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April 27, 2011

RECEIVED

APR 28 2011

PUBLIC SERVICE
COMMISSION

VIA OVERNIGHT MAIL

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

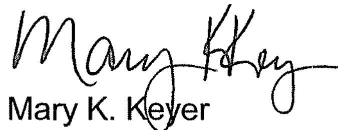
Re: dPi v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky
KPSC 2009-00127

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of AT&T Kentucky's Notice of Subsequent Developments.

Should you have any questions, please let me know.

Sincerely,



Mary K. Keyer

cc: Parties of Record

Enclosures

919633

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

AT&T KENTUCKY'S NOTICE OF SUBSEQUENT DEVELOPMENTS

BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") respectfully submits the attached documents to inform the Kentucky Public Service Commission ("Commission") of developments in other states since the Parties filed their Reply Briefs on March 11, 2011.

A. South Carolina Office of Regulatory Staff Recommendation

In the Consolidated Phase proceedings in South Carolina,[1] the Resellers filed a Post-Hearing Brief[2] in which they presented essentially the same arguments that dPi

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[1] *Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phone Services, Incorporated d/b/a High Tech Communications*, Docket No. 2010-14-C; *Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated*

Teleconnect, LLC ("dPi"), presented in its Brief filed in this docket on February 7, 2011. After considering the briefs filed by the Resellers and AT&T South Carolina, the South Carolina Office of Regulatory Staff ("ORS")[3] on April 6, 2011, submitted its written recommendation to the Public Service Commission of South Carolina. A copy of the ORS Recommendation is attached hereto as **Attachment 1**.

Specifically, in addressing the issue of the appropriate methodology[4] to be used for computing cashback credits to the Resellers of AT&T promotions that provide a one-time cashback benefit that exceeds the monthly price of the underlying service (which the Resellers erroneously characterized as a "negative price" situation), the ORS recommended:

> that the [South Carolina] Commission find that AT&T's method is appropriate when the net amount paid by a Reseller in the aggregate is greater than the net amount paid by a retail customer in the aggregate over a period of three months or less, but where the net amount paid by a Reseller in the aggregate is greater than the net amount paid by a retail customer in the aggregate over a period of four or more months, Resellers can challenge AT&T's methodology before this Commission in light of the specific facts of the situation. ORS respectfully submits that this is

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d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Dialtone & More, Incorporated, Docket No. 2010-15-C; *Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated 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. 2010-16-C; *Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. OneTone Telecom, Incorporated,* Docket No. 2010-17-C; *Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. dPi Teleconnect, LLC,* Docket No. 2010-18-C; *Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Image Access, Incorporated d/b/a NewPhone,* Docket No. 2010-19-C. The Defendants in these proceedings are collectively referred to herein as the "Resellers."

[2] The Resellers' South Carolina Post-Hearing Brief is available at: http://dms.psc.sc.gov/pdf/matters/DA487BBC-C3FC-5982-B6CB5D5EA0810296.pdf.

[3] The ORS is a state agency that is independent of the South Carolina Commission, and "must represent the public interest of South Carolina before the [South Carolina] Commission." *See* S.C. Code Ann. §58-4-10(B).

[4] AT&T proposed applying the Commission-established wholesale discount "to the promotional price and not to the standard retail price of the services that are subject to the promotional offerings." ORS Recommendation at 1. This is mathematically identical to applying the discount to both the standard retail price of the service and the cashback credit provided to a Reseller, which is what AT&T Kentucky proposes in its brief in this docket.

> consistent with the reasoning that led the Federal Communications Commission to exempt promotions lasting ninety (90) days or less from the resale obligations of the Telecommunications Act of 1996.

Attachment 1 at 3. Although AT&T believes that the disciplines imposed by the competitive marketplace render the "period of four or more months" aspect of the ORS's Recommendation unnecessary, AT&T acknowledges that the ORS's proposal is not unreasonable and is consistent with controlling law.

B. North Carolina Utilities Commission's Appellate Brief

AT&T Kentucky, in its Brief (at 26) filed in this docket on February 4, 2011, addressed the North Carolina Utilities Commission's ("NCUC") Order in favor of AT&T North Carolina in a cashback complaint proceeding dPi brought against AT&T in that state.[5] The NCUC case is the companion proceeding to the dPi complaint the Kentucky Commission is considering in this docket. dPi appealed the NCUC Order,[6] and dPi's brief in that proceeding presents essentially the same arguments as presented in dPi's Brief filed in this case on February 7, 2011. In its Response Brief filed April 21, 2011 (attached hereto as **Attachment 2**), among the arguments made by the NCUC in response to dPi's arguments are the following:

> C. The Method that the NCUC Directed Parties to Use to Calculate Promotional Credits Mirrors the Method Described in *Sanford* by the Fourth Circuit. *See* Attachment 2 at 16.

. . .

---

[5] *See In the Matter of dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc.*, North Carolina Utilities Commission Docket P-55, Sub 1744, Order Denying Exceptions and Affirming the Recommended Order (October 1, 2010). A copy of the Order is attached as Exhibit 8 to AT&T Kentucky's Brief filed herein.

[6] *See dPi Teleconnect, L.L.C. v. Chairman Edward S. Finley, Jr., Commissioner William T. Culpepper, III, Commissioner Lorinzo L. Joyner, Commissioner Bryan E. Beatty, Commissioner Susan W. Rabon, Commissioner ToNola D. Brown-Bland, and Commissioner Lucy T. Allen (in their official capacities as Commissioners of the North Carolina Utilities Commission); and BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, U.S. District Court, Eastern District of North Carolina, Western (Raleigh) Division, Civil Action 5:10-cv-00466-BO.

D. Contrary to dPi's argument, Federal Provisions Allow Temporary Retail Price Reductions That Drop Below Wholesale Prices and Do Not Require Revisions to the Wholesale Discount in Order to Ensure that Wholesale Prices Are Always Lower than Retail Prices. *Id.* at 17.

. . .

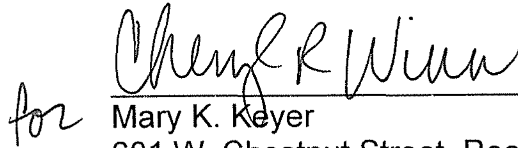
E. Contrary to dPi's Argument, Federal Requirements Do Not Allow Changes to the Discount Percentage For Cashback Promotions. *Id.* at 20.

. . .

III. dPi's Argument Concerning Preapproval Should Not Be Reveiwed Because It Was Not Raised In The Pleadings And Is Not Pertinent To The Determination Of The Issue That Was Raised, dPi Is Not Aggrieved By The NCUC'S Statement Concerning Preapproval, And, If Reviewed, The NCUC'S Statement Described A Practice That Is Not Contrary To Federal Law. *Id.* at 23.

The NCUC's discussions associated with these arguments squarely address and refute each of dPi's erroneous arguments herein.

Respectfully submitted,



for

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ATTACHMENT 1

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Nanette S. Edwards
Chief Counsel and Director of Legal Services

April 6, 2011

VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk and Administrator
Public Service Commission of South Carolina
101 Executive Center Dr., Suite 100
Columbia, SC 29210

Re: Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phone Services, Incorporated d/b/a High Tech Communications
Docket No. 2010-14-C

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

Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated 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. 2010-16-C

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

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

Complaint and Petition for Relief of BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Image Access, Incorporated d/b/a NewPhone
Docket No. 2010-19-C

Dear Ms. Boyd:

Although the South Carolina Office of Regulatory Staff ("ORS") did not present testimony or file proposed orders and briefs in the above referenced dockets, attorneys for both complainant and defendants have asked ORS to review the issues raised in this matter.

In considering the briefs submitted by the parties, ORS submits the following recommendations for the Commission's consideration in deciding the issues before the Commission in this proceeding. The three issues before the Commission are as follows:

I. The methodology for computing cash back credits to Resellers of AT&T South Carolina's ("AT&T") retail promotions
II. Whether word-of-mouth promotions are available for resale and if so the methodology for computing credits to Resellers
III. The calculation of credits to Resellers for waiver of the line connection charge

I. Cash-Back Promotions

The Federal Communications Commission's *Local Competition Order*[1] provides that promotions lasting longer than ninety (90) days are subject to resale. An Incumbent Local Exchange Carrier ("ILEC") must offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.[2] Furthermore, an ILEC cannot impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service. Consistent with the Telecommunications Act, the South Carolina Public Service Commission established a wholesale discount of 14.8% to be applied to BellSouth Telecommunications, Inc.'s retail telecommunications services in Order No. 97-189.

