ATTACHMENT D

LOUISIANA PUBLIC SERVICE COMMISSION
ADMINISTRATIVE HEARINGS DIVISION

DOCKET NUMBER U-30976

DPI TELECONNECT, L.L.C.
VS.
BELLSOUTH TELECOMMUNICATIONS, INC.
D/B/A AT&T LOUISIANA

In re: Dispute over Interpretation of the Parties' Interconnection Agreement regarding BellSouth's failure to extend Cash Back promotions to dPi.

PROPOSED RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

The findings and conclusions recommended by the administrative law judge in this proceeding are contained within the Proposed Recommendation following this cover page.

This *proposed* recommendation is being issued pursuant to Rule 56 of the Rules of Practice and Procedure of the Louisiana Public Service Commission. All parties are advised to familiarize themselves with the Rules of Practice and Procedure, including provisions within Rule 56 pertaining to:

(1) The filing of exceptions to the *proposed* recommendation (within fifteen days of the filing of the *proposed* recommendation);

(2) The filing of opposition memoranda to filed exceptions to the *proposed* recommendation (within fifteen days of the filing of the exception);

(3) Issuance of the *final* recommendation of the Administrative Law Judge (following review of timely filed exceptions and opposition memoranda);

(4) Requests by parties to present oral argument at the Commission meeting at which the Commissioners will consider and vote on the *final* recommendation (within five working days of issuance of the *final* recommendation); and

(5) Instances in which the deadlines for the above-described procedures may be extended, abbreviated, or omitted.

Copies of the Rules of Practice and Procedure of the Louisiana Public Service Commission are available on the Commission's web site or may be requested from the Administrative Hearings Division.

All parties are further advised that they may ascertain whether this recommendation will be considered at the Commission's next monthly meeting by accessing the Commission's web page at **http://www.lpsc.org** and "clicking" on **Official Business** to view the Agenda for the Commission's upcoming monthly meeting. Alternatively, parties may obtain this information by calling the Commission's Administrative Hearings Division at either of the following telephone numbers:

(225) 219-9417 or **(800) 256-2397.**

Baton Rouge, Louisiana, this 3rd day of September, 2009.

Carolyn L. DeVitis
Administrative Law Judge

cc: Official Service List
via: U.S. Mail and E-Mail or Fax

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In re: Dispute over Interpretation of the Parties' Interconnection Agreement regarding BellSouth's failure to extend Cash Back promotions to dPi.

PROPOSED RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

Nature of the Case

dPi Teleconnect, LLC ("dPi") is a competitive telecommunications company authorized to provide intrastate local exchange and interexchange telecommunications services in Louisiana. dPi is not a facilities based carrier, it is a reseller, operating under an Interconnection Agreement with BellSouth Telecommunication, Inc. d/b/a AT&T Louisiana ("AT&T"). dPi is almost exclusively a prepaid provider in Louisiana. BellSouth/AT&T provided a number of "cash back" promotions to its retail customers beginning in late 2003. In this proceeding dPi seeks bill credits for the "cash back" component of three promotional offerings for local telecommunications services from AT&T between March 2005 and June 2007.[1]

dPi argues that it is entitled to purchase at a wholesale discount, services that AT&T offers its own retail customers including cash back promotions which are offered for 90 days or longer. AT&T's refusal to make the cash back promotions available, dPi asserts, was not authorized by the Commission, and such refusal is, according to dPi, unreasonable,

[1] The cash back promotion credits dPi seeks in this proceeding relate to three promotional offerings AT&T Louisiana made available to its retail customers during that time period: $100 Cash back for 1FR + 2 Custom Calling or Touch Star Features; $100 Cash back for Complete Choice, Area Plus with Complete Choice, and Preferred Pack; and $50 Cash back 2-Pack Bundle Plan.

discriminatory and impermissible. dPi argues that what it is entitled to receive is the full amount of the cash back premium offered to AT&T's retail customers, not the premium amount reduced by the wholesale discount factor, or any other factor.

