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September 28, 2012

RECEIVED

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PUBLIC SERVICE  
COMMISSION

**VIA OVERNIGHT MAIL**

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

Re: BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T  
Kentucky v. Lifeconnex Telecom, LLC f/k/a Swiftel LLC  
PSC 2010-00026

Dear Mr. Derouen:

Enclosed for filing in the above-captioned case is AT&T Kentucky's Motion for Order Finding Lifeconnex Liable for Unpaid Charges, Dismissing Counterclaims and Closing Docket.

Exhibit A to the Affidavit of David J. Egan attached as Exhibit 8 of AT&T's Motion contains confidential commercial information. AT&T files herewith its Motion for Confidentiality, pursuant to 807 KAR 5:001, Section 7, seeking protection of that material. One proprietary copy and 10 edited copies are provided to the Commission. A proprietary copy is provided to Justin Nymark and Tom Biddix with Lifeconnex.

In light of the withdrawal of counsel for Lifeconnex, we are serving the Motion on the individuals and addresses listed in the attached service list. These names and addresses were obtained from correspondence of Tom Biddix and the Commission, from the Commission's industry information website, and from the withdrawal notices of counsel for Lifeconnex. While not required to do so, we are serving the Motion on Lifeconnex and its principal, Tom Biddix, by both regular and certified mail at the addresses listed.

We are filing a similar motion in Case No. 2010-00023, 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. As information, Angles shares common ownership with Lifeconnex.

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

Sincerely,

  
Mary K. Keyer

Enclosures

cc: Attached Service List

1047184

EDITED

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of: )  
)  
BELLSOUTH TELECOMMUNICATIONS, INC. )  
d/b/a AT&T SOUTHEAST )  
d/b/a AT&T KENTUCKY )  
Complainant )  
v. ) CASE NO. 2010-00026  
)  
LIFECONNEX TELECOM, LLC )  
f/k/a SWIFTEL LLC )  
Defendant )

**MOTION FOR CONFIDENTIALITY OF BELLSOUTH  
TELECOMMUNICATIONS, LLC D/B/A AT&T SOUTHEAST  
D/B/A AT&T KENTUCKY**

Petitioner BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T Kentucky ("AT&T Kentucky"), by counsel, hereby moves the Public Service Commission of the Commonwealth of Kentucky (the "Commission"), pursuant to KRS 61.878 and 807 KAR 5:001, § 7, to classify as confidential Exhibit A (copied on yellow paper) to the Affidavit of David J. Egan attached as Exhibit 8 to AT&T Kentucky's Motion for Order Finding Lifeconnex Liable for Unpaid Charges, Dismissing Counterclaims and Closing Docket filed herewith. The material that is copied on yellow paper contains information specific to Lifeconnex in the conduct of its business with AT&T Kentucky.

The Kentucky Open Records Act exempts certain information from the public disclosure requirements of the Act, including certain commercial information. KRS 61.787(1)(c)1. To qualify for the commercial information exemption and, therefore, keep

the information confidential, a party must establish that disclosure of the commercial information would permit an unfair advantage to competitors and the parties seeking confidentiality if openly discussed. KRS 61.878(1)(c)1; 807 KAR 5:001 § 7. The Commission has taken the position that the statute and rules require the party to demonstrate actual competition and the likelihood of competitive injury if the information is disclosed.

The information for which AT&T Kentucky seeks confidentiality contains information specific to Lifeconnex, a competitive local exchange carrier and a customer of AT&T Kentucky. Specifically, the information that is copied on yellow paper is information relative to the amounts billed by AT&T Kentucky, billing adjustments provided by AT&T Kentucky and payments made by Lifeconnex. This information is specific to Lifeconnex in the conduct of its business with AT&T Kentucky. Public disclosure of the identified information could competitively advantage competitors of Lifeconnex.

The Commission should also grant confidential treatment to the information for the following reasons:


- (1) The information for which AT&T Kentucky is requesting confidential treatment is not known outside of AT&T Kentucky;
- (2) The information is not disseminated within AT&T Kentucky and is known only by those of AT&T Kentucky's employees who have a legitimate business need to know and act upon the information;

(3) AT&T Kentucky seeks to preserve the confidentiality of this information through appropriate means, including the maintenance of appropriate security at its offices; and

(4) By granting AT&T Kentucky's petition, there would be no damage to any public interest.

For the reasons stated herein, the Commission should grant AT&T Kentucky's request for confidential treatment of the identified information.

Respectfully submitted,

  
\_\_\_\_\_  
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COUNSEL FOR BELL SOUTH  
TELECOMMUNICATIONS, LLC  
D/B/A AT&T SOUTHEAST  
D/B/A AT&T KENTUCKY

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.	)	
d/b/a AT&T SOUTHEAST	)	
d/b/a AT&T KENTUCKY	)	
Complainant	)	
v.	)	CASE NO. 2010-00026
	)	
LIFECONNEX TELECOM, LLC	)	
f/k/a SWIFTEL LLC	)	
Defendant	)	

**AT&T KENTUCKY’S MOTION FOR ORDER FINDING LIFECONNEX LIABLE FOR UNPAID CHARGES, DISMISSING COUNTERCLAIMS AND CLOSING DOCKET**

This case arises out of unpaid charges for telecommunication services provided by BellSouth Telecommunications, LLC d/b/a AT&T Kentucky (“AT&T Kentucky”) to BLC Management, LLC d/b/a Lifeconnex Communication Solutions (“Lifeconnex”) for resale pursuant to the terms of an interconnection agreement that was filed with and approved by the Kentucky Public Service Commission (the “Commission”) by letter dated September 9, 2008 (the “ICA”). More specifically, Lifeconnex manufactured over one million dollars of specious promotional credit requests and improperly offset the value of those requests against monies otherwise due to AT&T Kentucky for the services Lifeconnex ordered from AT&T Kentucky and resold to its own customers.

As discussed below, Lifeconnex’ methods of calculating various credits have been soundly rejected by this Commission and in other forums; and Lifeconnex has elected to cease operations and apparently abandon the prosecution of its baseless counterclaims here, rather than pay amounts due to AT&T Kentucky. AT&T Kentucky,

therefore, seeks an Order finding that Lifeconnex owes \$1,926,923 under the Parties' ICA, dismissing with prejudice the counterclaims asserted by Lifeconnex, and closing this docket.

### **A. Background and Procedural History**

On January 20, 2010, AT&T Kentucky commenced this case by filing a Formal Complaint to resolve all billing disputes between AT&T Kentucky and Lifeconnex under the ICA, and determine the amount Lifeconnex owes AT&T Kentucky under the ICA. The ICA provides that disputes such as these are to be resolved in the first instance by the Commission. ICA, General Terms and Conditions at 10, § 8. When the Complaint in this action was filed by AT&T Kentucky, the past-due and unpaid balance was more than \$400,000 for services provided in Kentucky alone. That past-due and unpaid balance has now grown to nearly \$2 million in Kentucky alone.<sup>1</sup>

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

First, Lifeconnex contended that it was entitled to the full retail amount of any "cash back" promotion for which it qualified, without discounting the retail amount by the Commission-approved resale discount. See Lifeconnex Answer at 3-5.

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<sup>1</sup> At the time AT&T Kentucky's Complaint was filed, Lifeconnex had a past-due balance of over \$6.2 million across the nine southeastern states that comprise the AT&T Southeast incumbent local exchange carrier ("ILEC") operating territory. That total has now grown to more than \$18.8 million.

Second, Lifeconnex asserted that AT&T Kentucky's customer referral marketing promotions (such as the "word-of-mouth" promotion) were subject to resale to Lifeconnex' customers. *Id.* at 5-6.

Third, Lifeconnex sought a credit based upon the full retail amount of AT&T Kentucky's promotional waiver of the line connection charge for new retail customers, again without discounting the retail amount by the Commission-approved resale discount. *Id.* at 7.

Simultaneous with the filing of its Complaint with the Commission against Lifeconnex, AT&T Kentucky commenced separate actions with the Commission seeking similar relief against three other resellers that were withholding monies due to AT&T Kentucky based upon arguments and excuses substantially similar to those raised by Lifeconnex in this action. The other three actions were against: (1) Budget Prepay, Inc. d/b/a Budget Phone f/k/a Budget Phone, Inc. ("Budget Prepay") (Case No. 2010-00025); (2) dPi Teleconnect, LLC ("dPi") (Case No. 2010-00029); and (3) BLC Management, LLC d/b/a Angles Communication Solutions ("Angles") (Case No. 2010-00023) (collectively, with this action, the "Kentucky Actions"). Angles shares common ownership with Lifeconnex.

Each of the Kentucky Actions involved some or all of the following three issues: (a) how cash back credits to resellers should be calculated; (b) whether the word-of-mouth promotion is available for resale; and (c) how credits to resellers for waiver of the line connection charge should be calculated (the "Threshold Issues"). The cases with Budget Phone and dPi were settled and dismissed, leaving the actions against

Lifeconnex and Lifeconnex' related entity, Angles, as the only remaining active Kentucky Actions.

At the time this case was commenced, Lifeconnex was similarly refusing to pay substantial monies for services provided to it in other states. As a result, actions were commenced against Lifeconnex and/or Angles with the state regulatory authorities in Alabama, Louisiana, North Carolina, Tennessee and Florida; and Lifeconnex defended the actions against it on substantially the same baseless grounds as those offered by Lifeconnex in this case. Thus, AT&T petitioned those other state regulatory authorities to address and determine the Threshold Issues with respect to Lifeconnex' claimed credits. In addition, similar regulatory actions were commenced against other unrelated competitive local exchange carriers ("CLECs"). The defenses interposed by those CLECs implicated the Threshold Issues presented here. In an effort to avoid duplication of effort in addressing multiple cases involving overlapping issues and common parties, the Parties agreed that the hearings on the Threshold Issues in this action would be held in abeyance while the Threshold Issues were addressed in other forums.

#### **B. Resolution of Threshold Issues in AT&T's Favor In This and Other Forums**

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

##### **1. Cash Back Promotion**

In *dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2009-00127, by Order dated January 19, 2012, this Commission adopted AT&T Kentucky's position on the calculation of the cash back credit and held that "any promotional discounts should be adjusted by the wholesale discount." *Id.* at



13. By Order dated March 2, 2012, the Commission denied dPi's motion for rehearing. This ruling was consistent with the rulings in AT&T's favor on this issue by a federal district court in North Carolina<sup>2</sup> and by state commissions in Louisiana,<sup>3</sup> North Carolina,<sup>4</sup> and Texas.<sup>5</sup> In doing so, this Commission, and each of the other cited jurisdictions, expressly rejected the arguments that Lifeconnex has raised in this proceeding with respect to the cash back calculation.<sup>6</sup> These decisions are entirely consistent with the Fourth Circuit's holding in *BellSouth Telecommunications, Inc. v. Sanford*<sup>7</sup> and with the federal Telecommunications Act of 1996.<sup>8</sup>

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<sup>2</sup> *dPi Teleconnect, LLC v. Finley, et al.*, Docket No. 5:10-CV-466-BO (USDC, EDNC, Western Div.), Order dated February 21, 2012, at 6-7 ("NC Fed Ct Order"), attached as **Exhibit 1**.

<sup>3</sup> *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al.*, Docket No. U-31364-A (Louisiana Public Service Commission) Order dated May 25, 2012, at 17 ("LA Consolidated Phase Order"), attached as **Exhibit 2**.

<sup>4</sup> *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina v. dPi Teleconnect, LLC, et al.*, Docket No. P-836, Sub 5, etc. (North Carolina Utilities Commission) Order Resolving Credit Calculation Dispute dated September 22, 2011, at 5 ("NC Consolidated Phase Order"), attached as **Exhibit 3**.