For cash-back promotions where the cash-back amount is less than the standard retail price of the service, ORS recommends that the Commission adopt AT&T's position that the wholesale discount of 14.8% be applied to the promotional price and not to the standard retail price of the services that are subject to the promotional offerings. For example, assuming a monthly retail amount of $30.00 with a cash-back promotion of $25.00 using AT&T's methodology maintains an avoided cost percentage of 14.8%.

AT&T's Method						
Total Paid	$ 25.56	$ 51.12	$ 76.68	$ 102.24	$ 127.80	$ 153.36
Total Cashback	$ (21.30)	$ (21.30)	$ (21.30)	$ (21.30)	$ (21.30)	$ (21.30)
Net Amount Paid	$ 4.26	$ 29.82	$ 55.38	$ 80.94	$ 106.50	$ 132.06
% Difference from Net Retail	14.8%	14.8%	14.8%	14.8%	14.8%	14.8%

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, *11 FCC Rcd 15499, (1996)(Local Competition Order), subsequent history omitted.*
[2] 47 USC § 251(c) (4)(A)

However, for cash-back promotions where the cash-back amount is higher than the standard retail price of the services, ORS recommends a different approach. While we believe that it is not appropriate to consider only the month in which the cash-back is received, ORS believes that these types of promotion should be evaluated over a reasonable period of time. ORS can foresee circumstances in which AT&T's methodology could impede a Reseller's ability to compete. For example, if AT&T offered $200 cash-back on a service with a monthly price of $20.00, under AT&T's method it would be many months before the aggregate amount a retail customer pays for the service exceeds the aggregate amount a Reseller pays for the service:

AT&T's Method						
Total Paid	$ 17.04	$ 34.08	$ 51.12	$ 68.16	$ 85.20	$ 102.24
Total Cashback	$ (170.40)	$ (170.40)	$ (170.40)	$ (170.40)	$ (170.40)	$ (170.40)
Net Amount Paid	$ (153.36)	$ (136.32)	$ (119.28)	$ (102.24)	$ (85.20)	$ (68.16)
% Difference from Net Retail	14.8%	14.8%	14.8%	14.8%	14.8%	14.8%

To balance these concerns, ORS recommends that the Commission find that AT&T's method is appropriate when the net amount paid by a Reseller in the aggregate is greater than the net amount paid by a retail customer in the aggregate over a period of three months or less, but where the net amount paid by a Reseller in the aggregate is greater than the net amount paid by a retail customer in the aggregate over a period of four or more months, Resellers can challenge AT&T's methodology before this Commission in light of the specific facts of the situation. ORS respectfully submits that this is consistent with the reasoning that led the Federal Communications Commission to exempt promotions lasting ninety (90) days or less from the resale obligations of the Telecommunications Act of 1996.

II. Word-of-Mouth Promotions

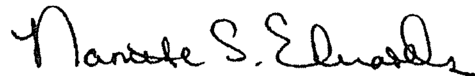
AT&T states that qualifying AT&T South Carolina retail customers can receive promotional benefits such as gift cards under these offerings if they convince friends and family members who are not AT&T retail customers to purchase particular AT&T services (i.e. word-of-mouth promotion). The Resellers in their brief state that the Word-of-Mouth promotion allows an AT&T customer to receive a $50 rebate for referring a new customer to AT&T. ORS submits that resale obligations apply only to "telecommunications services" the ILEC provides at retail, and a marketing referral program like "word-of-mouth" should not be subject to resale. Therefore, ORS recommends that the Commission adopt AT&T's position on this issue.

III. Waiver of Line Connection Charge Promotions

AT&T also offers a line connection charge waiver ("LCCW") promotion to its end-users. The retail customer would normally incur a charge for the line connection, and as a result of the waiver is charged nothing. The Resellers are first charged the Line Connection Charge at the applicable wholesale discount and then are credited back the amount assuming they qualify for the promotion.

The Resellers seek a credit of the entire amount (prior to application of the wholesale discount). ORS's position is that the waiver should be in the amount of a credit to zero out the amount previously charged to the Reseller. In this manner, the Reseller is not paid for the Line Connection Charge. Thus, ORS recommends that the Commission adopt AT&T's position on this issue.

Respectfully submitted,



Nanette S. Edwards

cc: Patrick W. Turner, Esquire
Henry Walker, Esquire
John J. Pringle, Jr., Esquire
Anton Christopher Malish, Esquire
Paul Francis Guarisco, Esquire

ATTACHMENT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN (RALEIGH) DIVISION

Civil Action 5:10-cv-00466-BO

<table>
<tr><td>dPi TELECONNECT, L.L.C.,

Plaintiff,

v.

Chairman Edward S. Finley, Jr., Commissioner William T. Culpepper, III, Commissioner Lorinzo L. Joyner, Commissioner Bryan E. Beatty, Commissioner Susan W. Rabon, Commissioner ToNola D. Brown-Bland, and Commissioner Lucy T. Allen (in their official capacities as Commissioners of the North Carolina Utilities Commission); and BellSouth Telecommunications, Inc. d/b/a/ AT&T North Carolina

Defendants.</td><td>)
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)</td><td>DEFENDANT COMMISSIONERS' RESPONSE BRIEF IN SUPPORT OF AN ORDER DENYING RELIEF SOUGHT BY PLAINTIFF AND AFFIRMING ORDERS OF THE NORTH CAROLINA UTILITIES COMMISSION</td></tr>
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN (RALEIGH) DIVISION

Civil Action 5:10-cv-00466-BO

dPi TELECONNECT, L.L.C., Plaintiff, v. Chairman Edward S. Finley, Jr., Commissioner William T. Culpepper, III, Commissioner Lorinzo L. Joyner, Commissioner Bryan E. Beatty, Commissioner Susan W. Rabon, Commissioner ToNola D. Brown-Bland, and Commissioner Lucy T. Allen (in their official capacities as Commissioners of the North Carolina Utilities Commission); and BellSouth Telecommunications, Inc. d/b/a/ AT&T North Carolina Defendants.	)	**DEFENDANT COMMISSIONERS' RESPONSE BRIEF IN SUPPORT OF AN ORDER DENYING RELIEF SOUGHT BY PLAINTIFF AND AFFIRMING ORDERS OF THE NORTH CAROLINA UTILITIES COMMISSION**

Defendants Edward S. Finley, Jr., in his capacity as Chairman of the North Carolina Utilities Commission, and William T. Culpepper, III, Lorinzo L. Joyner, Bryan E. Beatty, Susan W. Rabon, ToNola D. Brown-Bland, and Lucy T. Allen, in their official capacities as Commissioners of the North Carolina Utilities Commission (together, "the Defendant Commissioners"), by and through their undersigned counsel, file this responsive brief in support of an order that denies the relief sought by Plaintiff dPi Teleconnect, L.L.C. ("dPi") and affirms the orders of the North Carolina Utilities Commission ("NCUC" or "Commission").

SUMMARY OF THE NATURE OF THE CASE

This action for declaratory judgment is in the nature of an administrative appeal from orders of the NCUC in a complaint proceeding, and concerns how promotional credits should be calculated for "resale" services that defendant BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina ("AT&T") sold to dPi pursuant to requirements of the Telecommunications Act of 1996 ("the Telecom Act" or "the Act."). *See* 47 U.S.C., §§ 251(c)(4); 252(d)(3). dPi filed a complaint with the NCUC seeking a determination that it is entitled to recovery of promotional credits from AT&T pursuant to the parties' interconnection agreements for the period beginning late 2003 through July 2007. (Doc 38-1) Following an evidentiary hearing and oral arguments, the NCUC issued a Recommended Order that allowed dPi's complaint and ordered AT&T to pay dPi's claims subject to validation of the amounts. *See Recommended Order* issued 7 May 2010 in *In the Matter of dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc., d/b/a/ AT&T North Carolina*, Docket No. P-55, Sub 1744 (*"RO")*. (Doc 39-10) However, the NCUC did not find that the credits should be calculated using the method advocated by dPi. *RO* 6, 20-22. (Doc 39-10 pp 7, 21-23) Under dPi's method, the full value of promotional cashback offers (e.g. $100) would be credited to dPi, but the NCUC found 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. *Id.* The parties filed exceptions to the *RO* and, following oral arguments, the NCUC affirmed the decision in the *RO* in the *Order Denying Exceptions and Affirming the Recommended Order* issued 1 October 2010. (Doc 39-16) dPi filed this action seeking a declaration that the method of calculation adopted by the NCUC is not consistent with federal law and policies

under the Telecommunications Act, and that dPi's method must be used. (Doc 1)

The matter is now before this Court to address dPi's complaint for declaratory relief from the NCUC decision, and will be decided based on the record before the NCUC and the briefs filed by the parties with this Court. *See* Scheduling Order (Doc 37); Report of Rule 26(f) Conference and Joint Motion for Scheduling Order (Doc 36).

dPi's brief is denominated a "Motion for Summary Judgment/Brief on the Merits." (Doc 41) If the Court treats the briefs as motions and memoranda supporting summary judgment, then Defendant Commissioners ask that this Response be considered as the Defendant Commissioners' memorandum of law in support of their response to dPi and in support of a cross motion for summary judgment for defendant Commissioners.

dPi's brief makes two arguments: first, that the NCUC decided the method of calculation of promotional credits incorrectly under federal requirements; and second, that federal law requires AT&T to obtain pre-approval from the NCUC for promotions that are offered in excess of 90 days. The second argument raises an issue that is not presented in or pertinent to dPi's Complaint filed with this Court.