AT&T argues that dPi is not entitled to the cash back promotional credits it seeks because AT&T's decision not to make the credits available to dPi was, according to AT&T, a reasonable and nondiscriminatory (and therefore permissible) restriction on resale. Alternatively, AT&T asserts, if AT&T were required to make the cash back promotions available to dPi, any award of credit should be limited to disputed billings within one year of billing. AT&T further argues that any award should also be reduced by the 20.72% residential resale discount established by the Louisiana Commission and by what AT&T claims is a 24.5% error rate in the cash back credit requests submitted by dPi.[2]

Jurisdiction

The source of the Louisiana Public Service Commission's jurisdiction over public utilities in Louisiana is found in Article IV, Section 21(B) of the Louisiana Constitution, which provides that

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

Pursuant to constitutional and statutory provisions, the Commission is given broad power to regulate the service of telephone utilities and may adopt all reasonable and just rules, regulations and orders affecting or connected with the service or operation of such business. *South Central Bell Tel. Co. v. Louisiana Public Service Commission*, 352 So.2d 999 (La. 1997).

[2] Submitted since AT&T Louisiana began making cash back promotions available for resale in July 2007.

47 U.S.C § 252 provides for the negotiation, arbitration, and approval of interconnection agreements between telecommunications carriers. If the carriers are unsuccessful in their negotiations, 47 U.S.C § 252(b)(1) states that "the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Under 47 U.S.C § 252(b)(4) the State Commission is limited in its consideration "to the issues set forth in the petition and in the response, if any, filed".

The Louisiana Public Service Commission has promulgated Regulations for Competition in the Local Telecommunications Market, most recently amended by Corrected General Order Number R-30347 dated August 13, 2009. The Regulations in Section 901(F) reference 252(b) of the Telecommunications Act of 1996 and state that either party to the negotiation may petition the Commission to arbitrate any open issue to the negotiation.

Procedural History

On March 16, 2009, dPi Teleconnect, LLC ("dPi") filed a Complaint against BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana (AT&T) entitled: Dispute over Interpretation of the Parties' Interconnection Agreement regarding BellSouth's failure to extend cash back promotions to dPi. The Complaint was published in the Commission's Official Bulletin on May 1, 2009. AT&T filed an Intervention and Protest on May 8, 2009. A Notice of Assignment and Notice of Status Conference was issued on May 19, 2009, noticing a status conference for June 1, 2009. The status conference was held, a procedural schedule was adopted, and a Report of Status Conference and Establishment of Procedural Schedule was issued on June 1, 2009.

On January 20, 2010 AT&T and dPi filed a Joint Motion to Continue Hearing Date and Establish Further Procedural Schedule, which stated that AT&T and dPi believe the matter

appropriate for submission on pre-filed testimony and exhibits and briefs. On January 21, 2010, a Notice of Continuation of Hearing Date and Establishment of Procedural Schedule was issued. The Notice continued without date the previously scheduled hearing and established a procedural schedule for the filing of Stipulated Facts and Briefs. At the joint request of AT&T and dPi the filing dates for the Stipulated Facts and Briefs were extended[3] and eventually the Stipulated Facts were due by April 6, 2010 and the Briefs were due May 7, 2010.

On April 6, 2010, AT&T and dPi filed the Fact Stipulations and on May 7, 2010, AT&T and dPi filed their Briefs. On May 14, 2010, AT&T filed an Unopposed Motion to Substitute, requesting substitution of certain exhibits to the Direct Testimony of P.L. Ferguson. On May 17, 2010, dPi filed an Unopposed Motion for Leave to File Responsive Brief, requesting permission to file a brief to address an issue raised in AT&T's brief. A Notice of Leave to file Briefs was issued on May 18, 2010, establishing filing dates for briefs and responsive briefs. On May 26, 2010, dPi filed its Brief and on May 28, 2010, AT&T filed its Responsive Brief. On June 4, 2010, AT&T filed a letter and on June 7, 2010, dPi filed a letter, both in reference to a tentative decision of the North Carolina Utilities Commission, which the Parties agreed to file into the record of the proceeding.