<sup>5</sup> *Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company d/b/a AT&T Texas under FTA Relating to Recovery of Promotional Credit Due*, Docket No. 39028 (Texas Public Utility Commission) Order No. 15 Granting AT&T's Motion for Summary Decision dated April 5, 2012 at 4, attached as **Exhibit 4**, affirmed in Order on Motion for Reconsideration of Order No. 15 dated June 14, 2012, attached as **Exhibit 5**.

<sup>6</sup> The Alabama Public Service Commission held an evidentiary hearing in January 2012 in a similar proceeding with Lifeconnex, and has received post-hearing briefs, but has not yet ruled. The South Carolina Public Service Commission also held an evidentiary hearing in a similar proceeding, where Lifeconnex is not a party, in December 2010, and in November 2011, issued a Directive announcing its intent to adopt a method of calculating the "cash back" credit when the retail cash back benefit exceeds the retail price of the underlying service. AT&T South Carolina has since informed the South Carolina Commission of the significant subsequent authority against its Directive and has asked the Commission to reconsider its vote. To date, the Commission has not yet ruled on AT&T South Carolina's request, and it has not entered an order in the matter.

<sup>7</sup> 494 F.3d 439 (4<sup>th</sup> Cir. 2007). See, e.g., *NC Consolidated Phase Order* at 6 ("The Fourth Circuit's decision in [*Sanford*] supports the Commission's decision").

<sup>8</sup> See, e.g., *NC Fed Ct. Order* at 6 (emphasis added) ("AT&T North Carolina's method properly makes wholesale discount adjustments to both relevant rates [the monthly retail price and the retail cashback amount] **as dictated by the statute.**").

## **2. Word-of-Mouth Promotion**

State Commissions in Louisiana and North Carolina have adopted AT&T's position on the "word-of-mouth" issue,<sup>9</sup> and the South Carolina Commission's Directive announces its intention to adopt AT&T's position as well.<sup>10</sup> In doing so, these Commissions considered and rejected the same arguments that Lifeconnex has raised in this proceeding. No state commission has ruled otherwise. Nor is there any reason for this Commission to rule otherwise.

## **3. Line Connection Charge Waiver**

State Commissions in Louisiana and North Carolina have adopted AT&T's position on the "line connection charge waiver" issue, and the *SC Directive* announces its intention to adopt AT&T's position as well.<sup>11</sup> In doing so, these Commissions considered and rejected the same arguments that Lifeconnex has raised in this proceeding. No state commission has ruled otherwise.

## **C. Status of Lifeconnex' Account and Business**

After the commencement of this action, Lifeconnex continued to purchase telecommunication services from AT&T Kentucky for resale, but continued to refuse to make payments when due based upon its specious credit calculations that have since been rejected in other jurisdictions. Even if all of Lifeconnex' disputed credits were valid, and they are not, they totaled no more than \$1,350,146<sup>12</sup>. This is less than the

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<sup>9</sup> *LA Consolidated Phase Order* at 18; *NC Consolidated Phase Order* at 11.

<sup>10</sup> *Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phones Services, Inc. d/b/a High Tech Communications, et al.* (Consolidated Docket 2010-14-C) (South Carolina Public Service Commission) Commission Directive dated November 9, 2011 at 2 ("*SC Directive*"), attached as **Exhibit 6**.

<sup>11</sup> *LA Consolidated Phase Order* at 18-19; *NC Consolidated Phase Order* at 10-11; *SC Directive* at 2.

<sup>12</sup> Lifeconnex' disputed amounts are described in the Affidavit of Cynthia A. Clark, Senior Quality/M&P/Process Manager, attached as **Exhibit 7**.

\$1,926,923<sup>13</sup> due to AT&T Kentucky under the ICA for services provided, and late fees due, through the final bill, leaving an undisputed amount of \$576,777 due from Lifeconnex to AT&T Kentucky even if all of Lifeconnex' claimed credits were valid.

Lifeconnex' claims for credits, however, are not valid. Lifeconnex has claimed credits associated with the Threshold Issues in the amount of \$335,590. Based upon this Commission's rulings in the dPi action (Case No. 2009-00127), Lifeconnex' claims based on the "cash back" promotions are not valid. Further, no state commission has ruled in a reseller's favor on the "word-of-mouth" or the "line connection charge waiver" issues, while the federal district court in North Carolina and state commissions in Louisiana, North Carolina, and Texas have all ruled in AT&T's favor on those issues.

Lifeconnex has chosen not to pay AT&T Kentucky even the undisputed amount due. Moreover, in light of the adverse rulings with respect to the substance of Lifeconnex' defenses and counterclaims in other states and one federal court, any efforts by Lifeconnex to reduce its debt to that undisputed amount would be futile.

AT&T Kentucky has brought two of the other Kentucky Actions to conclusion by settlement, and it is entitled to a resolution of its dispute as to Lifeconnex as well. If Lifeconnex remains unwilling to pay the undisputed amount and further participate in this proceeding, Lifeconnex' counterclaims and defenses should be dismissed with prejudice for lack of prosecution on the part of Lifeconnex, and Lifeconnex should be barred from asserting those defenses, or pursuing those counterclaims, in any other forum. Accordingly, AT&T Kentucky respectfully asks this Commission to enter an Order in AT&T Kentucky's favor, including findings that:

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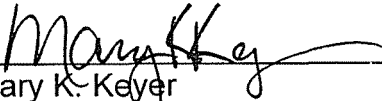
<sup>13</sup> Lifeconnex' undisputed amounts are described in the Affidavit of David Egan, Lead Credit Analyst, attached as **Exhibit 8**.

1. Lifeconnex is no longer serving Kentucky customers;
2. Lifeconnex has declined further participation in this proceeding; and
3. Lifeconnex has failed to pay all amounts in issue – including both undisputed amounts and those for which Lifeconnex had raised counterclaims and defenses – resulting in unpaid charges due and owing in the amount of \$1,926,923.

Alternatively, AT&T Kentucky requests that the Commission:

1. Find that AT&T Kentucky is entitled to be paid the undisputed balance of \$576,777, plus \$335,590 associated with the cash back, word-of-mouth, and line connection charge waiver subsidy claims; and
2. Dismiss Lifeconnex' remaining counterclaims with prejudice for Lifeconnex' failure to defend and prosecute those claims in the event Lifeconnex fails, upon notice, to appear for further proceedings.

Respectfully submitted,

  
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Mary K. Keyer  
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Louisville, KY 40203  
(502) 582-8219  
mary.keyer@att.com

COUNSEL FOR AT&T KENTUCKY

## Exhibit List

**Exhibit 1** - *dPi Teleconnect, LLC v. Finley, et al.*, Docket No. 5:10-CV-466-BO (USDC, EDNC, Western Div.), Order dated February 21, 2012 (“*NC Fed Ct Order*”).

**Exhibit 2** - *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al.*, Docket No. U-31364-A (Louisiana Public Service Commission) Order dated May 25, 2012 (“*LA Consolidated Phase Order*”).

**Exhibit 3** - *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina v. dPi Teleconnect, LLC, et al.*, Docket No. P-836, Sub 5, etc. (North Carolina Utilities Commission) Order Resolving Credit Calculation Dispute dated September 22, 2011 (“*NC Consolidated Phase Order*”).

**Exhibit 4** - *Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company d/b/a AT&T Texas under FTA Relating to Recovery of Promotional Credit Due*, Docket No. 39028 (Texas Public Utility Commission) Order No. 15 Granting AT&T’s Motion for Summary Decision dated April 5, 2012.

**Exhibit 5** - *Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company dba AT&T Texas under FTA Relating to Recovery of Promotional Credit Due*, Docket No. 39028 (Texas Public Utility Commission) Order on Motion for Reconsideration of Order No. 15 dated June 14, 2012, affirming.

**Exhibit 6** - *Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phones Services, Inc. d/b/a High Tech Communications, et al.* (Consolidated Docket 2010-14-C) (South Carolina Public Service Commission) Commission Directive dated November 9, 2011 (“*SC Directive*”).

**Exhibit 7** - Lifeconnex’ dispute amounts are described in the Affidavit of Cynthia A. Clark, AT&T Senior Quality/M&P/Process Manager.

**Exhibit 8** - Lifeconnex’ undisputed amounts are described in the Affidavit of David Egan, AT&T Lead Credit Analyst.

# **EXHIBIT 1**

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

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

ORDER

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

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

#### BACKGROUND

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

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



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

## DISCUSSION

### **Standard of Review**

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

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

## I. The Telecommunications Act of 1996

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

### 2. Calculating the Value of Promotional Credits

The Act requires that ILECs provide telecommunications services to CLECs at wholesale price—defined as the retail rate for that service less “avoided retail costs.” 47 U.S.C. § 252 (d)(3); 47 C.F.R. § 51.607. However, this “avoided retail costs” figure is not an individualized determination that actually reflects the costs avoided on each transaction. Such a scheme would be cumbersome and inadministrable. Foreseeing this fact, the FCC regulations provide that each state commission may use a single uniform discount rate for determining wholesale prices, noting that such a rate “is simple to apply, and avoids the need to allocate costs among services.” *Local Competition Order* ¶ 916. The NCUC set AT&T North Carolina’s discount rate at 21.5% for the residential services at issue here on December 23, 1996.<sup>1</sup> In other words, if AT&T North Carolina sells a service to its residential retail customers for \$100 a month, it must sell the same

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<sup>1</sup> *In the Matter of Petition of AT&T Communications of the Southern States, Inc. For Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub. 50 at 43.

service to dPi and other resellers for \$78.50.

When AT&T North Carolina offers promotions to attract potential retail customers, and those promotions are available at retail for more than 90 days, AT&T North Carolina must also offer a promotional benefit to resellers, like dPi, who purchase services subject to the promotion. 47 C.F.R. § 51.613 (a)(2); *Sanford*, 494 F.3d at 442 (holding that promotional offerings that exceed 90 days “have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied.”). When these promotions take the form of a cashback benefit, resellers are typically afforded a credit, which is applied against the amounts the reseller owes to AT&T North Carolina.

In *Sanford*, the Fourth Circuit reviewed the NCUC’s order of June 3, 2005<sup>2</sup>, noting that “while the value of a promotion must be factored into the retail rate for the purposes of determining a wholesale rate for would-be competitors, the promotion *itself* need not be provided to would-be competitors.” *Sanford*, 494 F.3d at 443. Rather, the order requires that “the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers *by applying the wholesale discount to the lower actual retail price.*” *Id.* at 443-44 (emphasis added). The Fourth Circuit noted that promotions offered for more than 90 days result in a promotional rate that “becomes the ‘real’ retail rate available in the marketplace.” *Id.* at 447.

dPi contends that it is entitled to the full face value of the cashback amount [DE 1 at 5]. AT&T North Carolina contends that it owes dPi credits for the value of the cashback amount

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<sup>2</sup>*In re Implementation of Session Law 2003-91, Senate Bill 814 Titled “An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”* N.C. Utilities Comm’n, Docket No. P-100, Sub 72b (June 5, 2005) (Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay).

reduced by the 21.5% wholesale discount [DE 39-10 at 20]. The NCUC adopted AT&T North Carolina's method of calculating the value of the promotional credits. AT&T North Carolina's method properly makes wholesale discount adjustments to both relevant rates, as dictated by the statute. dPi originally paid the standard retail rate less the wholesale discount. After the *Sanford* decision, it is clear that dPi should have paid the promotional rate less the wholesale discount. As noted by the NCUC, the difference between these two figures accurately reflects the value of the credits due to dPi. This figure can alternatively be calculated by reducing the cashback amount by the 21.5% wholesale discount, as AT&T North Carolina suggests.

