

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELL.SOUTH 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)	

ORDER

This case arises out of alleged unpaid charges owed by LifeConnex Telecom, LLC f/k/a Swiftel, LLC (“LifeConnex”) to BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky (“AT&T Kentucky”). The charges are from the parties’ interconnection agreement where LifeConnex purchased service from AT&T Kentucky and resold the service to its end users, usually on a prepaid basis. AT&T Kentucky alleges that LifeConnex deliberately and incorrectly manufactured millions of dollars of promotional credit requests and improperly offset the values of those requests against what it owed to AT&T Kentucky for the services ordered from AT&T Kentucky.¹

LifeConnex argued that it does not owe AT&T Kentucky any money under the terms of the interconnection agreement and alleged that it was entitled to additional

¹ Formal Complaint of AT&T Kentucky (“Complaint”), filed Jan. 21, 2010, at 4.

credits from AT&T Kentucky. However, LifeConnex is no longer providing service in Kentucky and has not replied to recent Commission Orders or notices.

In order to resolve this case, the Commission must resolve two issues: (1) Should the “cash-back” and line connection charge waiver (“LCCW”) promotions be subject to the wholesale discount; and (2) Should the “word-of-mouth” promotion be made available for resale?

BACKGROUND

On January 21, 2010, AT&T Kentucky filed four formal complaints against four telecommunications providers. The four providers are: (1) LifeConnex; (2) BLC Management, Inc. d/b/a Angles Communications Solutions;² (3) dPi Teleconnect, LLC;³ and (4) Budget Prepay, Inc. d/b/a Budget Phone (“Budget Phone”).⁴ AT&T Kentucky subsequently reached settlements with both Budget Phone and dPi Teleconnect, LLC, and AT&T Kentucky voluntarily withdrew the complaints against those two carriers.

AT&T Kentucky alleges that LifeConnex incorrectly calculated credits for three AT&T Kentucky promotions. First, AT&T Kentucky alleges that LifeConnex erroneously did not discount the value of a “cash-back” promotion by the wholesale discount rate.⁵ Second, AT&T Kentucky alleges that LifeConnex erroneously asserted that customer

² Case No. 2010-00023, *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. BLC Management, Inc. d/b/a Angles Communications Solutions*, filed Jan. 21, 2010.

³ Case No. 2010-00029, *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. dPi Teleconnect, LLC* (Ky. PSC May 3, 2012).

⁴ Case No. 2010-00025, *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. Budget Prepay, Inc. d/b/a Budget Phone* (Ky. PSC Feb. 11, 2011).

⁵ Complaint at 5.

referral marketing promotions are subject to resale.⁶ Third, AT&T Kentucky alleges that LifeConnex incorrectly sought a credit based on the full retail amount of the LCCW instead of discounting it by the wholesale discount rate.⁷

LifeConnex, in its answer, argued that: (1) The cash-back promotion should not be discounted by the wholesale discount;⁸ (2) The customer referral marketing program should be available for resale;⁹ and (3) The LCCW promotion should not be discounted by the wholesale discount.¹⁰

LifeConnex and AT&T Kentucky agreed that the case should be placed in abeyance pending the outcome of the Commission's decision in Case No. 2009-00127¹¹ (which addressed whether promotions should be discounted by the wholesale discount) and litigation in several other states. The case was held in abeyance until July 2012, when it was removed from abeyance by motion of the parties.

Commission Staff scheduled a telephonic informal conference on July 31, 2012 to discuss establishing a procedural schedule. Counsel for AT&T Kentucky attended the conference; no representatives for LifeConnex called in or attended the conference. Commission Staff subsequently confirmed that notice of the conference had been properly sent to LifeConnex's listed contact.

⁶ *Id.* at 6-7.

⁷ AT&T Kentucky's Response to LifeConnex Answer and Counterclaims ("Answer"), filed Apr. 9, 2010, at 2-3.

⁸ LifeConnex's Answer and Counter-Claim, filed Feb. 25, 2010, at 4.

⁹ *Id.* at 5-6

¹⁰ *Id.* at 6-7.

¹¹ Case No. 2009-00127, *dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Dispute Over Interpretation of the Parties' Interconnection Agreement Regarding AT&T Kentucky's Failure to Extend Cash-Back Promotions to dPi (Ky. PSC Jan. 19, 2012).

On October 1, 2012, AT&T Kentucky filed with the Commission a motion for an Order finding that LifeConnex was liable for unpaid charges, dismissing counter-claims, and closing docket. On October 26, 2012, the Commission issued an Order directing LifeConnex to file a response, within 14 days of the date of the Order, to AT&T Kentucky's Motion. Responses were due no later than November 12, 2012—no responses or filings have been received as of the date of this Order.