STATEMENT OF THE FACTS

Background about the Telecom Act is helpful to an understanding of the facts.

The Act restructured the local telecommunications industry in order to introduce competitive markets where previously the industry had consisted primarily of state-regulated monopolies. The Act regulates incumbent (i.e., historical) local exchange companies ("incumbent LECs") and competing local exchange companies ("CLECs") to facilitate competition and reduce monopoly control of local markets. *See DPI Teleconnect LLC v.*

Owens, 2011 U.S. App. LEXIS 2233 at *2 (4th Cir. 2011) (citations omitted)(unpublished).

To that end, the Act imposes a number of duties on incumbent LECs, including in pertinent part, the duty to offer telecommunications services to resellers (e.g., CLECs) for resale by CLECs to end users. 47 U.S.C. § 251(c)(4) (Each incumbent LEC has the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."). Resale services must be sold at wholesale prices established by state commissions based on the retail rate less avoided costs. 47 U.S.C. § 252(d)(3). The duty to sell services to resellers at wholesale prices applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term (i.e., rates that are in effect for no more than 90 days and that are not used to evade the wholesale rate obligation). 47 C.F.R. § 51.613(a)(2); *See BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007)("*Sanford").* The NCUC has concluded, in decisions affirmed by the Fourth Circuit Court of Appeals in *Sanford*, 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." *Sanford*, 494 F.3d at 442 (*affirming "Restriction on Resale Order I"* issued December 22, 2004 and *"Restriction on Resale Order II"* issued June 3, 2005, in Docket No. P-100, Sub 72(b)). Thus, the

> "benefit of a ... promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the regulated service(s) associated with the promotion at the promotional rate minus the wholesale discount, unless the [incumbent LEC] proves to the Commission (per 47 C.F.R. [§] 51.613(b)) that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the [incumbent LEC's] resale obligation."

RO 10 (quoting *Restriction on Resale Order I).* (Doc 39-10 p 11)

The complaint to the NCUC involved a dispute about the wholesale price applicable to purchases made by reseller dPi from incumbent LEC AT&T[1] during the period beginning in late 2003 through July 2007. AT&T offered three cashback promotions to its retail customers that were not made available for resale. Under the promotions, end users who agreed to subscribe to a particular service or bundle of services for a particular period of time were offered coupons that could be applied for and redeemed for cash. *RO* 4. (Doc 39-10 p 5)

Promotion #1, referred to as the "$100 Cashback for IFR + 2 Custom Calling or TouchStar Features" promotion, was available for new residential local service subscribers who purchased at least two qualifying features in addition to basic residential service from August 25, 2003 to January 31, 2005. *RO* 6 (Doc 39-10 p 7) AT&T mailed a $100 Cashback coupon to qualified users and the coupon could be redeemed within 90 days for a $100 check. *Id.* Promotion #2, referred to as the "$100 Cashback for Complete Choice, Area Plus with Complete Choice and Preferred Pack" promotion, was available for returning AT&T local service users who purchased one of the qualifying plans from June 1, 2003 through the rest of the period addressed in the complaint. *Id.* AT&T mailed a $100 Cashback coupon to qualified users and the completed coupon could be redeemed for a $100 check by mailing the coupon along with the first month's bill showing the purchase of eligible services. *Id.* Promotion #3, referred to as the "$50 Cashback 2-Pack Bundle Plan" promotion, was available for reacquisition end users from December 15, 2005 to April 30, 2007. From May 1, 2007 through the rest of the period addressed in the complaint the Cashback reward was reduced to

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[1] AT&T, Inc. and BellSouth Corporation merged effective December 29, 2006 and for purposes of this matter are referred to together as AT&T.

$25. AT&T mailed a Cashback coupon to qualifying users that could be redeemed for a check. *RO* 7. (Doc 39-10 p 6)

AT&T adopted the official position that these cashback promotions were not available for resale. *RO* 4, 7. (Doc 39-10 pp 5,8) However, in July 2007 AT&T changed its position following the *Sanford* decision, 484 F.3d 439, and began making cashback promotions available for resale prospectively. *RO* 4-5. (Doc 39-10 pp 5-6) Despite the change in position, AT&T continued to deny claims made by dPi for credits related to promotions that had occurred from 2003 through 2007. *Id.*

The NCUC heard dPi's complaint seeking credits for the cashback promotions offered during 2003-2007, and found that dPi had complied with the applicable terms of its interconnection agreements with AT&T. *RO* 6 (Doc 39-10 p 7) Further, the NCUC found that AT&T failed to show that the refusal to allow resale of the promotions was reasonable and nondiscriminatory or that the credits should be barred on other grounds. *Id.* Therefore the NCUC determined that dPi is entitled to receive credits relating to the promotions. *Id.*

AT&T has not challenged the NCUC's decision, and there is not a dispute before this Court that dPi should receive credits relating to the promotions from 2003 through mid 2007. Rather, the dispute concerns how the credits should be calculated. (Doc 1 p 6)

The method advocated by dPi would credit the full face value of the promotional offering. (Doc 1 p 5) Hence, dPi would credit $100 or $50 or $25 depending on the promotion that the credit relates to. AT&T proposed a method that would calculate the credit based on the value of the promotional offering reduced by the wholesale discount. *RO* 20 (Doc 39-10 p 21) Hence, under AT&T's method, dPi would be credited based on the face value of

the promotion ($100 or $50 or $25) reduced by the 21.5% wholesale discount. Based on the evidence, the NCUC adopted AT&T's method, finding "AT&T should calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion." *RO* 6, 20-22. (Doc 39-10 pp 7, 21-23)

Other facts in the case are provided in conjunction with arguments that follow.

ARGUMENT

I. THE DETERMINATION OF HOW A CREDIT TO DPI SHOULD BE CALCULATED WAS PRIMARILY A FACTUAL MATTER TO WHICH THE COURT APPLIES A SUBSTANTIAL EVIDENCE STANDARD OF REVIEW; AND AS TO LEGAL CONCERNS, THE STANDARD OF REVIEW IS *DE NOVO* BUT THE NCUC DECISION SHOULD BE ACCORDED RESPECT GIVEN THE CARE AND EXPERTISE EXERCISED IN THE MATTER.

The determination that dPi challenges in this case – the correct way to calculate the amount of promotional credits – is predominantly a factual issue. DPi paid too much for telecommunications services during the period 2003-2007 because the value of cashback promotions was not reflected in the wholesale prices that dPi paid. The issue is whether the method that was approved by the NCUC for calculating promotional credits in order to correct the amounts dPi overpaid was - or was not - appropriate. As to findings of fact, the "substantial evidence" standard is applied. *See GTE South v. Morrison*, 199 F.3d 733, 745 n.5 (4th Cir. 1999) (holding 'substantial evidence' is the appropriate standard, but noting that "some other courts" have applied the 'arbitrary and capricious' standard, and observing that "[w]ith respect to review of factfindings, there is no meaningful difference"). On review of a state commission determination under the Act, the court does not "sit as a super public utilities commission," *id* at 745, and is "not free to substitute its judgment for the agency's." *Id* at

746. Instead, the court "must uphold a decision that has substantial support in the record as a whole even if [the court] might have decided differently as an original matter." *Id* at 746; *see also DPI Teleconnect v. Owens*, 2011 U.S. App. LEXIS at *8.

dPi makes legal or policy arguments for using dPi's preferred method to determine the credits. As to questions of law that are raised by dPi's claims, the review is *de novo*. However, NCUC decisions are accorded respect and consideration and should not be taken lightly even under *de novo* review given the NCUC's longtime experience and the important role that state commissions play under the regulatory scheme established in the Telecommunications Act. *Sanford*, 494 F.3d at 447-48 (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) and *Skidmore v. Swift* & Co., 323 U.S. 134, 139-40 (1944)). While the decision in *Sanford* confirmed that state commission orders construing the Act fall outside "*Chevron*'s domain and its mandate of deference to reasonable interpretations of ambiguous statutes," 494 F.3d at 447, it found nonetheless that state commissions may deserve "the respect that flows from the longstanding principle that 'the well-reasoned views of the agencies implementing a statute' constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" 494 F.3d at 448 (quoting *Skidmore*, 323 U.S. at 139-40). In particular cases, the court found that the "amount of respect afforded to a state commission will vary in accordance with 'the degree of the agency's care, its consistency, formality, and relative expertness,' as well as 'the persuasiveness of the agency's position.'" *Sanford*, 494 F.3d at 448 (quoting *Mead*, 533 U.S. at 228).