When the NCUC considered the appropriate method for calculating promotion credits, dPi had already paid AT&T North Carolina for the services--using AT&T North Carolina's standard retail rate less the wholesale discount of 21.5% for residential services. Following the reasoning of *Sanford*, dPi is entitled only to the difference between the rate that it originally paid and the rate that it should have paid to AT&T North Carolina. The rate that it should have been charged is the promotional rate available to retail customers less the wholesale discount for residential services, or 21.5%.

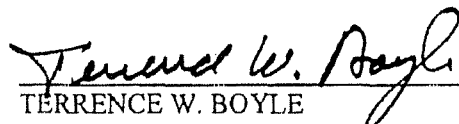
dPi suggests that this method produces anomalous results because, in the case where the cashback amount exceeds the monthly retail price, the "price" to the retail customer in a given month is a negative number. AT&T North Carolina has, therefore, effectively "paid" the retail customer that negative price during the month of service in which the cashback benefit is received. dPi argues that this cannot be the correct result because the Act dictates that the wholesale price must always be less than the retail price. However, dPi misapprehends the Act's mandate. As noted by the FCC in the *Local Competition Order*, "short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale

rate obligation.” ¶ 949. Such short-term rates are exempted from the ILEC’s resale obligation so long as the rate is “in effect for no more than 90 days.” 47 C.F.R. § 51.613(a)(2). Even if dPi’s anomaly should occur, the effect of a cashback amount greater than the monthly retail price is appropriate and permitted for a period of 90 days or less, after which any continuing distortion could be remedied by additional promotional credits.

CONCLUSION

For the foregoing reasons, Plaintiff’s Motion for Summary Judgment is DENIED and summary judgment is entered for Defendants. Because the Court here decides the dispositive Motion, Defendant’s Motion for Decision on the Briefs [DE 73], Plaintiff’s Motion for Oral Argument on Summary Judgment [DE 56], Motion to Abate Pending Related Action by the North Carolina Utilities Commission [DE 57], and Opposed Motion for Oral Argument on Summary Judgment [DE 74] are DENIED as MOOT. In light of Judge Louise W. Flanagan’s Order of January 19, 2012 in *dPi Teleconnect, L.L.C., v. Bell South Telecomms., L.L.C.*, No. 5:11-CV-576-FL, Plaintiff’s Motion to Consolidate Cases [DE 77] is also DENIED as MOOT. The Clerk is DIRECTED to enter summary judgment for Defendants.

SO ORDERED, this the 19 day of February, 2012.

  
TERRENCE W. BOYLE  
UNITED STATES DISTRICT JUDGE

# **EXHIBIT 2**

**LOUISIANA PUBLIC SERVICE COMMISSION**

**ORDER NO. U-31364-A**

**BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTHEAST D/B/A  
AT&T LOUISIANA**

**V.**

**IMAGE ACCESS, INC. D/B/A NEW PHONE;**

**BUDGET PREPAY, INC. D/B/A BUDGET PHONE D/B/A BUDGET PHONE, INC.;**

**BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATIONS SOLUTIONS D/B/A  
MEXICALL COMMUNICATIONS;**

**DPI TELECONNECT, LLC;**

**AND**

**TENNESSEE TELEPHONE SERVICE, INC. D/B/A FREEDOM COMMUNICATIONS  
USA, LLC**

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*Docket Number U-31364 In re: Consolidated Proceeding to Address Certain Issues Common to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.*

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**ORDER**

(Decided at the April 26, 2012 Business and Executive Session)

***Background***

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

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

to allow them to proceed notwithstanding the bankruptcy filing. Accordingly, AT&T Louisiana and Tennessee Telephone entered into the following stipulations:

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

On February 10, 2011, AT&T and Budget Prepay, Inc. d/b/a Budget Phone f/k/a Budget Phone, Inc. ("Budget Phone") filed a Motion to Dismiss in this proceeding, jointly moving that all claims, demands and counter-claims asserted by either of them be dismissed with prejudice, on the grounds that the parties have amicably resolved their disputes. The Commission issued Order No. U-31364 dismissing Budget Phone as a party to consolidated docket number U-31364, with prejudice, on February 15, 2011.

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

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

This consolidated proceeding was instituted for the limited purpose of addressing and resolving three issues identified in the joint motion, as well as any other common issues subsequently identified and approved for consolidation. The Parties also requested that all other pending motions in the proceedings be held in abeyance while the common issues were



addressed. It was determined that further proceedings in the five dockets should be stayed pending a resolution of issues in the consolidated proceeding, unless a subsequent Ruling or Order directed otherwise. The Parties, as outlined in the stipulations submitted at the time of the hearing, request a ruling on three basic issues that are to be decided in this consolidated docket, which are: Cashback Offerings, the Line Connection Charge Waiver ("LCCW") and Referral Marketing ("Word-of-Mouth"). A hearing was held on the consolidated issues on November 4 and 5, 2010.

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

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

In accordance with the Commission's order, the administrative law judge reopened the case for submission of post-hearing briefs and oral arguments. After argument was heard on November 30, 2011 and after considering the existing record in accordance with the Remand Order, a Final Recommendation of the Administrative Law Judge ("ALJ") on Remand was issued on April 13, 2012. It addresses the calculation methodology to be applied to cash back promotions.

The Final Recommendation on Remand was considered at the April 26, 2012 Commission Business and Executive Session. On motion of Commissioner Skrmetta, seconded by Commissioner Field, and unanimously adopted, the Commission voted to accept the ALJ Recommendation as follows: 1) that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the

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

Resellers at the wholesale discount. A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service. This equals the standard retail price of the service discounted by the resale discount rate established by this Commission. The Commission has previously established the resale discount rate as 20.72%. When the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%. 2) That if the Resellers are entitled to receive a promotional credit for the LCCW, the Resellers are entitled to a credit of the LCCW, less the applicable resale discount rate. 3) That word-of-mouth promotions are not a "telecommunications service". The word-of-mouth promotion is the result of AT&T's marketing referral program and is not subject to resale.

***Jurisdiction and Applicable Law***

The Commission holds broad power, pursuant to the Louisiana Constitution and statutes, to regulate telephone utilities and adopt reasonable and just rules, regulations, and orders affecting telecommunications services. *South Central Bell Tel. Co. v. Louisiana Public Service Commission*, 352 So.2d 999 (La.1997).

Article IV, Section 21 of the Louisiana Constitution of 1974, provides, in pertinent part, that:

The Commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties and perform other duties as provided by law.

Louisiana Revised Statutes 45:1163, et seq., similarly provide that the Commission shall exercise all necessary power and authority over telephone utilities and shall adopt all reasonable and just rules, regulations and orders affecting or connected with the service and operation of such business.

Pursuant to its authority, the Commission has issued Orders addressing specific aspects of telecommunications services. Section 1101 B5 of the Commission's Local Competition Regulations provides:

Short-term promotions, which are those offered for 90 days or less, are not subject to mandatory resale. Promotions that are offered for more than ninety (90) days must be made available for resale, at the commission established discount, with the express restriction that TSPs shall only offer a promotional rate obtained from the ILEC for resale to those customers who would qualify for the promotion if they received it directly from the ILEC.

Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 USC section 251 et seq.) regulates local telephone markets and imposes obligations on Incumbent Local Exchange Carriers ("ILECs") to foster competition, including requirements for ILECS to share their networks with competitors. Pursuant to 47 USC § 251(c)(4)(A), ILECS have a duty,

to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

The wholesale price at which these services are to be provided is the retail rate less avoided costs, pursuant to 47 USC § 252(d)(3). This duty applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term. This excludes rates that are in effect for no more than 90 days and that are not used to evade the wholesale rate obligation. 47 CFR § 51.613(a)(2). The Commission has established that avoided cost (or wholesale discount) at 20.72%, in Order U-22020, and it has been continuously applied.

#### ***STIPULATIONS FOR CONSOLIDATED PHASE***

In accordance with the Joint Motion on Procedural Schedule submitted in these Dockets on June 16, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana ("AT&T Louisiana") and each of the Respondents in the above-referenced Dockets (collectively the "Parties") respectfully submit the following Stipulations for use in resolving the issues presented in the Consolidated Phase of these Dockets.<sup>2</sup>

#### **I. Introduction**

The Parties agree that in the Consolidated Phase of these dockets, it is neither practical nor necessary to identify the terms and conditions of each and every retail promotional offering that may be implicated by the various pleadings in these Dockets, and the Parties have not attempted to do so in these Stipulations. Instead, the Parties submit the stipulations in Section II below to give the Commission a general description of the representative types of promotions that are addressed in the three issues in the Consolidated Phase – *i.e.*, Cashback Offerings, Referral Marketing ("Word-of-Mouth"), and Line Connection Charge Waiver ("LCCW") – and a general description of the representative types of AT&T retail offerings that are subject to such promotions. In Sections III and IV, the Parties provide a general description of a representative

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

process for AT&T's retail customers and its wholesale customers to request a promotional offering. The Parties respectfully ask the Commission to address the issues in the Consolidated Phase based on these stipulations and the representative types of promotions and processes included herein.

In addressing the specific offerings in the Consolidated Phase, the Parties agree to the following:

a. Cashback and LCCW (described at page 2, paragraphs 2(a) and 2(c), respectively, of the Joint Motion on Procedural Issues). As to these offerings, the Parties ask the Commission **in this Consolidated Phase** to assume that the Parties agree that a Respondent is entitled to receive a promotional credit and **that the only dispute is the amount of the credit** to which the Respondents are entitled.<sup>3</sup>

b. Word-of-Mouth (described at page 2, paragraph 2(b) of the Joint Motion on Procedural Issues). As to this offering, the Parties ask that the Commission make an initial determination as to whether the word-of-mouth referral reward program described herein is subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law. **If the Commission determines that the referral award program described herein is subject to such resale obligations**, the Parties ask that the Commission further assume that the Parties agree that a Respondent is entitled to receive a promotional credit and **that the only dispute is the amount of the credit** to which the Respondents are entitled.

In reaching the Stipulations below in the Consolidated Phase, no Party waives any of its rights to, after the Commission has issued an order resolving the issues in the Consolidated Phase, present evidence and arguments regarding each and every retail promotional offering that may be implicated by the various pleadings in these Dockets, including how and whether credit requests have been processed and credits issued by AT&T to any Respondent and whether a given Respondent is entitled to receive a given amount of promotional credits.

Similarly, the Parties agree that in the Consolidated Phase, it is neither practical nor necessary to address the facts specific to any Respondents' requested promotional credits, or AT&T's processing of those credits. In order to provide context for the Commission to decide

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<sup>3</sup> Some of AT&T's cashback promotional offerings are associated with long distance services, and AT&T has denied promotional credit requests associated with such offerings. These stipulations do not address such offerings, and each Party reserves all rights to argue, in subsequent phases of these proceedings and in other forums, that such promotional offerings are or are not subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law.

the issues presented in the Consolidated Phase, however, the parties submit the stipulations in Sections III and IV below. In reaching these Stipulations in the Consolidated Phase, no Party waives any of its rights, after the Commission has issued an order resolving the issues in the Consolidated Phase, to present additional evidence and arguments as to retail and wholesale requests for any offerings that are being or have been processed.