Summaries of the Parties' Positions

dPi's Position

dPi argues BellSouth/AT&T is required by law to include CLECs in its promotions offerings, and that dPi is entitled to purchase at a wholesale discount services that AT&T offers its own retail customers including cash back promotions which are available for 90 days or

[3] Joint Request for Extension of Time to File Fact Stipulations were filed on February 22, 2010 and March 5, 2010, a Joint Request for Extension of Time to File Fact Stipulations and for Filing of Briefs was filed on March 19, 2010.

longer. dPi argues that it is not relevant whether the promotions are telecommunications services, checks or credits; it is relevant only that the promotions affected the rate at which the telecommunications services are provided. The cash back promotions have the effect of offering to reduce the net amount spent by the consumer on telephone service, and therefore must, according to dPi, be available for resale. AT&T's refusal to make the cash back promotions available was not, dPi points out, authorized by the Commission; BellSouth/AT&T never got approval from the Commission prior to instituting the restriction. dPi asserts that withholding promotional credits was done without basis, is unreasonable and discriminatory, and fosters an anti-competitive environment contrary to the intent of the Telecommunications Act of 1996. Since mid-2007, according to dPi, "BellSouth/AT&T has tacitly admitted that CLECs are entitled to these kinds of promotional credits by paying these credits from July 2007 forward." (dPi Brief at 13)

dPi states that it timely filed its requests for the promotional credits. The orders in dispute were provided from 2003 to June 2007. Therefore, dPi argues it should be the 2003 Interconnection Agreement ("ICA") that controls. The 2003 ICA provides that it will be governed by federal and state substantive telecommunications law, but governed in all other respect in accordance with Georgia state law. In Georgia, dPi asserts, the prescription period for breach of contract is six years, therefore, dPi's asserts, its claim has not prescribed.[4] dPi opposes AT&T's suggestion that dPi has somehow waived its right to the promotional credits by not vigorously pursuing its rights to the promotional credits until months after the services were rendered. dPi relies on Interconnection Agreement language that provides, "A failure or delay of

[4] The second contract which went into effect in May of 2007 does have a 12 month limitations period in it for the bringing of billing disputes.

either Party to enforce any of the provisions,...or to require performance of any of the provisions hereof, shall in on way be construed to be a waiver of such provisions."

dPi argues that it should receive the full amount of the cash back premium offered to AT&T's retail customers, not the premium amount reduced by the wholesale discount factor as claimed by AT&T. The purpose behind the resale provisions is to allow CLECs to purchase services from the ILEC at a lower rate than the ILEC sells those services at retail, for resale. dPi claims that reducing the promotional credit amount by the wholesale results in situations where the wholesale rate is more than the retail rate. dPi argues for a plan whereby the resale discount factor would be multiplied by the tariffed price to produce the base amount of the avoided cost, and the avoided cost would then be subtracted from the retail sales price.

dPi disputes AT&T's claim that if dPi is entitled to any cash back promotions, that the amount should be reduced by an "error rate" which is consistent with the percentage of requests that AT&T has refused since July 2007. dPi argues that the doctrine of laches should be applied under Georgia law as the data from AT&T is no longer available to verify claims.

AT&T's Position

AT&T argues that dPi is not entitled to the cash back promotional credits it seeks because AT&T's decision not to make the credits available to dPi was, according to AT&T, a reasonable and nondiscriminatory (and therefore permissible) restriction on resale. AT&T's decision was not unreasonable because: The 1996 Telecommunications Act requires that retail "telecommunications services" are subject to the Act's wholesale obligations. AT&T argues that coupons that can be redeemed for checks are marketing incentives and are not themselves, telecommunications services. AT&T's retail customers did not receive a reduction in the

monthly rate they were required to pay, they received a check that could be used to purchase anything. Therefore, AT&T concludes, it was not under an obligation to offer these promotions for resell at a wholesale rate. AT&T Louisiana asserts that, "adoption of pre-merger AT&T's position was a voluntary change that reflected the need to modify business practices to facilitate operation as one corporate entity." (Ferguson Direct at 17-18, it was not a statement that pre-merger BellSouth's position was not legally permissible.)

AT&T argues that the Act does not prohibit all restrictions on resale, only those that are unreasonable or discriminatory. AT&T claims that the touchstone factor to be considered in considering a restriction on resale is whether the competition will be "stifled or unduly harmed."[5] dPi provides relatively high cost pre-paid services to customers who have gotten in trouble with AT&T. Competition is not harmed because dPi is not competing with AT&T; dPi is pricing its services without regard to the price charged by AT&T. AT&T did not provide cash promotions to any other pre-paid provider during that time, so dPi was not at any competitive disadvantage. AT&T points out that dPi is the only reseller to file such a complaint with the Commission. The absence of complaints by other resellers is, according to AT&T, an indication that the restriction is reasonable and non-discriminatory.