Here, the NCUC proceedings involved initial pleadings, discovery, pre-filed testimony, evidentiary hearings, and the submission of written briefs and proposed orders.(Doc 38-5)

Following the issuance of the *Recommended Arbitration Order*, parties filed exceptions and participated in oral argument, and the full Commission reviewed the case. The final order denied exceptions and affirmed the *RO*, providing additional explanation for the decision. (Doc 39-16) The Commission's orders provide extensive consideration of the issues raised by the parties and the reasoning for the determinations made. (Docs 39-10, 39-16)) These factors support a high level of respect for the NCUC decision in this case as to matters of law.

II. THE NCUC CORRECTLY DETERMINED THE METHOD FOR CALCULATING THE PROMOTIONAL CREDITS.

The NCUC accurately decided how promotional credits should be calculated in order to correct the amount that dPi paid for services from 2003-2007 to reflect the effect of the cashback promotions on the wholesale price. The method adopted by the NCUC was supported by on substantial evidence and used the same method for calculating the wholesale price for a promotional telecommunications service as was used in a hypothetical described in the *Sanford* decision. The method advocated by dPi, on the other hand, is not mathematically accurate - i.e., not an accurate way to calculate the promotional rate or the credit in order to correct the amount overpaid. The legal arguments posited by dPi are not well founded and do not support the use of an incorrect calculation method.

As computed by the NCUC, the promotional credits reflect the difference between what dPi originally paid for services during 2003-2007– *i.e., the standard retail rate less the wholesale discount* – and what dPi would have paid taking into account the cashback promotions - i.e., *the promotional retail rate less the wholesale discount.* The promotional rate is the standard retail rate adjusted for the cashback amount. The NCUC's method of

calculating the credits correctly makes adjustments to all components of the formula relating to the change in the retail rate, whereas the approach that dPi advocates would adjust the retail rate to reflect the value of the cashback promotion, but would not make any corresponding adjustment to the amount of the wholesale discount. Thus, the dPi approach is simply incorrect mathematically. In fact, as will be shown below, dPi's discussion about how the credits should be calculated ignores the formula that is inherent in the FCC regulation, disregards the evidence of how the formula applies shown during cross examination of dPi's witness, and conflicts with the statements provided in prepared testimony presented by dPi's own witness.

A. Federal and State Provisions Establish the Formula for Determining the Wholesale Price Available to Resellers

The formula used by the NCUC to determine the wholesale price applicable to resellers is based on federal requirements. Under the Telecommunications Act, incumbent LECs are obliged to offer telecommunications services for resale to competing providers, 47 U.S.C. § 251(c)(4), and the wholesale price for services sold to resellers is a matter that is determined by a State commission "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). The *wholesale price* that an incumbent LEC may charge for a particular telecommunications service provided for resale must equal the retail rate for that service less "avoided retail costs." 47 C.F.R. § 51.607. Pursuant to 47 C.F.R. § 51.609, the amount of the avoided retail costs shall be determined by State commissions on the basis of a

cost study that meets particular requirements. 47 C.F.R. § 51.609(a); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F.C.C.R. 15499 (*"Local Competition Order*") ¶ 909. The criteria in the regulation are designed to apply consistent interpretations of the Act in setting wholesale rates based on avoided cost studies in order to facilitate swift entry by resellers. *Id.* Nonetheless, the criteria "are intended to leave the state commissions broad latitude in selecting costing methodologies that comport with their own ratemaking practices for retail services." *Id.* The FCC specifically recognizes that state commissions may use a single uniform discount rate for determining wholesale prices. *Local Competition Order* ¶ 916; In other words, the FCC regulations recognize and anticipate that an evaluation of particular avoided costs for each service would be cumbersome and instead allow the application of a uniform percentage discount. *Id.* The FCC recognized that the adoption of a uniform rate "is simple to apply, and avoids the need to allocate costs among services." *Id.*

The discount rate for AT&T (i.e., the "BellSouth") was determined by the NCUC in the *Recommended Arbitration Order* issued 23 December 1996 in *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&T RAO 1996*")[2] The NCUC adopted a wholesale discount rate of 21.5% for residential services and 17.6% for business services. *Id* p 43. The parties have not challenged the accuracy of the percentage or supplied new cost studies for the purpose of establishing additional classes of service to which

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[2] dPi agrees that the discount percentage was established in the *AT&T RAO 1996. See dPi's Reply to Staff's Proposed Findings and Conclusions.* (Doc 39-7 p 7, note 2)

a different discount rate should apply.

B. Examples Illustrate How the Wholesale Price Is Calculated and Demonstrate that the NCUC Ordered the Accurate Method to Calculate Corrections to the Wholesale Price Charged from 2003-2007.

The wholesale price for a particular service is equal to the retail rate for the service reduced by the wholesale discount. 47 C.F.R. § 51.607(a); *Local Competition Order* ¶ 916. For example, if the retail rate for a residential service is $75, the corresponding 21.5% wholesale discount is $16.12 and the wholesale price is equal to $58.88:

Example 1: $75 - 21.5% of $75 = $58.88

Since the wholesale discount amount is equal to a percentage of the retail rate, a larger retail rate corresponds to a larger discount amount. For example, if the retail rate is reduced by $25 from $75 to $50, then the corresponding wholesale discount is reduced from $16.12 to $10.75 and the reduced wholesale price is equal to $39.25:

Example 2: $50 - 21.5% of $50 = $39.25

Reviewing the math, when the retail rate was reduced by $25 in Example 2, the reduction in the retail rate prompted a corresponding reduction in the amount of the wholesale discount.

Example 1: Wholesale discount for $75 = $16.12

Example 2: Wholesale discount for $50 = $10.75

The difference between the wholesale price for a retail service offered at $75 (Example 1) and a retail service offered at $50 (Example 2) equals $19.63:

$58.88 - $39.25 = $19.63

Another way that the difference in the wholesale price can be measured is by applying

the discount to the amount of the reduction:

$75-$50 = $25 - 21.5% of $25 = $19.63

During cross examination of dPi's CEO Tom O'Roark (who adopted pre-filed testimony of Mr. Brian Bolinger), AT&T questioned the witness about the way the wholesale price would be calculated using similar examples illustrated in O'Roark Cross-Examination Exhibit No. 4, and Mr. O'Roark agreed with the math. (Doc 39-1 pp 87-90) Pages from testimony relating to these calculations are attached in Commissioner's Response Exhibit A and the cross examination exhibit is attached in Commissioner's Response Exhibit B.

When the NCUC considered the issue about what method is appropriate for calculating the impact of cashback promotions on the wholesale price that dPi should have paid between 2003 through 2007, dPi had already paid for the services.(Doc 39-1 pp 50-51) The wholesale price dPi had paid was based on AT&T's *standard* retail rate unadjusted for the reductions caused by the cash-back promotions. *Id.* Therefore the NCUC calculated what *correction* should be made to credit dPi for the difference between the wholesale price applicable to the standard retail rate and the wholesale price applicable to the promotional retail rate. It found that what is required is "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." *RO* p 21 (Doc 39-10 p 22)(quoting *Restriction on Resale Order II* p 6)

AT&T argued that the proper method to correct the amount paid during 2003-2007 would be to credit dPi for the promotional amount less the amount of the corresponding correction to the wholesale discount. *RO* 20 (Doc 29-10 p 21) So, for a promotion offering

$25 cash back, AT&T argued dPi should be given a promotional credit of $25 - 21.5% of $25 = $19.63. (Doc 39-1 p 90) AT&T's method correctly reflects the fact, demonstrated in Examples 1 and 2 above, that when the retail rate is reduced, there is a corresponding reduction in the amount of the wholesale discount. Therefore, a correction to the amount paid by a reseller must reflect both the change in the retail rate and the corresponding change to the discount amount.

dPi argued that the proper method to correct the amount it paid during 2003-2007 would be to credit dPi for the *full amount* of the cash back dollars offered in promotions. *RO* 21 (Doc 39-10 p 22) So for a promotion offering $25 cash back, dPi argued it should be given a promotional credit of $25.

dPi's method of calculating the amount of the correction was not consistent with some of dPi's own testimony, however. dPi's witness argued in his pre-filed testimony that, "the practical effect of these promotions is to reduce the effective retail rate qualifying customers pay for telephone service." (Doc 39-1 p 51) dPi discussed AT&T's failure to make the promotional rate available to dPi and described the way the wholesale price should have been determined:

> This dispute arises because BellSouth has over the past months and years sold its retail services at a discount to its end users under various promotions that have lasted for more than 90 days. DPi Teleconnect is entitled to purchase and resell those same services *at the promotional rate, less the wholesale discount.*

(Doc 39-1 p 50) Thus dPi's witness conceded that the wholesale discount applies to the *promotional rate*, a position that is not consistent with the position taken later in arguments that the wholesale discount applies to the standard rate, and then the full value of the

promotion is subtracted. *See* dPi's Brief 14 (Doc 41 p 16) and *compare* (Doc 39-1 p 50).