## **II. Representative Description of Promotions**

### ***a. Cashback Offerings***

1. Attachment A to these Stipulations are representative descriptions of various Cashback Offerings. Attachment B to these Stipulations are representative descriptions of retail services and prices that are the subject of these representative Cashback Offerings, and the parties stipulate that additional representative descriptions of retail services and prices that are the subject of these representative Cashback Offerings are available at:

<http://cpr.bellsouth.com/pdf/la/a996.pdf>

<http://cpr.bellsouth.com/pdf/la/g996.pdf#page=1>

### ***b. Word-of-Mouth Offerings***

2. Attachment C to these Stipulations is a representative description of a "Word-of-Mouth" Referral Offering.

### ***c. LCCW Offerings***

3. Attachment D to these Stipulations are representative descriptions of various LCCW Offerings. Attachment B to these Stipulations are representative descriptions of the retail services and prices that are the subject of these representative LCCW Offerings, and the parties stipulate that additional representative descriptions of retail services and prices that are the subject of these representative LCCW Offerings are available at:

<http://cpr.bellsouth.com/pdf/la/a996.pdf>

<http://cpr.bellsouth.com/pdf/la/g996.pdf#page=1>

## **III. AT&T's Procedure for Processing a Retail Request for a Promotional Offering**

4. An AT&T retail customer is billed the standard retail price for the telecommunications services subject to a "cashback" promotional offering. The

AT&T retail customer then requests the benefits of the cashback promotion either on-line or by mailing in a form within the allowable time period as described in the terms and conditions of the particular promotion. If the retail customer meets the qualifications of the promotional offering, AT&T mails a check, gift card, or other item (as described in the promotional offering) to the retail customer's billing address. This process is further described by AT&T in "frequently asked questions" found at <https://rewardcenter.att.com/FAQ.aspx>. Attachment E to these Stipulations is a copy of this description.

5. At the time an AT&T retail customer requests a "LCCW" promotional offering, an AT&T retail representative determines whether the retail customer meets all qualifications of the offering. If the retail customer meets those qualifications, the line connection charge is waived.
6. If an existing AT&T retail customer refers a potential customer to AT&T and the potential customer orders service(s) that qualify for the "Word-of-Mouth" Referral Offering, the AT&T customer referring the new customer to AT&T may be entitled [to] a referral benefit. In order to process the request for the benefit, the referring AT&T retail customer requests the benefits of the promotion on-line by: (1) registering in the program; (2) nominating a potential customer before that customer orders qualifying service(s) from AT&T; and (3) after the potential customer orders qualifying service(s) from AT&T, providing that customer's account information to AT&T online. If the referring retail customer meets the qualifications of the promotional offering, AT&T mails a gift card or other item (as described in the promotional offering) to that retail customer's billing address. The AT&T retail customer that refers a potential customer as set forth above is billed the standard retail price for the telecommunications services he or she purchases from AT&T.

**IV. AT&T's Procedure for Processing a Wholesale Request for a Promotional Offering**

7. When a Respondent purchases for resale the telecommunications services that are subject to any of the offerings described herein, AT&T bills the Respondent the wholesale rate (the retail rate less the 20.72% residential resale discount established by this Commission) for those telecommunications services.

8. After being billed by AT&T, the Respondent submits promotional credit requests seeking any credits to which it believes it is entitled pursuant to the offering.<sup>4</sup>
9. Upon receipt of these requests, AT&T reviews them to determine whether it believes the Respondent is entitled to the credits it requests. To the extent AT&T determines that the Respondent is entitled to the requested credits, AT&T applies the credits that it believes are due on a subsequent bill to the Respondent.<sup>5</sup>
10. For purposes of this Consolidated Phase, the Parties agree that AT&T did not seek prior approval from the Commission regarding the methodology it used to calculate the amount of promotional credits to Respondents that are the subject of the Consolidated Phase.

***Witnesses***

***Dr. William Taylor***, an employee of National Economic Research Associates, Inc., testifying on behalf of AT&T.

***Joseph Gillan***, an economist with a consulting practice specializing in telecommunications, testifying on behalf of the Resellers.

***Christopher Klein***, an Associate Professor in the Economics and Finance Department of Middle Tennessee State University, testifying on behalf of Resellers.

***Overview of Party Positions***

***AT&T Louisiana's Positions***

AT&T Louisiana uses a two-step process to resell a telecommunications service that is subject to a retail cashback promotion: (1) a reseller orders the requested telecommunications service and is billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the 20.72% resale discount rate established by the Commission); and (2) the reseller requests a cashback promotional credit which, if verified as valid by AT&T Louisiana, results in the reseller receiving a bill credit in the amount of the face value of the retail cashback benefit discounted by the 20.72% resale discount rate established by the Commission. The issue becomes whether the 20.72% resale discount rate is to be applied to the standard retail price of the affected service and not to the cashback benefit or to the retail

<sup>4</sup> Those stipulations address only the process for the 9-state former BellSouth region and not the process for the other 13 states in which an AT&T entity operates as an ILEC.

<sup>5</sup> As mentioned above, neither Respondents nor AT&T stipulate that AT&T has or has not processed or applied all credits that AT&T has deemed are due, and neither Respondents nor AT&T stipulate that AT&T has or has not processed all credits that are actually due.

promotional price of the service. AT&T Louisiana avers it is correctly applying the 20.72% resale discount rate to the promotional price of the service.

AT&T Louisiana argues that the Resellers position concerning LCCW is incorrect because discounting the \$0 retail price by 20.72% produces a wholesale price of \$0. It avers it is not only the mathematically accurate result, but also the result envisioned by the 1996 Act. The controlling statute provides that wholesale prices shall be set "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to [costs avoided by the ILEC]."

Concerning the word-of-mouth program, AT&T Louisiana argues that these referrals are marketing promotions and are not subject to resale. Resale obligations apply only to "telecommunications services" AT&T Louisiana provides at retail, and a marketing referral program like "word-of-mouth" is not even arguably a telecommunications service. Rather it is a marketing activity that AT&T induces from its customers.

#### *The Resellers Positions*

The Resellers state this docket is about preserving the viability of wholesale competition and the efficacy of federal pricing rules. They espouse in their post-hearing brief at page 2:

At issue is whether retail should be less than wholesale -- that is, whether AT&T's retail price for telecommunication services should ever be less than the wholesale price at which AT&T resells those services to competitive local exchange carriers (CLEC") such as the Resellers. Obviously, it should not: the whole concept behind requiring Incumbent Local exchange Carriers ("ILECs") like AT&T to resell their services at wholesale rates hinges on retail rates being greater than wholesale rates. Nevertheless, the Louisiana Public Service Commission ("Commission") is here confronted with the problem that AT&T's use of "cashback" promotions, combined with its failure to extend the full value of those promotions to the Resellers, results in retail prices less than wholesale. AT&T's promotional pricing practices are unreasonable, discriminatory, and contrary to the requirements and purposes of the Federal Telecommunications Act of 1996 ("FTA") and the FCC's rules on resale.

The Resellers state the question before the Commission is how to calculate the amount the Resellers are entitled to when reselling services subject to cash back, LCCW and referral (or word of mouth) promotions for the month in which the promotion is earned. They argue that no other months are in dispute. The FTA and federal regulations set the resale rate for telecommunications services that an ILEC may charge as "the rate for the telecommunications service, less avoided retail costs, as described in section 51.609. Thus, the "wholesale discount" must by law be calculated as the avoided cost. The Resellers argue that the appropriate method



for determining the wholesale price is to first calculate the amount of the avoided cost, then subtract the avoided cost from the actual sales price.

Resellers state that to properly determine the avoided cost, one multiplies the resale discount factor times the standard/tariffed price. This gives one the base amount of the avoided cost, and thus the amount by which the wholesale amount should be less than the retail price. They argue this is because the costs associated with the service remain the same, even if the price is temporarily changed for a particular customer pursuant to a special sale or promotion. They state that it also makes sense to measure the avoided costs based on the standard/tariffed retail rate because that is how the model was originally designed, years prior to the introduction of cashback and other promotions. The resellers state the three steps to finding the wholesale price are:

STEP 1: Find the pre-promotion standard/tariffed retail price.

STEP 2: Find the avoided cost: multiply the standard/tariffed retail price by the wholesale discount factor.

STEP 3: Subtract the avoided cost from the retail sales price, which is the standard/tariffed price, or, if a promotion applies, the price after applying the promotion. By applying this method, they state, the wholesale price is always the same amount less than the retail price which, as AT&T's witness acknowledged, is what the FCC intended.

The Resellers further state that they are entitled to the full value of AT&T's cash back promotions because according to the FTA and pertinent FCC regulations, AT&T is required to offer its services for resale "subject to the same conditions" that AT&T offers its own end-users and at "the rate for the telecommunications service less avoided retail costs." There are scenarios where this would result in AT&T giving credit balances to the Resellers.

#### *The LPSC Staff's Position*

Staff concludes that:

1) the proper wholesale rate applicable when a "cashback" promotion is offered is the "effective retail price" of the telecommunications service multiplied by the LPSC's 20.72%

avoided cost. Staff uses the following equation: Wholesale Rate = (Retail Rate) – (Cash-back) x (Discount).

2) credits to resellers for the WLCC promotion should be equal to the amount the reseller was charged for the service; and

3) word-of-mouth promotions should not be available for resale.

On remand, Staff adopts a compromise position concerning cashback promotions that result in a negative price scenario. Staff states that AT&T's methodology results in a greater benefit being provided to its retail customers than is provided to wholesale customers when the effective price is negative.<sup>6</sup> "In simple terms, AT&T should provide the same credit amount to a reseller than [sic] it provides to its retail customers, if the cash-back amount is greater than the price of the service."<sup>7</sup> Staff requests that the Commission adopt the position advanced by Staff with respect to the correct treatment of "cash-back" promotions. In the alternative, Staff respectfully requests consideration of Staff's alternative compromise that ensures Resellers receive equal benefits to those received by retail customers.

#### *Issues and Analysis*

All parties to this proceeding are to be complimented for their work in narrowing down the issues to be addressed by the Commission. The Joint Stipulation specifically requests that three issues be decided. Since there is no need to review any individual promotions or offers, the Commission, upon a review of pre-filed testimony, exhibits, testimony elicited at the hearing and briefs on the issues, answers the questions presented to it by the Parties as succinctly as possible.

#### Cashback Offerings

The Parties have requested for the Commission to assume that the Parties agree that Resellers are entitled to receive a promotional credit for cashback offerings. The Parties state the only dispute is the amount of the credit to which the Resellers are entitled.

Resale services must be sold at wholesale prices established by state commissions based on the retail rate less avoided costs. 47 U.S.C. § 252(d)(3). The duty to sell services to resellers at wholesale prices applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term (i.e., rates that are in

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

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

effect for no more than 90 days and that are not used to evade the wholesale rate obligation). 47 C.F.R. § 51.613(a)(2); See *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4<sup>th</sup> Cir. 2007) (“Sanford”). The cashback offerings in this case are based upon a one-time rebate that is applied as a credit to AT&T retail customers as well as the Resellers. It is not necessary to determine what length of time must be considered in evaluating the promotions. AT&T grants the rebates to its customers if they stay for 30 days and complete the requisite paperwork. The same time frame applies to the Resellers.

Cashback offerings are used to entice customers to purchase service. A cashback promotion is a reduction in the price of a service and does not result in a change to tariffed rates. In the instance of AT&T, it is hoped that using such enticements will result in customers who will not only purchase the service, but keep it long term. “It would be irrational for AT&T to offer cashback promotions to woo customers who will stay with the company for only one month; . . . a proper understanding of the economics of a cashback promotion necessarily looks at a longer term.”<sup>8</sup> The ruling in *Stanford* holds that if these cashback offerings are offered for more than 90 days, the promotional rates shall be available for resale at the wholesale discount. These promotions need not be refunded to the Resellers’ customers. The Resellers are entitled to receive the cashback incentive in the month earned. It need not be averaged over several months.

A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the 20.72% resale discount rate established by this Commission). When the Reseller requests a valid cashback promotional credit, the Reseller first receives a bill credit in the amount of the face value of the retail cashback benefit. AT&T discounts the retail cashback benefit by the 20.72% resale discount rate established by the Commission. Resellers oppose this practice of deducting the resale discount rate from the cashback benefit. Resellers argue that the avoided costs (the wholesale discount percentage of 20.7%) should not be applied to the promotional cash back amount but should only be applied to standard retail prices. Resellers argue that by AT&T taking this deduction, particularly when it results in a credit to AT&T’s retail customers, it results in a pricing situation where the wholesale price is greater than the retail price. Resellers argue that wholesale must always be less than retail.