Alternatively, AT&T asserts, if AT&T was required to make the cash back promotions available to dPi, any such award should be limited to disputed billings within one year of billing. dPi is not entitled to credits it seeks because, AT&T assures, dPi did not dispute and/or escalate in a timely manner as required by the interconnection agreement. AT&T asserts that dPi delayed in requesting the credits in the first place, and waited too long to challenge AT&T's denial of

[5] Order Ruling on motion Regarding Promotions, In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to clarify the Law Regarding Competitive and Deregulated Offering of Telecommunications Services, Docket No. P-100, Sub 72b at 12, December 22, 2004, Resale Promotion Order.

those credits, so that if there is a laches issue, the argument should be raised against dPi, not AT&T.

AT&T further argues that any award should also be reduced by the 20.72% residential resale discount established by the Louisiana Commission and by a 24.5% error rate in the cash back credit requests dPi has submitted since AT&T Louisiana began making cash back promotions available for resale in July 2007. AT&T argues that as the claimant, dPi must demonstrate that it is entitled to recover, and demonstrate that the amount it seeks to claim is correct.

The Parties have requested that this matter be decided based on the written record and have submitted pre-filed testimony and exhibits as well as the following stipulated facts:

Fact Stipulations

1. The parties stipulate to the admissibility of all exhibits to pre-filed testimony.
2. The cashback promotional credits dPi seeks in this proceeding relate to service orders dPi submitted during the March 2005 through June 2007 time period.
3. Two different interconnection agreements were in effect during the time period at issue. The two interconnection agreements were approved pursuant to the letters of the Louisiana Public Service Commission attached to these stipulations as exhibits 1 and 2.
4. The cashback promotion credits dPi seeks in this proceeding relates to three promotional offering AT&T Louisiana made available to its retail customers during that time period: $100 Cashback for 1FR + 2 Custom Calling or TouchStar Features; $100 Cashback for Complete Choice, Area Plus with Complete Choice, and Preferred Pack; and $50 Cashback 2-Pack Bundle Plan.

5. The primary component of each of these promotions is a cashback offering that gave qualifying A&T& residential retail customer the opportunity to receive a check (not a bill credit) in a designated amount from AT&T Louisiana.

6. Specifically, if an AT&T Louisiana end user purchased services designated in these promotions, the end user would be billed the full retail price for the services and would receive a check for a specified amount from AT&T Louisiana if the end user returned the requisite coupon within the allowable time period.

7. When dPi purchased the telecommunications services that were subject to the retail promotions at issue from the AT&T Louisiana for resale, AT&T Louisiana billed dPi the standard resale rate (the retail rate less the 20.72% residential resale discount established by this Commission) for the telecommunications services involved in the promotions. After being billed by AT&T Louisiana in this manner, dPi audited its billing records to determine those instances in which it asserts it was entitled to, but not initially billed, the promotional rate. dPi then submitted promotional credit requests on a telephone number by telephone number basis seeking any additional credits to which it thought it was entitled pursuant to the promotion. dPi submitted these promotional credit requests on a Billing Adjustment Request ("BAR") form, which are the forms typically used by CLECs to submit billing disputes to AT&T. This general process has been in place throughout the 2003 – 2007 time period at issue in this docket, but the process has become more mechanized over time. For the time period at issue in this docket, a CLEC that satisfied a promotion's criteria for receiving a cashback amount but that did not submit a cashback promotional credit request to AT&T did not receive a promotion credit from AT&T Louisiana.

8. dPi began purchasing the telecommunications services that were subject to the retail promotions at issue from AT&T Louisiana in March 2005. dPi did not submit any cashback promotional credit request to AT&T Louisiana for any cashback promotional credits at that time, and AT&T did not provide dPi any promotional credits at that time.