Furthermore, other testimony presented by dPi indicates that dPi's witness was not strongly wedded to the "full value" approach now advocated by dPi. In pre-filed rebuttal testimony dPi's witness was asked, "What about BellSouth's contention that some of the cashback amounts requested by dPi are too high?" He answered,

> There may be some merit in this concern. This has to do with when the retail price is calculated, and ... when the corresponding wholesale discount is applied. *Thus, if the discount is applied before the promotion is taken, the promotion should also be discounted.* The converse is also true. The parties should be able to reach agreement on the true numbers at issue.

(Doc 39-1 p 56) (Emphasis added.)

Although the NCUC agreed with dPi's witness that the promotional rate should have been used to determine the wholesale price, and required AT&T to credit dPi for the corrected amount, the NCUC agreed with AT&T about how the promotional credits should be calculated in order to make the correction.

Therefore, the NCUC directed AT&T to "calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion." *RO* 6 (Doc 39-10 p 7) In other words, the calculation should factor in the effect of the retail rate reduction on the discount.

The NCUC explained its reasoning first by summarizing the examples used in cross examination of Mr. O'Roark and in O'Roark Cross-Examination Exhibit No. 4. *RO* 20 (Doc 39-10 p 21) The NCUC observed that, if the amount of the promotional offering were not reduced by the wholesale discount, then dPi "would receive a greater benefit than it otherwise would be entitled to receive had AT&T merely reduced the telecommunications service's

rate." *RO* 21 (Doc 39-10 p 22) Without an adjustment to the discount amount, the promotional credit would not correct for the difference between what dPi paid as a wholesale price during the 2003-2007 period – based on the *standard rate less the wholesale discount* and what dPi should have paid – based on the *promotional rate less the wholesale discount.*

In sum, the testimony presented to the NCUC provided substantial evidence in support of the method that the NCUC adopted for purposes of calculating promotional credits to correct the overpayments that occurred from 2003-2007.

C. The Method that the NCUC Directed Parties to Use to Calculate Promotional Credits Mirrors the Method Described in *Sanford* by the Fourth Circuit

There is a hypothetical described in the *Sanford* decision that illustrates the impact of a promotion on the retail rate and wholesale price, and the hypothetical applies the same calculation method that was adopted by the NCUC in this case. 494 F.3d at 450-51. The hypothetical was discussed during cross examination of dPi's witness. (Doc 39-1 pp 93-97)

In the hypothetical developed by the Court, the standard rate for telephone service is $120/month, but the customer is sent a monthly rebate check for $100/month. 494 F.3d at 450-51. The Court found that the NCUC was correct in finding that the rebate check must be considered in determining the wholesale price. *Id.* Therefore, the Court observed that, under the NCUC's determination, the appropriate wholesale rate would be "$16, because that is the *net* price paid by the retail customer ($20), less the wholesale discount (20%)" *Id.* (The 20% discount was hypothetical). The formula developed by the Court applied the discount to the *promotional rate* (the method advocated by AT&T in this case and adopted by the NCUC). It did not subtract the *full value* of the $100 rebate check and apply the discount only to the

standard rate (as dPi's method would do). If the Court had applied dPi's method in the hypothetical in *Sanford*, then instead of $16, the wholesale price would have been negative $4. I.e., the standard rate ($120), less the wholesale discount (20% of $120 or $24), less the full $100 rebate:

$120 (the standard rate) - 20% of $120 - $100 = -$4

AT&T questioned Mr. O'Roark about what would be done to correct an overcharge using the hypothetical from *Sanford.*(Doc 39-1 pp 93-94) Through the questioning, AT&T showed that, if the reseller had originally paid a wholesale price of $96 based on the standard $120/month rate ($120 less 20% of $120), then the correction for the promotion would be calculated by applying the discount (20%) to the $100 rebate amount and the reseller would be due a credit of $80. Thus the original $96 rate corrected by the $80 credit would come back to the appropriate retail rate of $16. (Doc 39-1 pp 93-94)

Thus, as was shown in evidence presented to the NCUC, the method of calculating the promotional credits advocated by AT&T is consistent with the method approved in *Sanford.* 494 F.3d at 450-51.

D. Contrary to dPi's argument, Federal Provisions Allow Temporary Retail Price Reductions That Drop Below Wholesale Prices and Do Not Require Revisions to the Wholesale Discount in Order to Ensure that Wholesale Prices Are Always Lower than Retail Prices.

dPi argues that its method for calculating promotional credits must be used in order to ensure that wholesale prices are *always* lower than retail prices. *See* dPi's Brief p 9 ("the Commission's decision … adopts a methodology which violates the key principle that wholesale should be less than retail.") dPi's argument is flawed for several reasons.

First, although retail rates are reduced by avoided costs to determine wholesale rates, what constitutes the "retail rate" is not specifically defined and the FCC has not found that retail prices must at all times be lower than wholesale prices. *Local Competition Order* ¶949. FCC regulations allow incumbent LECs to offer short term (i.e., up to 90 day) promotions that result in temporary price reductions without making such promotions available for resale. *See* 47 C.F.R. § 51.613(a)(2);*Local Competition Order* ¶949. The effect of such short term promotions is not considered in the retail rate of the underlying services when the discounted wholesale price is determined. *Id.*[3] As a result, the price that retail customers pay may temporarily fall below the wholesale price. The FCC found that when promotions are limited in length they may serve pro-competitive ends. *Local Competition Order* ¶949. Hence, dPi's contention that wholesale prices are *always* lower than retail prices is an overstatement. The price may vary temporarily, and the effect on the rate is not necessarily limited to the single month.

In this case, dPi's complaint that the wholesale price is temporarily higher than the retail price is based on the fact that the promotional credit relates to a lump sum amount that shows up in a single month, but the effect on rates is not felt in a single month. In fact, the cashback offer is not paid until a cashback coupon is mailed out to retail customers and returned by them. *RO* 6 (Doc 39-10 p 7) The record does not indicate how much time passes during which retail customers pay the standard rate before they receive the cashback amount. Similarly, the promotional credits to dPi do not match up with a particular month of wholesale

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[3] In this case, the promotions do not qualify as "short term" because they are available as offers for longer than 90 days, thereby affecting the retail rate. *Id; Sanford,* 494 F.3d 439.

service. In fact, the credits are corrections to the wholesale price for services that AT&T sold to dPi between 2003 and 2007. Thus, although the corrections are reflected as promotional credits that apply in one month, the corrections relate to services that dPi purchased for resale at least four years ago. Accordingly, the argument is not compelling that the difference between the retail price and wholesale price in a particular month is problematic and the problem would be corrected if dPi's calculation method were used instead of the method adopted by the Commission.

Moreover, dPi uses an illustration in Table 4 of its Brief based on hypothetical rates and a hypothetical discount percentage that may exaggerate the effect of promotions on net retail prices and corresponding wholesale prices. dPi Brief p 7. The Table compares results of applying the NCUC's adopted approach versus dPi's full value approach to measure the retail versus wholesale prices under several scenarios.[4] The hypothetical assumes a discount rate of 20%, whereas the rate is 21.5% in North Carolina. *Id.* Further, the "standard retail price" in the Table is assumed to be $25 for all cases while the cashback promotion amount changes in the cases from zero, to $25, to $50, and to $100. *Id.* dPi's assumption that the standard retail price stays $25 in all cases is not supported by evidence of the actual price, and does not take into account the fact that the $100 cashback promotions were offered in connection with services that have enhanced features or expanded calling areas that would tend

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[4] The table reflects the approved method and dPi's "full value" approach for calculating the wholesale price change. It also reflects a third method discussed by dPi that calculates the wholesale price using an "absolute value" formula. The third method ignores that the promotional credit is a *correction* to amounts previously overpaid by dPi, and accordingly the reduction to retail rate corresponds to a reduction in the amount of the discount. The "absolute value" approach appears to add to, rather than correct, the impact of the rate change on the discount.

to increase the standard retail price. The amount of the cashback offer compared to the standard retail rate makes a difference in the results shown. The results depicted in dPi's Table are exaggerated because of the assumptions that were used in the illustration.