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

Avoided costs are calculated as a percentage of the retail price. This amount is then deducted from the retail price. It is a basic mathematical equation. Thus, avoided costs vary with the retail price. As the retail price increases, so does the amount attributable to the avoided costs. Accordingly, the lower the retail price, the lower the amount of the avoided costs. AT&T's method of calculation is correct. Although this theory does not embrace the calculation methods proposed by the Resellers or Staff, this result is consistent with the FCC's Local Competition Order and the orders of this Commission.

**Example 1, with no promotional discount, the following calculation would apply:<sup>9</sup>**

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

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

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

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

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

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

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

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

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

AT&T's approach:

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

The Resellers approach

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

Staff's Compromise Approach

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

AT&T contends that Staff's formula is flawed because it adds the avoided cost estimate rather than subtracting it, causing AT&T to give resellers a high credit, which therefore increases the expense of the promotion to AT&T. AT&T postulates that "by making it more expensive for AT&T to offer these promotions, Staff's proposed new formula would discourage these pro-competitive promotions that are beneficial to consumers in Louisiana."<sup>10</sup> AT&T claims that the formula Staff proposes is an approach that was not addressed at the hearing. The Resellers aver that the Staff's proposal was not novel. The Resellers urge that the formula is the same as "Taylor's formula corrected for reality" proposed during the hearing by Reseller Witness Mr.

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

Joseph Gillan and illustrated on Reseller Exhibit #4. AT&T contends that the formula it uses is the long standing fundamental formula Staff supports in all other circumstances. Staff correctly posits this as an alternative method of calculation.

The Resellers argue that they should receive the full-value of the cash-back promotion (\$50). Resellers also aver that the value of the promotion should not be reduced by the wholesale discount rate applied to resale of regular services. In this example, for each eligible rebate, the Resellers want AT&T to provide the service for the Resellers' customer (a value of \$24) and pay the Reseller \$26. This would make the Wholesale Price \$-26, or \$6 less than the net or effective retail price. The Resellers argue that wholesale must always be less than retail.

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

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

The Resellers' argument yields the following result:

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

The Resellers would receive a credit from AT&T of \$26, thus making the net effective retail price -\$26. The Resellers urge that this is the correct application because it provides them with a lower price than AT&T's retail customers, or "wholesale must always be less than retail". This is not always the case. There are certainly times during limited promotions where the wholesale price is greater than the retail price and this is permissible. The Resellers are not entitled to the entire rebate because they will receive a reimbursement that is greater than the price they paid for the service. The Resellers do not pay the net or effective retail price. They pay less because the percentage attributable to the avoided costs is deducted from the price AT&T charges Resellers.

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

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

This Commission finds that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the Resellers. The Reseller requesting a telecommunications service is to be billed the standard wholesale price of the service. The standard wholesale price of the service equals the net or effective retail price of the service discounted by the resale discount rate previously established by this Commission as 20.72%.

### Waiver of Line Connection Charge

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

### Word of Mouth Promotion

The Parties ask that the Commission make an initial determination as to whether the word-of-mouth referral reward program described herein is subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law. They propose that if the Commission determines that the referral award program is subject to such resale obligations, that the Commission assume the Parties agree a Reseller is entitled to receive a promotional credit and determine the amount of the credit to which the Resellers are entitled.

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



receive the cash or near-cash offerings. This word-of-mouth referral is not a "telecommunications service" AT&T provides at retail. It is the result of AT&T's marketing referral program and should not be subject to resale.

In accordance with the conclusions reached in this consolidated docket;

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

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

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

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

May 25, 2012

/S/ FOSTER L. CAMPBELL  
DISTRICT V  
CHAIRMAN FOSTER L. CAMPBELL

/S/ JAMES M. FIELD  
DISTRICT II  
VICE CHAIRMAN JAMES M. FIELD

/S/ ERIC F. SKRMETTA  
DISTRICT I  
COMMISSIONER ERIC F. SKRMETTA

/S/ LAMBERT C. BOISSIERE  
DISTRICT III  
COMMISSIONER LAMBERT C. BOISSIERE, III

  
EVE KAHAO GONZALEZ  
SECRETARY

/S/ CLYDE C. HOLLOWAY  
DISTRICT IV  
COMMISSIONER CLYDE C. HOLLOWAY

# **EXHIBIT 3**

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. P-836, SUB 5  
DOCKET NO. P-908, SUB 2  
DOCKET NO. P-1272, SUB 1  
DOCKET NO. P-1415, SUB 2  
DOCKET NO. P-1439, SUB 2

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

BellSouth Telecommunications, Inc., d/b/a )  
AT&T Southeast, d/b/a AT&T North )  
Carolina, )  
Complainant )

v. )

ORDER RESOLVING CREDIT  
CALCULATION DISPUTE

dPi Teleconnect, LLC, Image Access, Inc., )  
d/b/a NewPhone, Affordable Phone )  
Services, Inc., BLC Management, LLC, d/b/a )  
Angles Communications Solutions, and )  
LifeConnex Telecom, Inc., f/k/a Swiftel, )

Respondents

HEARD IN: Commission Hearing Room 2115, Dobbs, Building, Raleigh, North  
Carolina, on April 15, 2011

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

APPEARANCES:

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For the Using and Consuming Public:

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For dPi Teleconnect, LLC, Image Access, Inc., d/b/a NewPhone, Affordable Phone Services, Inc., and BLC Management, LLC d/b/a Angles Communications Services:

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For Affordable Phone Services, Inc., and BLC Management, LLC, d/b/a Angles Communications Solutions:

Henry Walker, Brantley Arant Boulton Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203

BY THE COMMISSION: On January 8, 2010, BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina (AT&T or Complainant) filed in separate dockets complaints and petitions for relief against dPi Teleconnect, LLC (dPi), Image Access, Inc., d/b/a NewPhone (NewPhone), Affordable Phone Services, Inc. (Affordable Phone), and BLC Management, LLC, d/b/a Angles Communications Services (Angles) (collectively Respondents or Resellers), requesting that the Commission resolve outstanding billing disputes that exist between Complainant and Respondents, determine the amount that each Respondent owes Complainant under its respective interconnection agreement with AT&T, and require each Respondent to pay the amount to Complainant.

On February 25, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed defensive pleadings to AT&T's complaints. On April 9, 2010, Complainant filed responses to each of the defensive pleadings. On April 30, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed reply pleadings to Complainant's April 9, 2010, responsive pleadings.

On May 14, 2010, the Respondents and Complainant filed a Joint Motion on Procedural Issues in which the parties requested that the Commission hold all other pending motions in abeyance and convene a consolidated proceeding (Consolidated Phase) to which the Complainants and all Respondents are parties to resolve the following issues: how credits to resellers for the Cashback and Line Connection Charge Waiver (LCCW) promotions should be calculated; and whether the Word-of-Mouth promotion is available for resale and, if so, how the credits to resellers for the Word-of-Mouth promotion should be calculated. This Joint Motion was granted by Commission Order issued May 20, 2010.

On July 23, 2010, Complainant filed stipulations entered into by Complainant and Respondents for the Consolidated Phase. On August 3, 2010, the Commission issued its Order Allowing Intervention by LifeConnex Telecom, LLC, f/k/a Swiftel (LifeConnex), in the Consolidated Proceeding.

On August 27, 2010, Complainant prefiled the direct testimony and exhibits of William E. Taylor, and Respondents prefiled the direct testimonies and exhibits of Joseph Gillan and Christopher C. Klein. On October 1, 2010, Complainant filed the rebuttal testimony of William E. Taylor, and Respondents filed the rebuttal testimonies of Joseph Gillan and Christopher C. Klein.

On February 8, 2011, the Commission issued its Order Scheduling Hearing. On April 11, 2011, dPi filed Objections to and Motion to Strike Portions of Dr. William Taylor's Testimony. On April 13, 2011, Complainant filed a Response to Motion to Strike. The matter came on for hearing as scheduled on April 15, 2011. dPi's motion to strike was denied from the bench by Presiding Commissioner Culpepper.

**WHEREUPON**, based upon the foregoing and the entire record in this matter, the Commission makes the following

#### **FINDINGS OF FACT**

1. This matter is properly before the Commission on the Complaint of AT&T, and the Commission has jurisdiction over the parties in this Consolidated Phase and over the subject matter of the issues raised in this proceeding.

2. Pursuant to federal law, the Commission has previously reviewed avoided cost studies presented to the Commission and found a uniform discount rate of 21.5% to be just and reasonable for the residential services at issue in this Consolidated Phase.

3. AT&T's two-step process for determining credits that a reseller is entitled to receive when a telecommunications service which is subject to a retail cashback promotion is sold appropriately applies the Commission-approved 21.5% discount to the promotional price of the service and is therefore reasonable, in compliance with applicable laws, and otherwise appropriate.

4. The alternative proposals offered by the Respondents in this matter overstate the avoided cost estimate, which distorts the 21.5% discount rate set by the Commission and thus understates the wholesale prices that the Resellers are required to pay.

5. In comparing retail prices to wholesale prices, it is appropriate to consider the prices over a reasonable period of time, which is consistent with how customers subscribe to services.

6. AT&T's process of providing a discounted credit to Resellers for the LCCW results in both the retail customer and the wholesale customer paying a net amount of zero for the line connection charge, which is the appropriate result.

7. The Word-of-Mouth promotion is a marketing effort that is not required to be made available for resale.

## DISCUSSION OF EVIDENCE AND CONCLUSIONS

Federal law provides that prices for resold telecommunications services shall be set on the basis of retail rates charged to subscribers for the service requested, excluding the portion thereof attributable to costs that are avoided when an incumbent local exchange carrier ("ILEC") like AT&T provides a service on a wholesale basis rather than on a retail basis.<sup>1</sup> In 1996, the Commission used cost studies and other evidence presented in a contested proceeding to determine the aggregate amount of "avoided costs" associated with AT&T's retail services. The Commission then divided that aggregate "avoided cost" figure by the aggregate revenue generated by those services to determine the uniform resale discount rate of 21.5% for the residential services at issue in this docket. See Recommended Arbitration Order, *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50 at 43 (December 23, 1996); Order Ruling on Objections, Comments, Unresolved Issues, and Composite Agreement, *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50 (April 11, 1997). The issues in this Consolidated Phase involve: how credits to resellers for the Cashback and LCCW promotions should be calculated; and whether the Word-of-Mouth promotion is available for resale and, if so, how the credits to resellers for the Word-of-Mouth promotion should be calculated.

### A. CASHBACK PROMOTIONS

AT&T uses the following two-step process to sell a telecommunications service that is subject to a retail cashback promotion to Resellers at wholesale: (1) a Reseller orders the requested telecommunications service and is billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the

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<sup>1</sup> 47 U.S.C. 252(d)(3).

21.5% resale discount rate established by the Commission); and (2) the Reseller requests a cashback promotional credit which, if verified as valid by AT&T, results in the Reseller receiving a bill credit in the amount of the face value of the retail cashback benefit discounted by the 21.5% resale discount rate established by the Commission. (See Stipulations for Consolidated Phase at ¶¶7-9; Taylor Direct, Tr. at 29-30). To illustrate AT&T's method, assume a promotion that provides qualifying retail customers a one-time \$50 cashback benefit when they purchase a service with a monthly price of \$80. The effective price for the service to the retail customer is \$30 (\$80 standard price less \$50 cashback) for the month that the customer receives the promotional cashback benefit. The same service is available for purchase by a Reseller at a monthly price of \$62.80 (\$80 discounted by 21.5%). If the Reseller also qualifies to purchase the promotion for resale, AT&T gives the Reseller a \$39.25 (\$50 discounted by 21.5%) promotional cashback credit. This results in the Reseller paying an effective price of \$23.55 (\$62.80 less \$39.25) for the month that the Reseller receives the cashback credit, which amount is 21.5% less than the \$30 price to the retail customer for the cashback month.

