiscriminatory is an issue routinely addressed by state commissions. Therefore, this issue is one that is appropriate for referral to the state commissions. The regulatory scheme bolsters this conclusion as it requires Defendants to prove to the state commission that a restriction on resale is reasonable and nondiscriminatory. Moreover, Defendants have indicated that they are now seeking approval of the new calculation method from state commissions. The Court can find no reason to thwart Defendants attempts to obtain the approval that should have been obtained before implementing the plan. Accordingly, the Court finds that it is appropriate to stay Plaintiffs' claims pending a resolution of this issue by each of the appropriate state commissions.

E. Preliminary Injunction

A preliminary injunction may only be granted if a plaintiff establishes four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs any damage that the injunction might cause defendants, and (4) that the injunction will not disserve the public interest. *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999). A preliminary injunction is an extraordinary remedy which should only be granted when the plaintiff has clearly carried his burden of proof as to all four elements, *see Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1462 (5th Cir. 1990), and the decision is to be treated as the exception rather than the rule. *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

Here, Plaintiffs have clearly carried the burden of establishing all four elements making the entry of a preliminary injunction appropriate. Plaintiffs have established, and Defendants have admitted in open court, that state commission approval was not obtained prior to Defendants implementing the new calculation method which is a restriction on resale. As previously discussed, 47 C.F.R. § 51.613(b) requires ILECs to obtain state commission approval before implementing a resale restriction. Plaintiffs therefore, have established a strong likelihood of success on their claim that Defendants violated 47 C.F.R. § 51.613(b).[7]

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[7] Communications by Defendants to the Court further evidence that Plaintiffs' have a strong likelihood of success on their claim that Defendants violated 47 C.F.R. § 51.613(b). On the On October 5, 2009, Defendants informed the Court and Plaintiffs that they had received a letter from the Louisiana Public Service Commission concerning the new calculation method. The letter – a copy of which Defendants provided to the Court – indicates the Louisiana Public Service Commission's decision to suspend the effectiveness of the new calculation method. This decision was based on an initial finding that the new calculation method imposes a restriction on resale and AT&T's failure to take the proper steps to have the Commission find that the new calculation method is reasonable and non-discriminatory. Though the letter does not specifically state that the new calculation method is unreasonable and discriminatory, the Louisiana Public Service Commission's decision indicates a strong likelihood of such a finding.

Plaintiffs have also established that if Defendants were permitted to implement the new calculation method that they would suffer irreparable injury if the injunction is denied. The new calculation method would significantly impair Plaintiffs ability to compete with Defendants for new customers. There would be no ability to compete because Defendants would be able to entice new customers by offering $50 cash-back and a waiver of connection fees. Meanwhile, Plaintiffs would not be able to make the same offer because they would be purchasing service from AT&T at the normal retail price without $50 cash-back or waiver of connection fees.[8] In the absence of an injunction, Plaintiffs would be forced to pay more for service than they would have to pay without the resale restriction that has not been approved by any of the state commissions. Plaintiffs would have to make these payments while simultaneously losing money because of their inability to compete with Defendants. These circumstances would devastate Plaintiffs' business. In today's economy, this type of devastation could ultimately force Plaintiffs' out of business or at the least push them to the brink of being out of business- something from which they would be unlikely to recover.

Plaintiffs have also demonstrated the threatened injury to them outweighs any damage that the injunction might cause Defendants. It is of considerable importance to comparing the possible injuries that it is likely that if Plaintiffs were forced to pay millions of dollars at this time that it would be into an escrow account. Accordingly, Defendants would not actually be deprived of any income during the period in which this case is pending because the money would remain in an escrow account. Conversely, Plaintiffs would be forced to pay money that they do

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[8] At most, Plaintiffs could offer new customers the $3-$7 cash-back that Defendants are willing to give Plaintiffs under the new calculation method. As a result, the Plaintiffs sales pitch would be something to the effect of "No, we can't offer you $50 cash-back like AT&T. But AT&T has assured us that there is only a 33% chance that you will take the necessary steps to receive that $50 cash-back. So why not sign-up with us and we will knock $3.47 off your initial month of service." This certainly, is not the type of sales pitch that would allow Plaintiffs to remain competitive with Defendants.

not have into an escrow thereby depriving of them of that money immediately. Therefore, the Court finds that the irreparable injury that would be caused to Plaintiffs in the absence of an injunction would outweigh any damage that the injunction might cause Defendants.

Finally, Plaintiffs have demonstrated that the injunction will not disserve the public interest. An injunction in this case will promote competitiveness by ensuring that the statutes and regulations of the FTCA are met. Enjoining Defendants from implementing the new method of calculation without obtaining state commission approval will serve the public interest by providing enforcement of the regulations promulgated by the FCC. Were this Court to simply refer this case to the many appropriate state commissions without issuing a preliminary injunction then Defendants could go back to implementing the new calculation method prior to obtain approval from the state commission. In so doing, Defendants may be able to force Plaintiffs completely out of business before ever obtaining that approval. Forcing Plaintiffs out of business would leave Defendants as one of the few providers of telephone service in the relevant market. With far fewer telephone providers there will be far less competition. During these hard economic times this Country needs more competition not less competition. Accordingly, the Court finds that *not* issuing an injunction would disserve the public interest.