For these reasons, dPi's argument that the full value method must be used to calculate promotional credits in order to keep wholesale prices less than net retail prices in a particular month is flawed. The argument does not justify the use of a calculation method that would compute credits that over-correct for past overpayments.

E. Contrary to dPi's Argument, Federal Requirements Do Not Allow Changes to the Discount Percentage For Cashback Promotions.

dPi appears to argue that the wholesale discount ought not be applied to the cashback amount in calculating the promotional credits dPi is owed because the avoided costs of providing particular services to resellers do not change when offered at promotional rates. However, the formula for determining wholesale prices applies a percentage discount to the retail rate for any service in order to set the wholesale price. 47 C.F.R. §§ 51.607, 51.609; *Local Competition Order* ¶¶909, 916; *AT&T RAO 1996* p 43. Accordingly, the amount of the retail rate affects the calculation of amount of the discount. If an adjustment is not made to the amount of the wholesale discount for a change in the retail rate, then under the mathematical formula, there is a change in the percentage that has been discounted. Without performing a cost study, it is not appropriate for the NCUC to abandon the 21.5% percentage discount established for AT&T. 47 C.F.R. §§ 51.609(a).

It is unlikely that dPi would obtain an advantage if the NCUC were to engage in a recalculation of the percentage rate for particular promotions or for other types of new

services as they are offered. Although the percentage approach that applies uniformly to residential services is not an exact measure of avoided costs, it would be administratively impractical to identify such costs on a case by case basis.

In this case, there is no evidence to support dPi's contention that a change in the effective retail rate effected by cashback promotions did not have an impact on the amount of avoided costs that would be calculated if a cost study were performed. dPi's position that the formula should be altered in this case would result in a change in the percentage discount without analysis, contrary to federal regulatory requirements.

The NCUC accurately decided that the cash back promotion modifies the retail rate, and, under the wholesale pricing formula, the change in the retail rate prompts a corresponding change in the amount of the discount. As discussed earlier, dPi's witness conceded this point when he explained that "DPi Teleconnect is entitled to purchase and resell [the] same services *at the promotional rate, less the wholesale discount.*" (Doc 39-1 p 50)

F. Contrary to dPi's Argument, Promotional Credits Are Corrections to Amounts Paid by dPi in Prior Periods, and the Corrections Must Reverse the Original Discount Amount to the Extent it Was Based on an Overstated Retail Rate.

Another argument dPi makes for using dPi's method to calculate the promotional credits is that the statute requires that the avoided cost (i.e., the discount percentage) be <u>subtracted</u> from the retail price in order to compute the wholesale price. Apparently, dPi finds it hard to reconcile this principle with the calculation method adopted by the NCUC. However, dPi's argument fails to recognize that the purpose of the promotional credits is to make corrections to the wholesale prices that were charged from 2003 through 2007. The

original retail rates were overstated since they did not reflect the value of the cashback promotions, *and* the corresponding discount amounts were overstated since the discounts were based on the standard retail rates. The corrections adjust the retail rates *and* the discounts for the value of the promotions. As was demonstrated earlier in Examples 1 and 2, a reduction to the retail rate prompts a corresponding reduction in the amount of the wholesale discount. Therefore, the correction in the discount offsets the reduction in the retail rate somewhat when the promotional credit is calculated.

dPi also appears to argue that the full value of the cashback offers should be credited (e.g., the full $100 amount) so that the same terms and conditions offered to retail customers are offered to resellers. As the NCUC stated in the *RO* and in previous determinations, the obligation relating to promotional offers is to provide the *benefit* of the promotional offer through the wholesale price charged the reseller, not to provide the promotional item (such as a gift or cash) itself. *RO* 21 (Doc 39-10 p 22) The face value of the promotion is not required to be passed through to a reseller. Instead, "the price lowering impact of any such 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." *RO* 21 (Doc 39-10 p 22), *quoting Restriction on Resale Order II*, issued 3 June 2005 in Docket No. P-100, Sub 72(b), *affirmed* in *Sanford*, 494 F.3d 439) The formula approved by the NCUC for determining promotional credits accomplishes the purpose of correcting the wholesale price that dPi paid from 2003 through 2007 to reflect the price lowering impact of the cashback promotions on the standard retail rate.

III. DPI'S ARGUMENT CONCERNING PREAPPROVAL SHOULD NOT BE REVIEWED BECAUSE IT WAS NOT RAISED IN THE PLEADINGS AND IS NOT PERTINENT TO THE DETERMINATION OF THE ISSUE THAT *WAS* RAISED, DPI IS NOT AGGRIEVED BY THE NCUC'S STATEMENT CONCERNING PREAPPROVAL, AND, IF REVIEWED, THE NCUC'S STATEMENT DESCRIBED A PRACTICE THAT IS NOT CONTRARY TO FEDERAL LAW.

Next, dPi argues that AT&T must obtain preapproval from the NCUC in order to impose restrictions on resale of promotions that are offered in excess of 90 days, and the NCUC incorrectly stated that preapproval is not required. dPi does not specify what relief is sought from the NCUC's statement but apparently seeks a declaratory judgment that preapproval is required. This argument does not concern a factual or legal matter that is raised in the complaint dPi filed in this Court, (Doc 1) and indeed, although the NCUC commented on the issue in the *RO*, *RO* 10-11 (Doc 39-10 pp 11-12), dPi's complaint to the NCUC did not raise the issue for consideration either. (Doc 39-1) The NCUC's statement about the lack of a preapproval requirement did not affect the outcome of dPi's complaint, obviously, because the NCUC resolved that dPi is entitled to promotional credits. Thus, dPi is not aggrieved by the statement since it had no effect on the outcome. *See* 47 U.S.C. § 252(e(6); Complaint (Doc 1 p 2). Again, here, the resolution of the preapproval issue is not pertinent to the issue that is raised for determination by this Court, i.e., whether the method adopted for calculating promotional credits for telecommunications services purchased from 2003 to 2007 is proper. The discussion about preapproval does not concern a matter in dispute and Defendant Commissioners ask the Court to decline to issue a declaratory judgment addressing the matter.

If the Court determines that a ruling on the pre-approval question is appropriate, then Commissioners submit the following arguments in support of the NCUC's statement that pre-approval is not required.

dPi's argument about preapproval asserts that, when an incumbent LEC offers a promotion for more than 90 days and does not make the benefit of the promotional offering available for resale, there is a presumption that the restriction on resale is unreasonable and discriminatory and therefore that pre-approval from the NCUC is required before the promotion is offered. The NCUC has found that the benefit of a promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the telecommunications services at the promotional rate minus the wholesale discount, "unless the [incumbent] LEC proves to the Commission [per 47 C.F.R. 51.613(b)] that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the [incumbent] LEC's resale obligation." *RO* 10 (*quoting Restriction on Resale Order I, aff'd, Restriction on Resale Order II*, *aff'd Sanford*, 494 F.3d 439). (Doc 39-10 p 11) However, in reaching this decision, the NCUC has refused to establish a bright line rule that promotions exceeding 90 days must be offered to resellers, and instead has adopted a case by case approach allowing incumbent LECs to prove that a 90+ day promotion is reasonable and nondiscriminatory and thus not harmful to competition, though not offered for resale. *Id.*

In this case, the NCUC disagreed with dPi's contention that FCC regulations require an incumbent LEC to obtain pre-approval of promotions containing restrictions on resale that are intended to last more than 90 days, before implementing such restrictions. *Id.* The NCUC found that such a requirement "would unnecessarily burden the Commission's resources

because it would have to convene a proceeding to address *all* such offerings instead of only addressing those to which affected parties actually object." *Id.* dPi doubts that the NCUC would be burdened by a pre-approval requirement, but the NCUC is better situated than dPi or this Court to evaluate the potentially burdensome effect of a pre-approval requirement.

The NCUC's position on preapproval is consistent with federal law. The FCC does not specify that pre-approval is required. Indeed, the FCC has observed that it is not necessarily possible to predict the potential that resale provisions will unreasonably restrict or limit resale. The FCC observed, "we, as well as state commissions, are unable to predict every potential restriction or limitation on resale." *Local Competition Order* ¶ 939. As is alluded to in the FCC's comment, the NCUC may not foresee the problematic nature of a restriction or limitation on resale in a pre-approval process.