In this proceeding, the Resellers have contended that AT&T's two-step method is impermissible, does not appropriately apply the Commission approved discount and improperly calculates the credit that the Resellers are due to the Resellers' disadvantage. For the reasons explained below, the Commission concludes that AT&T's previously described two-step method complies with applicable law and appropriately applies the Commission-approved 21.5% resale discount percentage to the retail rate of the promotion-qualifying service.

In its *Local Competition Order*,<sup>2</sup> the FCC anticipated that state commissions would implement the "avoided cost" requirements of Section 252(d)(3) by adopting resale discount percentage rates like the 21.5% rate previously established. The FCC explained that, when avoided costs are determined in this manner, state commissions "may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate." See *Local Competition Order* at ¶ 908. The FCC went on to explain that when a promotional offering is available for more than 90 days (as is the case with the promotions at issue in this Consolidated Phase), the "promotional price ceases to be short-term **and must therefore be treated as a retail rate for an underlying service.**" *Id.* at ¶¶949-50 (emphasis added). As the example illustrated above demonstrates, in AT&T's two step method, AT&T multiplies the retail rate when a reseller qualifies to purchase the promotion by the discount price to determine the wholesale price (i.e., the retail rate minus the avoided costs) that the telecommunications product is made available to Respondents. The Commission therefore concludes that AT&T's two-step method described above is appropriate

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<sup>2</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, (1996)(*Local Competition Order*), subsequent history omitted. In this Order, the FCC concluded that it was "especially important to promulgate national rules for use by state commissions in setting wholesale rates" that will "produce results that satisfy the intent of the 1996 Act," and it stated that "[t]he rules we adopt and the determinations we make in this area are crafted to achieve these purposes," *Id.* at ¶907.

because it correctly applies the 21.5% resale discount rate to the retail rate, i.e., the promotional price, for the underlying service.

The Fourth Circuit's decision in *BellSouth Telecom, Inc. v Sanford*, 494 F.3d 439 (4<sup>th</sup> Cir.) 2007, supports the Commission's decision. In *Sanford*, the Fourth Circuit concluded that the Commission "correctly ruled that 'long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied.'"<sup>3</sup> Noting the FCC's finding that a promotion or discount offered for more than 90 days became part of a retail rate that had to be offered to competing LECs, the Fourth Circuit affirmed the conclusion "that when such incentives [like cashback or gift cards] are offered, the nominal tariff (the charge that appears on the subscriber's bill) is not the 'retail rate charged to subscribers' under §252(d)(3) because the nominal tariff does not reflect the value of the incentives."<sup>4</sup> The Fourth Circuit then provided the following example to explain its decision:

Suppose BellSouth offers its subscribers residential telephone service for \$20 per month. Assuming a 20% discount for avoided costs, BellSouth must resell this service to competitive LECs for \$16 per month, enabling the competitive LEC to compete with BellSouth's \$20 retail fee. Now suppose that BellSouth offers its subscribers telephone service for \$120 per month, but sends the customer a coupon for a monthly rebate check for \$100. According to the NC Commission's orders, the appropriate wholesale rate is still \$16, because that is the net price paid by the retail customer (\$20), less the wholesale discount (20%).<sup>5</sup>

This \$16 wholesale price that the Fourth Circuit affirmed is exactly the price that results when AT&T's method is applied to this scenario. (Taylor Rebuttal, Tr. at 68-69).

Finally, the decision rendered in Docket P-55, Sub 1744 (*dPi Recommended Order*) also is supportive of the credit calculation methodology proposed by AT&T in this case. In that docket, the Commission adopted a discount promotion credit calculation methodology advanced by AT&T that was based upon the example set forth in the *Sanford* decision. In that docket, the Commission held that AT&T should calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion. Finding of Fact 26, *dPi Recommended Order*. The methodology proposed in this proceeding is mathematically identical to the formula advanced by AT&T and adopted by this Commission in that docket.

In addition to being consistent with applicable law, AT&T's method also is consistent with economic reality. The Resellers' witnesses testified that a \$50 one-time

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<sup>3</sup> *Id.* at 442.

<sup>4</sup> *Id.* at 450.

<sup>5</sup> *Id.* at 450.



cashback benefit reduces the effective retail price of a resold telecommunications service by \$50. (Gillan Cross, Tr. at 244; Klein Evid. Hrg. Exh. No. 1 at 44). As a result of the "avoided cost" pricing standard in Section 252(d)(3), however, changes in the retail price of a telecommunications service do not flow through to a reseller on a dollar-for-dollar basis. For example, if the standard retail price of a service is increased by \$50 (from \$30 to \$80, for example), the wholesale price for the service does not increase by \$50. Instead, it increases by only \$39.25:

	Retail	Wholesale
New Price	\$80	\$62.80 (\$80 discounted by 21.5%)
Initial Price	\$30	\$23.55 (\$30 discounted by 21.5%)
Difference	\$50	\$39.25 (\$50 retail difference discounted by 21.5%)

The Resellers' witnesses testified that, conversely, a \$50 reduction in the standard retail price of a service does not result in a \$50 reduction in the wholesale price of the service, but instead results in a \$39.25 reduction in the wholesale price of the service. (Gillan Cross, Tr. at 235; Gillan Cross Exam. Exh. No. 1; Klein Cross, Tr. at 307-08).<sup>6</sup> In the Commission's view, it is appropriate that AT&T provides the Resellers the same \$39.25 wholesale price reduction when the retail price reduction takes the form of a cashback benefit as the resellers would receive if it took the form of a \$50 reduction to the "standard price." (See Taylor Direct, Tr. at 30-31). Further, this conclusion is consistent with the Commission's prior determination that a reseller is only entitled to the price lowering impact of the promotion and not the face value. See *dPi Recommended Order*, p. 22.

The Commission has reviewed and rejects each of the various alternative methods the Resellers proposed to use in applying the 21.5% resale discount to cashback offerings. Our review reveals that each method is inconsistent with the *Local Competition Order*, the *Sanford* decision, and the *dPi Recommended Order*. The Commission is persuaded that each of the Resellers' alternative proposals overstates the avoided cost estimate, which in turn distorts the established 21.5% resale discount rate and understates the wholesale price Resellers are required to pay for the services they order from AT&T.

In reaching this decision, the Commission notes that the Resellers have spent considerable time and resources in this proceeding arguing that AT&T's credit calculation method produces wholesale prices that are higher than retail prices. The evidence presented in this proceeding clearly indicates that the vast majority of the promotions that are the subject of this hearing have one-time cashback promotional benefits that exceed the monthly retail price of the service. In those situations, the Respondents have clearly demonstrated that resellers receive less money from AT&T for keeping the service for only a month or two than a retail customer would receive

<sup>6</sup> To simplify the math, Gillan Cross Exam. Exh. No. 1 assumed a 20% wholesale discount, which resulted in a \$40 reduction in the wholesale price. When the actual 21.5% wholesale discount rate is used, the reduction is \$39.25.

from AT&T for keeping the service only a month or two. (See Gillan Cross Exam. Exh. No. 8; Attachments P and Q to AT&T's Brief).

Although the Commission accepts that the result produced by this calculation shows that the Resellers receive less money from AT&T for keeping the service for only a month or two than a retail customer would receive, the Commission is not persuaded that this fact demonstrates that AT&T's method causes the Resellers' wholesale purchase price to exceed the retail price that AT&T offers to its retail customers. To reach such a conclusion, the Commission would be required to accept the fundamental assumption embraced by Respondents that the pricing practices in this case, i.e., the wholesale price determination and/or the credit calculation should be based upon "that single month when the promotion is processed." Post Hearing Brief of the Respondents, p. 5. This, the Commission cannot do for the following reasons.

First, the Commission cannot accept this assumption because the wholesale discount is an average for all of AT&T's retail services. As such, it was never intended to represent the avoided costs for a particular service for an individual month. Second, and more importantly, the Commission cannot accept this assumption because the evidence presented in this hearing shows that, on average, both AT&T's customers and the Resellers' customers keep service more than a month or two. AT&T's witness Dr. Taylor testified that on average, AT&T's retail customers who take cashback promotions stay "much, much longer" than one or two months, (Taylor Redirect, Tr. at 184), and relying on the sworn testimony of dPi's CEO, Dr. Taylor testified that on average, Resellers' end users keep service from between three and ten months. (*Id.*, Tr. at 184-85). Resellers' witness Dr. Klein, for instance, testified that in considering whether pricing practices are below cost or predatory, "you would have to look at more than only one month of service." (Klein Cross, Tr. at 306; See also Klein Depo., Klein Evid. Hrg. Exh. No. 1. at 57-58).

Because of this evidence, it is not reasonable to consider a single month's financial data to determine the price of a product when the customer who purchases that product is reasonably expected to remain a customer of the seller of that product for enough months to make the promotion profitable. Taylor Direct, Tr. at 41. Instead, in these circumstances, it is appropriate for Cashbacks to be considered over a reasonable period of time in order to determine the ultimate price of the promotion based product. Such an approach is consistent with the Commission's historic practice which has allowed companies to recover their "up front" costs over a reasonable period of time instead of requiring that all such costs be recovered in the first month of service. The *Sanford* Court also looked favorably upon a similar approach.<sup>7</sup>

When considered in this manner, a reseller that keeps the service for more than a month or two always pays a net amount that is not only less than what the retail customer pays, but that is less by the 21.5% resale discount rate that the Commission

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<sup>7</sup> See *Sanford*, 494 F.3d at p. 454 where the Court stated: "[W]hen a promotion is given on a one-time basis in connection with an initial offering of service, its value must be distributed over the customer's expected future tenure with the carrier and discounted to present value.

established. (See Gillan Cross Exam. Exh. No. 8; Attachments P and Q to AT&T's Brief). Based on this evidence, the Commission concludes that over a reasonable period of time, the wholesale price of the cashback product is less than the retail price that the retail customer pays. That is, the Resellers appropriately pay 21.5% less than retail customers pay under AT&T's method over time. Thus, there is no merit to the Resellers argument the credit calculation proposed by AT&T and accepted by this Commission results in the wholesale price of the telecommunications service being higher than the retail price.

In conclusion, the Commission notes that while the Commission has considered the issue of the proper methodology for calculation of the amount to be credited to resellers for promotions in greater detail in this proceeding than in prior dockets, the Commission's decisions in Docket No. P-100, Sub 72(b) (*Restriction on Resale Orders I and II*), and in the *dPi Recommended Order* respectively make clear that the face value of a promotion is not required to be passed through to a reseller. Rather, only the benefit of such a reduction must be passed on to resellers by subtracting the properly determined wholesale discount from the lower actual retail price. Consistent with these decisions, the Commission, therefore, finds and concludes that AT&T's two-step process properly passes on the price lowering benefit of a cashback promotion to the Resellers by subtracting the properly determined wholesale discount from the lower actual retail price.

Similarly, the Commission is not persuaded by the Resellers' "price squeeze" arguments. Reseller witness Dr. Klein conceded that: he is not claiming that AT&T is trying to force the resellers out of business by creating a price squeeze; he is not claiming that AT&T has any sort of predatory intent; he is not claiming a violation of Section 2 of the Sherman Act; and in his view as an economist, there is not sufficient evidence in this docket to show a violation of section 2 of the Sherman Act. (Klein Cross, Tr. at 305-06). While Dr. Klein stated that he is testifying about a price squeeze in the regulatory context of the 1996 Act and the FCC's Rules and Orders implementing the 1996 Act, (Klein Cross, Tr. at 306-07), he conceded that if this Commission determines and the courts affirm that AT&T's method complies with the resale provisions of federal law, there would be no price squeeze in the "regulatory context" about which he testifies. (See Klein Cross, Tr. at 309). Since AT&T's method does, in fact, comply with federal law, no price squeeze has been evidenced in this proceeding.