9. In August, 2004, dPi hired a third party billing agent. dPi's stated reason for hiring this third party billing agent was to help dPi recover the overcharges for services provided by AT&T Louisiana which should have been provided at the promotional price points. Without agreeing with dPi's characterization of "overcharges for services provided by AT&T Louisiana which should have been provided at the promotional price points," AT&T Louisiana agrees that this is dPi's stated reason for hiring the third party billing agent. Exhibit 3 to this Stipulation is a true and accurate copy of the agreement between dPi and that billing agent. When it hired this third party billing agent in August 2004, dPi had not asked AT&T Louisiana for any cashback promotional credits.

10. In August 2004, dPi's billing agent met in person with AT&T Louisiana witness Kristy Seagle. During that meeting, Ms. Seagle explained the promotional credit request process to dPi's billing agent, and dPi's billing agent specifically asked if the cashback component of promotional offerings was available for resale.

11. Ms. Seagle told dPi's billing agent that they were not and, on August 26, 2004, she sent dPi's billing agent an email (Exhibit KAS-1) confirming that AT&T Louisiana would not make the cashback component of promotional offers available for resale.

12. In December 2005, dPi's billing agent first asked AT&T for cashback promotional credits on behalf of dPi. dPi instructed its billing agent to ask for these credits "because it would be worth a ton of cash for both of us."

13. AT&T Louisiana denied all of dPi's requests for cashback promotional credits that relate to the time period at issue in this docket.

14. In January 2007, dPi told AT&T Louisiana for the first time that it disagreed with AT&T Louisiana's denial of these requests.

15. For the time periods at issue, AT&T Louisiana did not grant any of dPi's requests for cashback promotional credits or otherwise provide any portion of the cashback component of the promotions to dPi.

16. For the time periods at issue, AT&T Louisiana did not grant any reseller's requests for cashback promotional credits or otherwise provide any portion of the cashback component of the promotions to any reseller.

17. Prior to July 2007, AT&T Louisiana's did not make the cashback aspect of a promotion available for resale, maintaining that the cashback portion of such promotions is not a telecommunications service that is subject to the resale obligations and that, instead, it is a one-time marketing expense that did not reduce the retail price of the telecommunications service. dPi agrees that this is the position AT&T Louisiana asserted, but it does not agree that this position is valid.

18. The total amount dPi is seeking in this docket is $26,800. This amount reflects the full face value of the cashback component of the offerings at issue, and it has not been reduced by the resale discount percentage adopted by the Commission.

19. The information contained in exhibit KAS-4 is true and accurate.

20. AT&T's records indicate that for billing periods prior to July 2007, dPi submitted $26,550 in cashback promotions in Louisiana. This amount reflects the full face value of the cashback component of the offerings at issue, and it has not been reduced by the resale discount percentage adopted by the Commission.

21. At the time dPi submitted a given BAR form requesting a promotional credit, AT&T Louisiana should have had access to records needed to verify whether dPi met the qualifications of the underlying promotions. Since the service orders and requests for promotional credits were first submitted, AT&T Louisiana has destroyed in the ordinary course of its business the records that are needed to verify whether dPi met the qualifications of the underlying promotions with regard to many of the credits it seeks in this docket.

22. dPi does not have copies of either the service orders submitted to AT&T or its own records created in the context of processing orders from its own retail customers. dPi asserts that it creates orders directly on the AT&T systems (using the equivalent of a password to access the systems) but is unable to make electronic copies of the actual orders submitted on AT&T's systems. Without agreeing with this assertion, AT&T Louisiana has no evidence to the contrary at this time. dPi used to print a screen shot of the order just before submittal, but discontinued the practice in about 1999 because of the volume of paper that was generated.

23. AT&T Louisiana rejected dPi's promotional credit requests that are at issue in this docket on the grounds that the cashback portion of such promotions was not a telecommunications service that is subject to resale. AT&T Louisiana did not attempt to determine whether, with regard to any of those requests, all qualifications of the underlying promotions were satisfied.

24. Pre-merger AT&T made the cashback aspect of a promotion available for resale.

25. Following the merger, AT&T adopted the pre-merger resale position throughout its 22 state ILEC territory.

26. From July 2007 forward, AT&T Louisiana has made the cashback aspect of a promotion available for resale.

27. For billing periods from July 2007 through September 2009, dPi has requested $270,883.34 in cashback promotional credits from AT&T Louisiana.