DISCUSSION

Under Federal Communication Commission ("FCC") regulations, if an incumbent, such as AT&T Kentucky, offers a promotion that lasts greater than 90 days, it must discount the wholesale price to a wholesale purchaser (such as LifeConnex) if the wholesale purchaser's customers would have qualified for the promotional discounts had they been AT&T Kentucky customers.¹² AT&T Kentucky does not dispute that the "cash-back" promotion and the LCCW¹³ should be made available for resale. AT&T Kentucky, however, argues that the "word-of-mouth" promotion should not be made available for resale.¹⁴

The dispute over the LCCW and the "cash-back promotion" is whether the wholesale discount should be applied to those promotions. The wholesale discount serves to set the rate that AT&T Kentucky charges a reseller for service. For example,

¹² 47 C.F.R. § 51.613.

¹³ Under the LCCW, AT&T Kentucky waives a new customer's line connection charge if the customer ordered basic service in addition to purchasing two or more "Touchstar" features. If a LifeConnex customer would purchase similar features, then AT&T Kentucky would have to provide the LCCW to LifeConnex. The LCCW would appear as a credit on the bill that the carriers would pay to AT&T Kentucky for the purchase of wholesale services.

¹⁴ Answer at 6-7.

if AT&T Kentucky charges its customers \$16.00 for retail service, it must sell the service to a reseller minus the wholesale discount of 16.79 percent which would equal \$13.31. In Case No. 2009-00127, the Commission determined that this discount applies to all promotions that are made available to resellers. Therefore, if a reseller qualifies for a \$50.00 promotion, it will actually receive \$41.60 of the promotion; the \$50.00 promotion minus the 16.79 percent discount. Because the Commission previously has determined that the wholesale discount applies to promotions, AT&T Kentucky prevails on the issue of whether or not the LCCW and “cash-back” promotion should be discounted by the wholesale discount.

The remaining issue to be determined is whether or not AT&T Kentucky must make the “word-of-mouth” promotion available for resale. The “word-of-mouth” promotion functions as a reward to existing customers that convince friends and family members who are not currently AT&T Kentucky customers to purchase AT&T Kentucky services.¹⁵ The existing customers that convince friends or family members to purchase AT&T Kentucky services then apply to AT&T Kentucky to receive cash or “near-cash” offerings (i.e., retail gift card).

AT&T Kentucky does not make the “word-of-mouth” promotion available for resale, arguing that it is not a “telecommunications service” and, therefore, not subject to be made available for resale.¹⁶ 47 U.S.C. § 153(46) defines “telecommunications services” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public . . .” and 47

¹⁵ *Id.*

¹⁶ Complaint at 7.

U.S.C. § 153(43) defines “telecommunications” as the “transmission between or among points specified by the user, of information of the user’s choosing without change in the form or content of the information as sent and received.”

47 C.F.R. § 51.605(a) provides, in relevant part that:

An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates

The “word-of-mouth” promotion, unlike the LCCW and “cash-back” promotions, does not require the recipient of the promotion to subscribe to or purchase any particular services to receive a promotion. It appears to the Commission that there is no correlation between the referral program and services purchased from AT&T Kentucky by the recipient of the promotion; those services may remain unchanged regardless of the number of successful referrals. The benefit received is directly tied to telecommunications services purchased by other customers. In this scenario, the recipient of the benefit is essentially performing as a marketer for AT&T Kentucky and that expense to AT&T Kentucky does not result in a net decrease in the price to the new purchaser of AT&T Kentucky’s services. Based on the above, the Commission finds that the “word-of-mouth” promotion does not need to be made available for resale because it does not qualify as a “telecommunications service” as defined in 47 U.S.C. § 153(46).

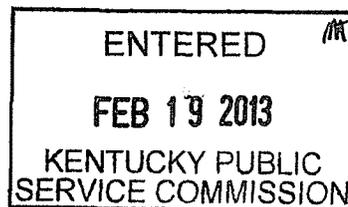
CONCLUSION

The Commission finds that on the issue of "cash-back" and LCCW promotions that AT&T Kentucky correctly discounted the amount of the promotion by the wholesale discount rate. The Commission also finds that on the issue of "word of mouth" promotions that AT&T has correctly restricted this promotion and not made it available for resale. LifeConnex shall be liable for all unpaid balances to AT&T based on these decisions.

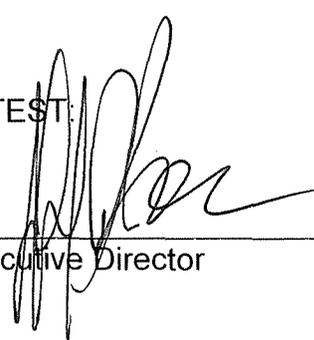
Based on the foregoing, IT IS THEREFORE ORDERED that:

1. The LCCW and "cash-back" promotions should be discounted by the wholesale discount.
2. The "word-of-mouth" promotion is not a telecommunications service that needs to be made available for resale.
3. LifeConnex is liable to AT&T Kentucky for the undisputed balances that it withheld from AT&T Kentucky as well as the wrongfully withheld charges associated with the LCCW, "word-of-mouth," and "cash-back" promotions.
4. LifeConnex's counterclaim is dismissed.
5. This is a final and appealable Order.

By the Commission



ATTEST:



Executive Director

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