Finally, the Resellers' "rebate" argument is likewise not persuasive. Resellers' witness Dr. Klein conceded that end users who receive a cashback "rebate" receive the same features, functionality, and quality of service as end users who do not receive the cashback "rebate," (Klein Cross, Tr. at 313), and that "the only thing that the rebate in and of itself affects" about the service is "the net amount paid for the service." (*Id.*)<sup>8</sup> The 1996 Act requires AT&T to pass certain aspects of a service along to the Resellers

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<sup>8</sup> See also Klein Depo, Klein Evid. Hrg. Ex. No. 1 at 83 ("what we're arguing about on these promotions is the price that should be charged"); *id.* at 84 ("as far as I know about what's at issue here, that's correct. It's just the monetary arrangements.").

in the same manner as provided to retail customers, but price is not one of them. Instead, the 1996 Act as implemented by this Commission authorizes AT&T to establish the wholesale price of a service by applying the 21.5% resale discount rate to the retail price of the service.

This point is confirmed by the *Sanford* decision, which generally characterizes cashback promotions as "rebates."<sup>9</sup> Additionally, in addressing the example of a \$120 standard monthly price and a \$100 monthly cashback benefit, *Sanford* specifically refers to "a coupon for a monthly *rebate* check for \$100."<sup>10</sup> Calling the check a "rebate," however, did not lead the Fourth Circuit to apply its hypothetical 20% resale discount to the \$120 "standard" price as the Resellers propose. To the contrary, the Fourth Circuit confirmed this Commission's reasoning that the resale discount must be applied to the promotional price of \$20 that results when the "monthly rebate check for \$100" is applied to the \$120 standard price for the offering.

## B. LCCW PROMOTIONS

The LCCW promotion waives the nonrecurring installation charge for new retail customers who are eligible for the promotion. AT&T witness Taylor testified that resellers are initially billed the retail charge for the line connection less the standard wholesale discount. If a timely request for a promotional credit is submitted, AT&T credits the reseller with the amount it initially billed the reseller. As a result, neither the retail customer nor the wholesale customer pays the line connection charge. (Tr. p. 45)

Witness Taylor testified that the line connection charge should be regarded as a telecommunications service since customers generally must buy it with their local exchange service. Thus, he contended that the two services should be treated as a single retail telecommunications service consisting of an upfront, one-time price and a monthly recurring charge, to which the wholesale discount is applied. (Tr. p. 46) Alternatively, Dr. Taylor proposed treating the LCCW as a cashback promotion and providing it for resale at the retail price less the wholesale discount. (Tr. pp. 46-47)

Respondent witness Klein contended that AT&T should credit the reseller with the avoided cost of line connection when the reseller's customer qualifies for the LCCW. (Tr. pp. 276-278, 280) He argued that the LCCW is in the form of a rebate for the reseller and should be calculated by applying the avoided cost discount to the standard retail rate, and giving the reseller the same rebate that the retail customer receives. (Tr. p. 288).

The Commission finds that AT&T's methodology of crediting Resellers with the wholesale price of the LCCW does not differ from that determined as proper for the cashback promotion. In regard to the LCCW, the effective retail rate is zero, so the

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<sup>9</sup> See *Sanford*, 494 F.3d at 442, 449.

<sup>10</sup> *Id.* at 450.

effect of the promotion is that neither retail nor wholesale customers are charged the line connection charge, which is appropriate.

### C. WORD-OF-MOUTH PROMOTION

AT&T witness Taylor testified that the Word-of-Mouth referral program should be regarded as an AT&T marketing expense. Customers are acting in the capacity of a part-time sales force for AT&T and compensated for successful referrals by receiving a cash reward. (Tr. p. 50) Dr. Taylor also stated that the benefit the recipient receives has no relationship to the services purchased by the recipient from AT&T, and that to receive the Word-of-Mouth payment, the recipient must perform a service of value to AT&T by convincing someone to become a new AT&T customer.

Respondents' witness Klein testified that the Word-of-Mouth referral program is a rebate offered as a term and condition of service and FCC rules require that rebates must be available for resale. (Tr. pp. 287-88) Dr. Klein offered a formula used to calculate the effective rate to the customer based on the rebate, and concluded that if the referral program was not available for resale, AT&T would be evading its wholesale rate obligation.

The Commission agrees with AT&T that the Word-of-Mouth referral program is not subject to the resale obligations of the Act. As explained by witness Taylor, the referral program differs from offerings that are subject to resale obligations in several critical aspects. First, there is no correlation between the referral program and services purchased from AT&T by the recipient; those services may remain unchanged regardless of the number of successful referrals. Instead, the benefit received is directly tied to telecommunications services purchased by other end users, creating a situation where the recipient of the referral program is essentially performing a marketing or sales service on behalf of AT&T. (Tr. p. 51).

The parties agree that marketing and sales costs are specifically included in the calculation of avoided costs as required by FCC rules (§ 51.609). Under cross-examination, Dr. Klein agreed that sales costs associated with several potential individual promotional efforts would not be required to be made available for resale. (Tr. pp. 315-16). The Commission believes that the Word-of-Mouth referral program is analogous to the sales efforts described in the cross-examination of Dr. Klein and is essentially a marketing program for AT&T's services. The Commission is aware of nothing in the *Local Competition Order* requiring a program that markets retail services to be made available for resale by a competitor.

The Commission, therefore, finds and concludes that the Word-of-Mouth referral program is not required to be made available for resale. Since the Commission has determined that the Word-of-Mouth referral program is not subject to the resale obligation, the question of how credits to Resellers should be calculated is moot.

IT IS, THEREFORE, ORDERED as follows:

1. That the credits to Resellers for the Cashback and Line Connection Charge Waiver promotions should be calculated by applying the Commission-approved 21.5% resale discount to the retail price of the underlying service; and.

2. That the Word-of-Mouth referral program does not have to be made available for resale.

ISSUED BY ORDER OF THE COMMISSION.

This the 22<sup>nd</sup> day of September, 2011.

NORTH CAROLINA UTILITIES COMMISSION

*Gail L. Mount*

Gail L. Mount, Deputy Clerk

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

lh092211.01

DOCKET NO P-836, SUB 5

CHAIRMAN EDWARD S. FINLEY, JR., CONCURRING IN RESULT: I concur with the conclusion of the majority that the calculations of any payments due the resellers from AT&T for cash back promotions should result in payments produced by AT&T's formula but for reasons different than those relied upon by the majority in its discussion and conclusions set forth in subsection A. For reasons that do not appear on the record, AT&T has agreed voluntarily to resell the subscription incentives at issue in this docket and has stipulated that it would do so in this case. In my view AT&T has no obligation to resell the promotions under TA-96 or the FCC's Local Competition Order because the subscription incentives are items of economic value, not rate discounts. Moreover, the subscription incentives are one-time promotion payments and the duration of the promotion is for less than 90 days.

All of the difficulties, the differences of opinion and the myriad formulae and calculations with which the Commission has been presented arise because in the one month the subscription incentive payments are made to AT&T's retail customers, the resale price to resellers exceeds the retail price. Under §§ 949 and 950 of the Local Competition Order and 47 C.F.R. § 51.613(a), ILECs are not required to resell short term promotions or promotions that will be in effect for no more than 90 days. Failure to acknowledge that these one-time subscription incentives fall clearly within the short term promotion category has resulted in endless arguments in which the parties struggle mightily to force a square peg into a round hole. These arguments miss the dispositive point.

In North Carolina the Commission's jurisdiction to require ILECs to resell these subscription incentive promotions arises because they are "items of value" affecting the underlying services the subscriber receives and are therefore "de facto" offerings in contrast to "de jure" or "per se" offerings addressed by Congress and the FCC. Because they are only "de facto" offerings they pose less potential anticompetitive harm to resellers. Such was the Commission's holding upheld by the Fourth Circuit in Sanford. Being only "de facto" offerings the subscription incentives need not be assessed by the FCC's requirements on resale at all. If they are to be so assessed, they need not be resold to resellers due to their one-time duration.

While painting itself into a corner by asserting "AT&T North Carolina is not arguing that the 'short term promotion exception' relieves it of its resale obligation with regard to the cash back promotions at issue in this proceeding" AT&T proceeds to substantiate its arguments on the very principles underlying this exception.

As the discussion of Attachment D above demonstrates, the Resellers' "wholesale is higher than retail" argument is the result of myopically focusing on a single month or two in isolation and ignoring the reality of what happens thereafter.

Brief p. 20.

Indeed, no aspect of a cash back promotion makes economic sense in such a short term, because it would be irrational for AT&T North Carolina to offer \$50 cash back to woo customers who will stay with the Company for only a month or two. Likewise the provisions of the 1996 Act are not intended to enable new entrants to win customers in a single month: that is not competition – it is churn. A proper understanding of the economics of a cash back promotion necessarily looks at a longer term.

Brief p. 21.

And the Resellers cannot honestly claim that what they perceive as a “wholesale is higher than retail” situation persists for an unreasonable period of time – in the example addressed in Attachment D of this Brief, for example, the situation is forever reversed when the service is kept for more than a single month.

Brief p. 22.

Looking at one-month in isolation for the on-going service charges ignores the economic realities of the tenure of the end user customer and does nothing more than encourage Resellers to churn those end users off after one month.

Brief p. 24.

In its Local Competition Order, the FCC excluded short-term promotions from the Federal Act’s resale obligations and thus sanctioned retail prices that temporarily are higher than wholesale prices, recognizing that

Promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.



Brief pp 24-25.

Resellers likewise advance arguments anchored on the principle that the promotion aspect of the subscription incentive lasts for a duration of only one month.

Regarding the cash back promotions, the question before the Commission is how to determine the amount Resellers are entitled when reselling services subject to cash back promotions for that single month when the promotion is processed. No other months are in dispute.

However, for this single month in dispute, AT&T continues to resist the requirements that it resell its services to CLECs at the effective retail rate less its costs avoided.

Brief p. 1. (emphasis in original).

It is unclear why this was a concern, since AT&T does not reduce its monthly rate. A cash back promotion is a price gimmick – a one-time deal designed to win business from competitors – that does not change the standard monthly rate and does not indicate a change in avoided costs.

Brief p. 22.

Both parties are absolutely correct. The subscription incentives are short term promotions that, were the FCC rules to apply, would be exempted from any resale requirement. As the ILEC has no obligation to resell the promotion in the first place, the Commission should not force the ILEC to pay Resellers more than the ILEC is willing voluntarily to pay. Endless arguments as to how the payment should be calculated through reference to FCC principles that apply to long term, *de jure* promotions, not short term and not *de facto* ones, simply are not useful.

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

# **EXHIBIT 4**

DOCKET NO. 39028

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

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ORDER NO. 15  
GRANTING AT&T'S MOTION FOR SUMMARY DECISION

I.

Summary

The Motion for Summary Decision of Southwestern Bell Telephone Company d/b/a AT&T Texas' ("AT&T Texas") is granted and the Motion for Summary Decision and Petition of Nexus Communications, Inc. ("Nexus") are denied. The arbitrators conclude that AT&T Texas' method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the terms of the parties' interconnection agreement.

II.

Background

On December 28, 2010, Nexus filed a petition against AT&T Texas for failing to calculate the credits on cash back promotions correctly.<sup>1</sup> Nexus filed the petition for post-interconnection dispute resolution pursuant to the Public Utility Regulatory Act (PURA), the Federal Telecommunications Act of 1996 (FTA) and P.U.C. PROC. R. 21.1 – 21.129, P.U.C.