28. AT&T has reviewed the $270,883.34 in cashback promotional credit requests to determine if they should be granted. As a result of this review, AT&T Louisiana agrees that dPi was entitled to $204,319.21 of these requested credits and contends that dPi is not entitled to $66,564.13 of these requested credits. dPi does not concede that these requests properly were denied and reserves all rights to dispute these denials.

29. For the $66,564.13 of promotional credit requests that AT&T has denied since 2007, these cashback promotional credit requests were denied because AT&T contends that the dPi end user did not meet at least one of the requirements that an AT&T Louisiana end user would have to meet to qualify for the promotion.

30. dPi is a reseller that is wholly owned by Rent-A-Center, a rent-to-own company.

31. dPi neither owns nor operates any facilities in the State of Louisiana, and it has not employees in the State. dPi has numerous point of sale and sales agents in Louisiana.

32. dPi is almost exclusively a prepaid provider in Louisiana.

33. Essentially every single one of dPi's new customers Is someone who was formerly a customer of AT&T Louisiana or another provider and who left after getting into trouble over their phone bill.

34. dPi serves a prepaid niche that is not served by AT&T Louisiana or any postpaid provider.

35. AT&T Louisiana's tariff price for retail basic local service to dPi for $10.27 (the retail price less the 20.72% resale discount established by the Commission).

36. dPi advertises that same basic local service for $39.99 per month, not including other taxes, fees and surcharges.

37. After various other fees and charges are applied, dPi's end users actually pay $45.43 for basic local service in the first month, $59.04 in the second month, and the, if they obtain a discount for timely payment, they pay $49.04 for the third and following months.

Analysis

dPi Teleconnect, LLC ("dPi") is a competitive telecommunications company authorized to provide intrastate local exchange and interexchange telecommunications services in Louisiana. dPi is not a facilities based carrier, it is a reseller operating under an Interconnection Agreement with BellSouth Telecommunication, Inc. d/b/a AT&T Louisiana ("AT&T"). The Parties agreed that dPi Teleconnect, L.L.C. and Bellsouth Telecommunication, Inc. d/b/a AT&T Louisiana entered into two interconnection agreements ("ICAs") that were in effect during the time period at issue, the 2003 ICA and the 2007 ICA. The two interconnection agreements were approved pursuant to the letters of the Louisiana Public Service Commission, copies of which were provided as well as copies of the ICAs.

During this time period BellSouth/ AT&T Louisiana made certain promotional offerings to its retail customers, i.e., $100 Cashback for 1FR + 2 Custom Calling or TouchStar Features; $100 Cashback for Complete Choice, Area Plus with Complete Choice, and Preferred Pack; and $50 Cashback 2-Pack Bundle Plan. The primary component of each of these promotions is a cash back offering that gave qualifying AT&T residential retail customer the opportunity to receive a check in a designated amount from AT&T Louisiana. The cash back promotion credits dPi seeks in this proceeding relate to three promotional offering AT&T made available to its own retail customers from March of 2005 through June of 2007. If a BellSouth/AT&T end user purchased services designated in these promotions, the end user would be billed the full retail price for the services and would receive a check for a specified amount from AT&T if the end user returned the requisite coupon within the allowable time period.

It has been shown that dPi had an interconnection agreement to purchase telecommunication services from BellSouth/AT&T during a period when BellSouth was offering cash back promotions to its own retail customers. (Fact Stipulations 4-6) Did BellSouth have an obligation to make available the same three cash back promotional offerings that Bellsouth/AT&T made available to its own retail customers from March of 2005 to July of 2007, i.e., $100 Cash back for 1FR + 2 Custom Calling or Touch Star Features; $100 Cash back for Complete Choice, Area Plus with Complete Choice, and Preferred Pack; and $50 Cash back 2-Pack Bundle Plan, to dPi? During this period BellSouth did not provide cash back promotions to dPi, or to any other Competitive Local Exchange Carrier ("CLEC"). When dPi made initial inquiries as to the availability of cash back promotions in 2004 and 2005, dPi was told that cash back promotions were not available for resale. The Parties have stipulated that the cash back promotions to be considered in this docket are exclusively those requests relating to service orders dPi submitted to BellSouth from March 2005 through June of 2007. (Post-merger AT&T began providing cash back promotional credits in July of 2007.)