Furthermore, the NCUC has expressed concern that a preapproval requirement would have a chilling effect on competitive offerings because incumbent LECs would be reluctant to provide their wireline, wireless, cable, and VoIP competitors such advanced notice of upcoming offerings. *RO* 10 (Doc 39-10 p 11)

In sum, dPi's arguments concerning the need for a preapproval process are not pertinent to the matter raised in dPi's complaint, and the arguments lack merit.

CONCLUSION

For the foregoing reasons, Defendant Commissioners ask the Court to deny the relief sought by Plaintiff dPi and to affirm the orders of the North Carolina Utilities Commission.

Respectfully submitted, this the 21st day of April, 2011.

ROY COOPER
Attorney General

/s/ Margaret A. Force
Assistant Attorney General

Counsel for Chairman Edward S. Finley, Jr., Commissioner William T. Culpepper, III, Commissioner Lorinzo L. Joyner, Commissioner Bryan E. Beatty, Commissioner Susan W. Rabon, Commissioner ToNola D. Brown-Bland, and Commissioner Lucy T. Allen (in their official capacities as Commissioners of the North Carolina Utilities Commission)

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CERTIFICATE OF SERVICE

I hereby certify that on this day, the 21st day of April, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel: David S. Wisz, Dennis G. Friedman, Jeffrey M. Strauss, Mary Kathryn Mandeville, Patrick W. Turner and I hereby certify that I have mailed the document to the following non CM/ECF participants: none.

Respectfully submitted,

/s/ Margaret A. Force
Assistant Attorney General

Counsel for Chairman Edward S. Finley, Jr., Commissioner William T. Culpepper, III, Commissioner Lorinzo L. Joyner, Commissioner Bryan E. Beatty, Commissioner Susan W. Rabon, Commissioner ToNola D. Brown-Bland, and Commissioner Lucy T. Allen (in their official capacities as Commissioners of the North Carolina Utilities Commission)

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COMMISSIONER'S RESPONSE EXHIBIT A

OFFICIAL COPY

1 PLACE: Dobbs Building, Raleigh, North Carolina

2 DATE: Thursday, November 12, 2009

3 DOCKET NO.: P-55, Sub 1744

4 TIME IN SESSION: 10:03 A.M. - 4:37 P.M.

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

7

8 IN THE MATTER OF:

9 BellSouth Telecommunications, Inc.: Complaint of dPi
Teleconnect, LLC

10

11

12 A P P E A R A N C E S:

13 FOR AT&T NORTH CAROLINA:

14 Edward L. Rankin, III
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18 FOR THE USING AND CONSUMING PUBLIC:

19 Lucy Edmondson, Staff Attorney
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21

22

23

24

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1 A P P E A R A N C E S (Continued):

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1 AT&T was not providing cash back credits to dPi, the
2 number of customers in North Carolina increased from 2,896
3 to 5,139, right?
4 A. Right.
5 Q. And from the time that AT&T began giving these
6 credit requests to dPi in North Carolina, your number of
7 customers in North Carolina dropped from 5,139 to 3,966 in
8 June of 2009, correct?
9 A. Correct.
10 Q. Now, let's talk about the amounts that dPi is
11 seeking in this docket. I want you to assume that AT&T's
12 promotion provided its retail customer a coupon that could
13 be redeemed for a $50 cash back check, okay?
14 A. Okay.
15 Q. If that is the request at issue in this docket, is
16 dPi asking the Commission to order BellSouth or AT&T to
17 pay $50 in credits or $50 less the promotional discount
18 and credits?
19 A. I believe that we've asked for $50, right?
20 Q. I'm asking you, sir.
21 A. I'd have to go back and revisit the calculation,
22 but I believe it's based on $50.
23 MR. TURNER: Mr. Chairman, I have a four-page
24 exhibit that I'd like to walk through in hypothetical form

1 with the witness. And I'd like that -- to ask that it be
2 marked as O'Roark Cross-Examination Exhibit No. 4.
3 COMMISSIONER CULPEPPER: All right. Let the
4 document be so identified.
5 (Whereupon, O'Roark Cross-Examination Exhibit
6 No. 4 was marked for identification.)
7 Would you tell us again what this document is?
8 MR. TURNER: Yes, sir. The first page is titled
9 "Telecommunications Service A Retail Price of $75."
10 Mr. Chairman, what I intend to do is walk through the
11 document and compare a price reduction to a cash back and
12 see the dollar amounts that would be at issue there.
13 COMMISSIONER CULPEPPER: All right. Well, let's
14 let the exhibit be identified as O'Roark Cross-Examination
15 Exhibit No. 4.
16 Q. Tell me when you've had a chance to look through
17 that, Mr. O'Roark, and are ready for me to ask you
18 questions.
19 A. I've looked at it.
20 Q. In order to explore dPi's position that it's
21 entitled to a credit for the full face value of a
22 promotional offering, I want you to assume, as depicted on
23 page 1 here, that AT&T has a retail telecommunications
24 service A that has a retail price of $75. I also want you

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1 to assume that the residential resale discount in North
2 Carolina is 21.5 percent. Will you assume that with me?
3 A. Sure.
4 Q. Now, if A -- if dPi purchases service A for
5 resale, we can agree, can't we, that dPi would pay AT&T
6 the $58.88 price that's set out on the last line of page 1
7 of Exhibit 4?
8 A. Hypothetically, yes.
9 Q. That's simply the $75 retail price less
10 21-and-a-half percent resale discount, right?
11 A. Right.
12 Q. Now, you've testified that the net effect of a
13 cash back promotion is to reduce the retail price that
14 AT&T's customers are paying for telephone service, right?
15 And if you want to look at your rebuttal, page 3, lines 1
16 through 2, it could refresh your memory.
17 A. You giving $50 to your customer reduces the price
18 that your customer pays, is that your question?
19 Q. My --
20 A. Yes, it does. Yes, it does.
21 Q. So let's assume that -- I said 50. I want you to
22 do 25. Let's assume that there's a $25 price reduction.
23 And let's assume that instead of taking the form of a cash
24 back offer, AT&T simply decides to reduce its price for

1 Telecommunication Service, here A, by $25. Will you make
2 that assumption with me?
3 A. Okay.
4 Q. Go to page 2 of Exhibit 4. We see a retail price
5 of $50 there, right?
6 A. Uh-huh.
7 Q. That's a yes?
8 A. Yes.
9 Q. And that is $25 less than the price on page 1,
10 right?
11 A. Right.
12 Q. If dPi purchased this service now with a $50
13 retail price, it would pay the 39.25 depicted at the
14 bottom of Exhibit 2, right?
15 A. Right.
16 Q. Now, flip to page 3. When the price of the
17 service was $75 dPi paid to resell the service, it paid
18 58.88, right?
19 A. Correct.
20 Q. And after the $25 reduction of the face value of
21 the price, dPi paid 39.25, right?
22 A. That's right.
23 Q. That's a difference of 19.63, right?
24 A. That's right.

1 Q. So a retail price reduction of $25 resulted in a
2 price reduction for dPi of 19.63, correct?
3 A. Correct.
4 Q. And you agree that if that's the way that this was
5 laid out, the 19.63 would be the difference that dPi was
6 entitled to, correct?
7 A. Do I agree that the difference between 58.88 and
8 39.25 is 19.63, yes, I agree.
9 Q. That's not quite what I asked. I'll clarify.
10 A. Okay.
11 Q. Do you agree that if AT&T reduced its retail price
12 from $75 to $50, that would inure to a benefit of $19.63
13 to dPi? It's not a $25 price reduction for dPi, it's a
14 19.63 price reduction, isn't it?
15 A. Yes. Yes.
16 Q. Let me ask you --
17 A. If you reduce the retail price, yes, that's
18 correct.
19 Q. If when we reduce our resale price by $25 you're
20 only entitled to 19.63, how is it that you claim to be
21 entitled to more than that when the reduction takes the
22 form of a cash back offer as opposed to a retail price
23 reduction?
24 A. Well, my understanding is that the law is and that

1 our interconnection agreement is that any promotion you
2 make available to your customer you have to make available
3 to my -- to my customer. And that if a customer comes to
4 you through the CLEC sales channel, you can't treat that
5 customer different than you treat a customer who comes to
6 you through your direct sales channel. So that when -- if
7 you give $25 to a customer that comes to you through your
8 direct channel, that you're obligated by contract and by
9 law to give that same $25 to the customer that comes to
10 you through the CLEC sales channel.
11 So, you know, that's my understanding of it. If
12 I'm -- I guess the Commission will decide what the actual
13 rule is, but, you know, we've -- we've asserted what we
14 believe to be the law and what we believe to be your
15 contractual obligation, that any promotion you make
16 available to your customer, you're obligated to make
17 available to my customer. If you give your customer $25,
18 you're obligated to give that same $25 to my customer.
19 You know, it's -- they're -- they're both
20 BellSouth customers. They just come through different
21 sales channels. They're still both BellSouth customers.
22 So we understood that the rule was that any promotion you
23 made available to your customer you had to make available
24 to my customer. You couldn't treat the two customers