<sup>1</sup> *Nexus Communications, Inc.'s Petition for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company d/b/a AT&T Texas under FTA Relating to Recovery of Promotional Credit Due* (December 28, 2010).

PROC. R. 22.1 – 22.284, and P.U.C. SUBST. R. 26.1 – 26.469. AT&T Texas filed its response to Nexus' petition on January 7, 2011.<sup>2</sup>

On August 10, 2011, the arbitrators issued Order No. 10, *Requesting Briefs on Threshold Legal Issue*. In Order No. 10, the arbitrators determined that the threshold legal issue in this docket is:

*Does AT&T Texas' method of calculating cash back promotional offerings available for resale comply with all applicable federal and state law and terms of the parties' interconnection agreement?*

Nexus' filed its Motion for Summary Decision on September 16, 2011 and filed its Reply Brief on Threshold Issues/Motion for Summary Decision on October 14, 2011. In its Motion for Summary Decision, Nexus asserted that AT&T Texas' method of calculating cash back promotions for resellers violates state and federal law and the terms of the parties' interconnection agreement (ICA) because AT&T Texas refuses to provide resellers with the same amount of credit that AT&T Texas provides its own retail customers thereby violating the principal that wholesale rates should be less than retail rates.<sup>3</sup> According to Nexus, AT&T Texas' calculations create the opposite effect, which are wholesale rates greater than retail rates.

Nexus claims that the wholesale discount percentage of 21.6% (avoided costs) should not be applied to the promotional cash back amount but should only be applied to standard retail prices. Nexus argued that the formula that should be used by AT&T Texas to calculate the wholesale price associated with special sales or promotions is the standard retail price subtracted by the full cash back promotional amount subtracted by the avoided costs (wholesale price = (retail price – promotional cash back) – avoided costs). In Nexus' formula, avoided costs are calculated by multiplying the standard retail prices by the wholesale discount percentage (the promotional discount is not reduced by avoided costs).<sup>4</sup>

On September 16, 2011, AT&T Texas filed its Motion to Dismiss and filed its Response to Nexus' Brief on Threshold Issue/Motion for Summary Decision on October 14, 2011. AT&T Texas avers that the parties' ICA, which incorporates the resale provisions of the Federal Telecommunications Act (FTA), provides that "[f]or promotions of more than 90 days, [AT&T]

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

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

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

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

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

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

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

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

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

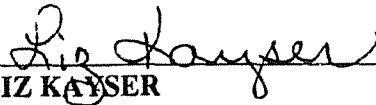
<sup>8</sup> *Id* at 5.

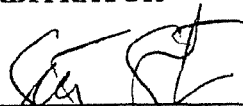
**III.  
Ruling**

The Arbitrators find that AT&T Texas' motion should be granted for the reasons contained in that motion and AT&T Texas' supporting documentation. All pending requests for relief of Nexus are hereby denied and this case is dismissed without prejudice.

**SIGNED AT AUSTIN, TEXAS** the 5<sup>th</sup> day of April, 2012.

**PUBLIC UTILITY COMMISSION OF TEXAS**

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

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

# **EXHIBIT 5**

PUC DOCKET NO. 39028

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

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OF TEXAS

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ORDER ON MOTION FOR RECONSIDERATION OF ORDER NO. 15

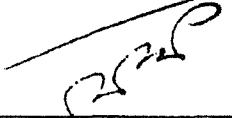
This Order addresses the motion for reconsideration of Order No. 15 by Nexus Communications, Inc. The Commission finds that the determination of the arbitrators in Order No. 15 is correct. Therefore, the Commission denies Nexus's motion for reconsideration and upholds the arbitrators' ruling in Order No. 15.

SIGNED AT AUSTIN, TEXAS the 14th day of June, 2012.

PUBLIC UTILITY COMMISSION OF TEXAS

  
DONNA L. NELSON, CHAIRMAN

  
KENNETH W. ANDERSON, JR., COMMISSIONER

  
ROLANDO PABLOS, COMMISSIONER



# **EXHIBIT 6**

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA  
COMMISSION DIRECTIVE**

ADMINISTRATIVE MATTER	<input type="checkbox"/>	DATE	<u>November 09, 2011</u>
			<u>2010-14-C/2010-15-C</u>
MOTOR CARRIER MATTER	<input type="checkbox"/>	DOCKET NO.	<u>2010-16-C/2010-17-C</u>
			<u>2010-18-C/2010-19-C</u>
UTILITIES MATTER	<input checked="" type="checkbox"/>	ORDER NO.	_____

**SUBJECT:**

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

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

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

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

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

-and-

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

**COMMISSION ACTION:**

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

The disputed amounts relate to three types of offers:

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

discounted.

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

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

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

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

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

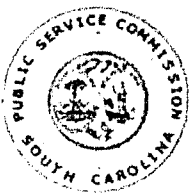
PRESIDING: Howard

SESSION: Regular

TIME: 1:30 p.m.

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HOWARD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
MITCHELL	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
WHITFIELD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
WRIGHT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

(SEAL)



RECORDED BY: J. Schmieding

# **EXHIBIT 7**

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC. )	
d/b/a AT&T SOUTHEAST )	
d/b/a AT&T KENTUCKY )	
Complainant )	
v. )	CASE NO. 2010-00026
LIFECONNEX TELECOM, LLC )	
f/k/a SWIFTEL LLC )	
Defendant )	

AFFIDAVIT OF CYNTHIA A. CLARK IN SUPPORT OF MOTION FOR ORDER FINDING LIFECONNEX LIABLE FOR UNPAID CHARGES. DISMISSING COUNTERCLAIMS AND CLOSING DOCKET

Cynthia A. Clark, having been duly sworn, hereby states as follows:

- My name is Cynthia A. Clark. I am employed by AT&T Services, Inc. as a Senior Quality/M&P/Process Manager. My business address is 2300 Northlake Centre Drive, Tucker, Georgia 30084. My group is part of the AT&T Wholesale Customer Care organization, and I am responsible for, among other things, managing certain aspects of billing disputes raised by competitive local exchange carrier (“CLEC”) customers of the AT&T incumbent local exchange carriers (“ILECs”), including BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky (“AT&T Kentucky”). In that capacity, I have knowledge of the facts set forth in this Affidavit.

- AT&T Kentucky and Lifeconnex Telecom, LLC f/k/a Swiftel LLC (“Lifeconnex”) entered into an interconnection agreement (“ICA”) and, pursuant to that ICA, AT&T Kentucky provided to Lifeconnex Resale services, *i.e.*, local

telecommunications services that Lifeconnex resold to its end users. Pursuant to the terms of the ICA, AT&T Kentucky submitted monthly charges to Lifeconnex for those Resale services.

3. Lifeconnex has submitted disputes to AT&T Kentucky related to the charges AT&T Kentucky billed for Resale services; and Lifeconnex has withheld payment from AT&T Kentucky based on its disputes. The great majority of disputes raised by Lifeconnex concerns claims for credits for various promotions offered by AT&T Kentucky to its retail customers. My group reviews such disputes and assesses whether to grant or deny the dispute as appropriate.

4. My group maintains detailed records of all of the disputes submitted by CLECs, such as Lifeconnex. Those records show that the total amount withheld by Lifeconnex as a result of its disputes is \$1,350,146. Included in that total, and relating to the three dispute issues identified as the "threshold issues" in this proceeding, is \$335,590 comprised of: (1) \$239,688 in what are referred to in this proceedings as the "cash back" promotion and line connection charge waiver ("LCCW") disputes relating to the avoided cost discount; and (2) \$95,902 in the customer referral ("word-of-mouth") promotion disputes.

[Signature on following page]

Cynthia A. Clark  
Cynthia A. Clark

STATE OF GEORGIA

COUNTY OF Gwinnett

Sworn to and subscribed before me this 25<sup>th</sup> day of September, 2012.

Howard F. Lowe  
Notary Public

My Commission expires:  
2/21/2014



# **EXHIBIT 8**



COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.	)	
d/b/a AT&T SOUTHEAST	)	
d/b/a AT&T KENTUCKY	)	
Complainant	)	
v.	)	CASE NO. 2010-00026
	)	
LIFECONNEX TELECOM, LLC	)	
f/k/a SWIFTEL LLC	)	
Defendant	)	

AFFIDAVIT OF DAVID J. EGAN IN SUPPORT OF MOTION FOR  
ORDER FINDING LIFECONNEX LIABLE FOR UNPAID CHARGES,  
DISMISSING COUNTERCLAIMS AND CLOSING DOCKET

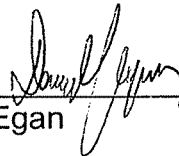
David J. Egan, having been duly sworn, hereby states as follows:

1. My name is David J. Egan. My business address is 722 N. Broadway, Floor 9, Milwaukee, Wisconsin. I am employed by AT&T Services, Inc., as a Lead Credit Analyst. In that position, I manage a group within the Wholesale Credit & Collections group that is responsible for, among other things, pursuing collection from competitive local exchange carriers ("CLECs") that fail to pay AT&T entities, including BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky"), for services. In that capacity, I have knowledge of the facts set forth in this Affidavit.

2. AT&T Kentucky and Lifeconnex Telecom, LLC f/k/a Swiftel LLC ("Lifeconnex") filed an interconnection agreement ("ICA"), filed with and approved by the Kentucky Public Service Commission.

3. After entering into the ICA, AT&T Kentucky provided to Lifeconnex Resale services *i.e.*, local telecommunications services that Lifeconnex resold to its end users. AT&T Kentucky maintains records of all amounts billed to Lifeconnex, all billing adjustments and all payments for Resale services.

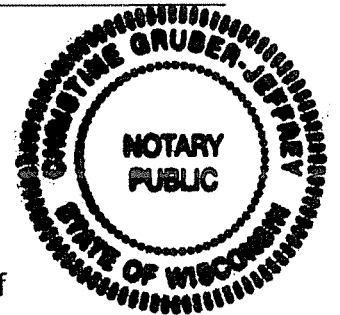
4. Lifeconnex has failed to pay all of AT&T Kentucky's charges for Resale services. According to AT&T Kentucky's records, as of December 31, 2010, when Lifeconnex was disconnected for non-payment in Kentucky, the total amount Lifeconnex had failed to pay AT&T Kentucky is \$1,926,923. Included in that amount is \$32,298 in late fees on unpaid charges for Resale services. A summary of the amounts billed by AT&T Kentucky, billing adjustments provided by AT&T Kentucky and payments made by Lifeconnex is attached as Exhibit A.

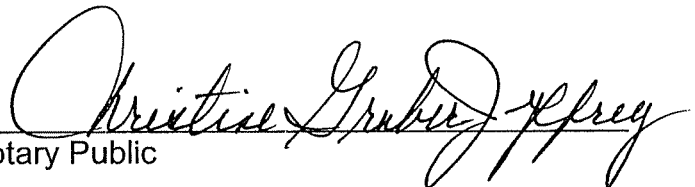
  
\_\_\_\_\_  
David J. Egan

STATE OF WISCONSIN

COUNTY OF Milwaukee

Sworn to and subscribed before me this 25<sup>th</sup> day of September, 2012.



  
\_\_\_\_\_  
Notary Public

My Commission expires:

October 13, 2013

# **Exhibit A**

**The entire document is proprietary.  
There is no edited version.**

CERTIFICATE OF SERVICE – PSC 2010-00026

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof via U.S. Mail, this 28th day of September 2012.

Justin Nymark  
Lifeconnex Telecom, LLC  
6905 N. Wickman Road, Suite 403  
Melbourne, FL 32940

Tom Biddix  
P. O .Box 1358  
Melbourne, FL 32902

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

  
\_\_\_\_\_  
Mary K. Keyer