The source of the requirement that an Incumbent Local Exchange Carrier ("ILEC") offer interconnection and resale services to a CLEC is found in the Telecommunications Act of 1996. The stated intent of the Telecommunication Act of 1996 is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." (*Telecommunication Act f 1996, Preamble, Pub. L. No. 104-404, 110 Stat. 56 (1996)*. In furtherance of this goal, a framework was established of mandated agreements between CLECs and ILEC, including ones under which the ILEC agrees to sell telecommunications services at a wholesale rate to a CLEC for resale. (47 U.S.C § 251(c)(4)(A)

and 47 U.S.C § 251 (c)(4)(B)). *47 U.S.C. Section 251 (c)(4)(A)* proclaims that ILECs have the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to its subscriber who are not telecommunications carriers.

> (a) 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 telecommunication carriers for resale at wholesale rates. 47 C.F.R. sec 51.605

BellSouth/AT&T argues that promotions are not "telecommunication services" and therefore are not subject to the retail obligation. However, the FCC considered the matter and concluded after notice and comment that promotions of over 90 days were included in the ILEC's resale obligation. The Fourth Circuit Court of Appeals in *BellSouth Telecommunications v. Sanford*, 494 F.3d 439 (4th Cir. (N.C.) July 25, 2007) found that the North Carolina Commission was correct in ruling that, "long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied." The Court reasoned that incentives such as those provided by BellSouth "decreased the retail rate for the purpose of calculating the wholesale rate, because retail customers effectively paid less for the telephone service in the amount of the incentives." The Commission and the Court recognized that cash back promotions do result in a savings to the customers who subscribe to the regulated service. The promotion reduces the customer's cost of service by the value of the check received. "The tariff retail rate would in essence, no longer exist, as the tariffed price minus the value of the gift card (or check) received for subscribing to the regulated service, i.e., the promotional rate, would become the 'real' retail rate." The promotions reduced the retail rate for the ILEC's customers; **BellSouth is required to pass on the value of the incentives to dPi.**

The FCC collected and considered comments before finalizing the Local Competition Report and Order including suggestions by ILECs that promotions and discounts are marketing tools for telecommunications services, and are not themselves "telecommunications services," and therefore, the promotions should not be subject to the resale obligation. After considering the comments, as *Stanford* explains, the FCC reasoned that 251(c)(4) requires ILECs to resell its "telecommunications service", which is defined to be "the offering of telecommunications for a fee directly to the public" "Telecommunications service" therefore describes both sides of the service contract, the telecommunications offered by the provider; and the fee paid by the consumers. The promotion reduces the retail price or "fee" for telecommunications. As such an incentive is part of "the offering of telecommunications" which incumbent LECs must offer to competitors. What the cash back promotion does is actually lower the rate of the service offered by BellSouth/AT&T, and it is this reduced price on which the wholesale rate should be determined. Section 949 of the FCC First Report and Order points out that, "The 1996 Act does not define 'retail rate;' nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that 'retail rate' should be interpreted in light of the pro-competitive policies underlying the 1996 Act." **A new retail rate has in effect been created by BellSouth/AT&T offering the cash back promotions. It is from this new retail rate that the wholesale rate is to be determined for dPi.**

The FCC took comments, considered whether this mandate to offer services for resale applies to promotional, as well as regular offerings, and made the determination that promotions lasting at least 90 days are included in the resale obligation established in the Telecommunications Act of 1996. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15954,

at 907 (rel. Aug 8, 1996), the FCC found that the resale requirement of Section 251(c)(4) of the Telecom Act,

> Makes no exception for promotional or discounted offerings, including contract and other customer–specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent ILECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.

The FCC expressed concern that carriers would attempt to avoid their resale obligations by changing around offerings, and sought to prevent this from occurring. In the Matter of *Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, 1nd 253 of the Communications Act of 1934 as amended,* Memorandum Opinion and Order, 14 FCC Red 21579, rec. 47 (rel. Dec. 23, 1999) ("Arkansas Preemption Order"), the FCC preempted the Arkansas Commission when the Arkansas Commission permitted the application of the wholesale discount to the ordinary retail rate, rather than to the reduced 90 day promotional rate. The FCC stated, "Our rules require the incumbent LEC to apply the wholesale discount to the special reduced rate."