1 differently just because one came through the CLEC sales
2 channel and one came through your direct sales channel,
3 that you had to treat them both the same; and that if you
4 didn't do that, that was -- that was unfair and that that
5 wasn't the rule. So that's part of what, I guess, is
6 going to be decided.
7 Q. Yes, your understanding of the law. I take it
8 that you rely in part on the Sanford decision in
9 determining whether it complies with the law or not?
10 A. I think the Sanford decision -- in my mind the
11 only -- the significance of the Sanford decision was that
12 it says that any promotion that tends to reduce the retail
13 price paid had to be passed through, had to be made
14 available to the CLEC. That didn't deal -- my
15 understanding was -- and I'm not a lawyer, but my
16 understanding was it didn't deal with this specific cash
17 back, but it just dealt with general principle that if a
18 retail promotion had the effect of -- tended to have the
19 effect of reducing the price that a customer paid, that
20 that retail promotion had to be made available to the
21 CLEC.
22 And the only other significance was that for some
23 reason you began issuing credits to CLECs about the same
24 time that that ruling came down. So -- but you never went

1 back and corrected the prior, so...

2 MR. TURNER: Mr. Chairman, I would like to

3 explore that a bit. And what I'd like to propose is that

4 I use the blackboard and ask my colleague, Ms. Phillips,

5 to copy what I'm putting on that blackboard. We'll

6 probably make it a -- move to make it a hearing exhibit at

7 the end so that the transcript can reflect what's on that

8 board.

9 COMMISSIONER CULPEPPER: That will be fine. Go

10 right ahead.

11 Q. See if we can make the hypothetical jibe with the

12 Sanford decision. Let's assume that the retail price is

13 $120. Assume that the coupon involved is $100. And to

14 make the math the same as the Fourth Circuit made it,

15 let's assume that the discount, resale discount, is

16 20 percent, right? If you take the service of 120, you'll

17 agree with me that 20 percent of 120 is 24, right?

18 A. Uh-huh.

19 Q. And that leaves -- if the CLEC bought the $120

20 service at a 20 percent discount, it would pay $96 for the

21 service, correct?

22 A. Uh-huh.

23 Q. Take the coupon. Coupon has a face value of $100,

24 right? You've got to say yes or --

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1 A. Oh, I'm sorry. Yes. Sorry.
2 Q. That's all right. And if you take 20 percent
3 discount off the coupon, you come up with 80, right?
4 A. Uh-huh.
5 Q. Well -- so if AT&T charged dPi $96 for the
6 service, then credited it $80, how much does dPi end up
7 paying for the service?
8 A. 16, right.
9 Q. Do you have a copy of the Sanford decision in
10 front of you?
11 A. No.
12 COMMISSIONER CULPEPPER: He doesn't have a copy
13 of it, Mr. Turner.
14 MR. TURNER: Oh, I'm sorry. I didn't hear him.
15 I'm trying to think of the least painful way to do this.
16 COMMISSIONER CULPEPPER: That's all right.
17 MR. TURNER: Mr. Chairman -- and I'm going to
18 ask counsel to agree to this so we can speed the process
19 up -- what I would like to do is to read into the record a
20 paragraph from the Sanford decision to show how it applies
21 to this.
22 COMMISSIONER CULPEPPER: Do you have a copy of
23 the Sanford excision -- decision that you want to present
24 to the witness?

1 MR. TURNER: I don't have it -- I have one copy,
2 Your Honor, and that's the problem.
3 COMMISSIONER CULPEPPER: You have one copy of
4 it, okay. Well --
5 MR. MALISH: I don't have -- I don't have an
6 objection to him reading it into the record. I don't have
7 an objection to him putting a copy in and he'll just add
8 it -- you know, actually give the court reporter --
9 COMMISSIONER CULPEPPER: Well, I --
10 MR. MALISH: -- a hard copy later. I mean, this
11 decision -- excuse me, the decision speaks for itself.
12 COMMISSIONER CULPEPPER: I understand that,
13 Mr. Malish. I understand that. So I tell you what, let's
14 -- let's do it this way. Mr. Turner, you hand Mr. O'Roark
15 a copy of the Sanford decision and you ask him to read
16 into the record whatever part of that decision you would
17 like for him to do so.
18 MR. TURNER: Yes, sir.
19 Q. Mr. O'Roark, just to save time, I would like you
20 to read from "suppose" down to this 20 percent number
21 here.
22 A. Subbose -- "Suppose BellSouth offers its
23 subscribers residential telephone service for $20 a month.
24 Assuming a 20 percent discount for avoided cost, see Local

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1 Competition Order PP [sic] 931-33. BellSouth must resell
2 this service to competitive LECs for $16 per month,
3 enabling the competitive LEC to compete with BellSouth's
4 $20 retail fee. Now suppose that BellSouth offers its
5 subscribers telephone service for 120 a month, but sends
6 the customer a coupon for a monthly rebate for $100.
7 According to the North Carolina Commission's orders, the
8 appropriate wholesale rate is still $16, because that is
9 the net price paid by the retail customer ($20) less the
10 wholesale discount. According to BellSouth's position,
11 however, the appropriate resale rate" --
12 Q. That's fine.
13 A. -- "the appropriate wholesale rate would be $96,
14 the nominal rate of 120, less the 20 percent discount for
15 *451 avoided cost."
16 COMMISSIONER CULPEPPER: All right. Stop right
17 there, Mr. O'Roark. Do you wish him to read any more of
18 the --
19 MR. TURNER: No.
20 COMMISSIONER CULPEPPER: -- of the decision?
21 All right. Thank you, Mr. O'Roark.
22 Q. Mr. O'Roark --
23 COMMISSIONER CULPEPPER: Ask him another
24 question now.

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1 MR. TURNER: Yes, sir.

2 Q. Mr. O'Roark, we can agree that in that passage the

3 Fourth Circuit said that if you had a $120 retail price

4 and a $100 coupon, the appropriate price that a reseller

5 should pay is 16, correct?

6 A. According to the North Carolina Commission orders,

7 the appropriate rate is still $16, yes, that's what it

8 says.

9 Q. In our hypothetical here when we took the coupon

10 and discounted it by the percentage that is there in that

11 order, we came to $16, didn't we?

12 A. Yes.

13 Q. If we gave the full value of the coupon, we'd come

14 up with a negative four, wouldn't we?

15 A. Right.

16 Q. And that's not the number that's in that Sanford

17 decision --

18 A. No, it's not.

19 Q. -- is it?

20 Could I have the decision back, please?

21 A. Yes.

22 MR. TURNER: Mr. Chairman, may I give a copy of

23 Ms. Phillips' notes on the board to opposing counsel so he

24 can agree that it's an accurate depiction of what was on

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COMMISSIONER'S RESPONSE EXHIBIT B

O'Roark Cross-Examination Exhibit No. 4
I & A
CC

Telecommunications Service A
Retail Price of $75.00

Price Retail Customer Pays	$75.00
Less 21.5% Resale Discount	($16.13)
Price Reseller Pays AT&T	$58.88

Telecommunications Service A
Retail Price Reduced by $25

Price Retail Customer Pays	$50.00
Less 21.5% Residential Discount	($10.75)
Price Reseller Pays AT&T	$39.25

Effect of $25 Retail Price Reduction on Price Reseller Pays AT&T

Price Reseller Paid AT&T Before $25 Retail Price Reduction	$58.88
Price Reseller Paid AT&T After $25 Retail Price Reduction	$39.25
Price Reduction for CLEC	$19.63

Reducing the Face Value of the Reduction by the Resale Discount

Retail Price Reduction	$25.00
Less 21.5% Residential Discount	($5.38)
	$19.63

<u>CERTIFICATE OF SERVICE – PSC 2009-00127</u>

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof, this 27th day of April 2011.

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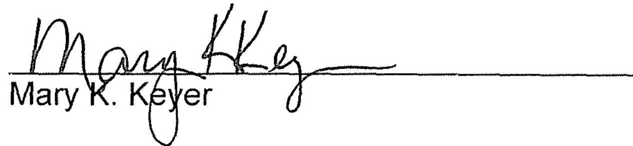

Mary K. Keyer