F. Bond

Though Defendants' Motion to Increase Bond was made in reference to the bond ordered by the Court when issuing the T.R.O., the motion can also be read as requesting that bond be increased upon the entry of a preliminary injunction. Accordingly, the Court addresses Defendants' motion now.

Rule 65(c) states:

> The Court may issue a preliminary injunction . . . only if the movant gives security in an amount *that the court considers proper* to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c) (emphasis added). The italicized language indicates that determining the proper amount of bond is within the discretion of the district court. *Id.*; *see also Petro Franchise Sys., LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, 801 (W.D. Tex. 2009) ("[d]istrict courts have discretion over the amount of the security"). As discussed above, the Court finds that it is substantially likely that Plaintiff will succeed in demonstrating that Defendants failed to obtain state approval prior to implementing the new calculation method. In large part, this conclusion is based on Defendants own admissions in open court. Accordingly, the Court finds that it is highly unlikely that Defendants are being wrongfully restrained from implementing the new method of calculation prior to obtaining approval from the appropriate state commissions. The unlikelihood that Defendants are being wrongfully restrained, coupled with the fact that Plaintiffs otherwise valid claim would be obviated by being forced to post an inordinately large bond amount, leads this Court to conclude that the $1,000,000 bond Defendants request would be improper.

Nonetheless, the Court does find that the amount of the bond posted should be increased to more properly reflect the guidance given by Rule 65(c). Using this guidance, the Court herby increases the bond from $5,000 to $50,000. Accordingly, Defendants' Motion to Increase Bond is granted.

III. Plaintiffs' Anti-Trust and Fraud Claims

Defendants argue that Plaintiffs' anti-trust and fraud claims should be dismissed pursuant to Rule 12(b)(6). Plaintiffs have essentially admitted that the Amended Complaint does not state a claim for relief for anti-trust violations or fraud. Plaintiffs have requested leave to amend to correct these errors. Though the Court believes that Defendants may be correct in their assertion that leave to amend would be futile in light of *Verizon Commc'ns Inc. v. Trinko,* 540 U.S. 398, 407 (2004), the Court is not prepared to reject Plaintiffs' contention that it can plead facts that will state an anti-trust claim for relief. Accordingly, the Court believes that Plaintiffs should be granted leave to amend the complaint. In so doing, the Court directs Plaintiffs to be mindful of *Trinko* when pleading their anti-trust claims and to be mindful of the heightened pleading standards of Fed. R. Civ. P. 9 when pleading their fraud claims.

IV. Plaintiffs State Law Claims

Defendants only argument for dismissal of Plaintiffs' state law claims is that if this Court dismisses Plaintiffs' federal claims it will not have jurisdiction over Plaintiffs' state law claims. The Court however, has not dismissed Plaintiffs' federal claims. Supplemental jurisdiction over Plaintiffs' state law claims is therefore proper.

V. Conclusion

For the above stated reasons, the Court Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED; Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED; Defendants' Motion to Dismiss for Failure to State a Claim is DENIED; Plaintiffs' Motion for a Preliminary Injunction is GRANTED; Defendants' Motion to Increase Bond is GRANTED; Defendants' Motion to Dismiss Plaintiffs' anti-trust and fraud claims is GRANTED, but Plaintiffs are GRANTED leave to amend their complaint to re-plead these claims; and Defendants' Motion to Dismiss Plaintiffs state law claims is DENIED.

The Court ORDERS Defendants to desist and restrain from:

1. Discriminating against Plaintiffs as resellers by proceeding to use the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048)[9] to calculate credits available to Competitive Local Exchange Carriers (CLECs) under the Win-back Cash Back promotion.
2. Implementing or further implementing any plans to impose restrictions on the resale of the cash back or other promotional offers lasting longer than 90 days to Plaintiffs where such plans calculate the credits available to CLECs using the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048) without first obtain approval from the appropriate state commission.
3. Pursuing collection activities against Plaintiffs in connection with amounts related to the dispute over the calculation of credits using the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048). This includes a prohibition against Defendants from demanding payment of charges in excess of the promotional rate reduced by the wholesale discount, withholding preferential pricing discounts to Plaintiffs, requiring additional security or amounts placed in escrow, or suspending or disconnecting service to Plaintiffs, for amounts connected to this dispute.

IT IS FURTHER ORDERED that:

4. Plaintiffs post bond in the amount of $50,000.
5. Defendants submit their plans to implement the new calculation method to the appropriate state commissions.

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[9] (Pls.' Am. Compl. Ex. 3)

These proceedings will be stayed until each state commission has reached a decision determining whether Defendants' new calculation method is reasonable and nondiscriminatory. Plaintiffs shall file their Amended Complaint, if any, once the stay has been lifted. Though the proceedings will be stayed, the preliminary injunction will continue in effect until the stay has been lifted or until it is otherwise altered by a written and signed order of the Court.[10]

IT IS SO ORDERED.

SIGNED this 30th day of November, 2009.

Jorge A. Solis

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

[10] The Court will consider appropriate alterations of the preliminary injunction should Defendants obtain approval to implement the new calculation method from a state commission prior to the stay being lifted.