The reasoning as regards cash back promotions, which are a subset of promotional or discounted offerings, should be the same, i.e., that there is no basis for creating a general exemption for cash back promotions and that, "A contrary result would permit incumbent ILECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." **Consistent with the reasoning behind including promotions of more than 90 days in the resale obligation, the subset of cash back long-term promotions should also be included.** No compelling reason has been advanced to justify exclusion of cash back promotions from the general rule that promotions

lasting longer than 90 days must be made available for resale. The effect is similar whether the consumer receives cash in his pocket through paying less for his telecommunications service through a credit on a bill, or through a coupon redeemed for a check. The result is the same, i.e., the customer pays less for service and competition may be affected.

AT&T argues that the refusal to provide cash back promotions was reasonable and nondiscriminatory, and therefore permissible. 47 U.S.C. Section 251(c)(4)(B) provides that ILECs have a duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service. Under FCC regulations, ILECs are specifically prohibited from imposing any unreasonable or discriminatory conditions or limitations on that resale. The only restrictions which may typically be imposed on resale are 1) cross-class selling and 2) short term promotions of no more than 90 days (and not in a sequential series of 90-day promotions).

An incumbent LEC may impose a restriction, other than cross-class or short term promotion, **only if it proves to the state commission that the restriction is reasonable and nondiscriminatory**. 47 C.F.R. Section 51.613 (emphasis added). BellSouth/AT&T did not obtain, nor even seek, prior Commission approval of the cash back restriction on resale. AT&T argues it is impractical and time consuming to seek prior approval of promotional offerings. **However nothing in the Telecom Act of 1966, nor the FCC First Report and Order suggests that an ILEC may unilaterally impose additional restrictions on resale. State commission approval is required for the imposition of any additional restrictions on resale.**

Not only does the FCC place the burden on the ILEC to demonstrate that a proposed restriction is reasonable and non-discriminatory, the FCC concludes that consistent with the precompetitive goals of the Telcom Act of 1996, there should be a presumption that any other

resale restriction is unreasonable and discriminatory. In the First Report and Order at section 939, the FCC states,

> We conclude that **resale restrictions are presumptively unreasonable.** Incumbent LECs can rebut this presumption, but only if the restrictions are narrowly tailored....Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the precompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4).(emphasis added)

BellSouth/AT&T has the substantial burden of demonstrating that the proposed resale restrictions are reasonable and do not discriminate, and until such time as AT&T successfully does so, the restrictions, in this case failure to provide cash back promotions, are presumed to be unreasonable and discriminatory. The presumption is that a restriction, other than cross class or short term, is unreasonable and discriminatory, therefore the ILEC would have to rebut the presumption that it is unreasonable and discriminatory before it could impose the restriction. It seems that federal law has also already addressed this question by placing the burden on the ILEC and by further establishing the presumption that any restrictions beyond cross class and short-term promotions are unreasonable. The FCC stated at Section 939, First Report and Order 96-325 "We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the precompetitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4)." Even if BellSouth/AT&T could show its restrictions on resale were reasonable, for the period of time at issue in this docket, March 2005 through June 2007, **BellSouth/AT&T had not sought approval from the Louisiana Public Service Commission to impose the resale restriction, therefore the**

presumption that the restrictions on resale were unreasonable and discriminatory remained un-rebutted and in place.

It has been established that dPi is a telecommunications carrier with an interconnection agreement with BellSouth/AT&T, under which dPi purchases telecommunications services from BellSouth/AT&T to resale to its own customers. BellSouth/AT&T offered cash back promotions to its retail subscribers during the period from March 2005 through June 2007. These cash back promotions should have been made available for resale to dPi. dPi submitted claims asking for cash back promotions from BellSouth/AT&T for orders submitted during this period. Unfortunately the Parties have informed the Tribunal that the records detailing theses claims do not survive. According to dPi, the total amount dPi is seeking in this docket is $26,800. AT&T states its records indicate that for billing periods prior to July 2007, dPi submitted $26,550 in requests for cash back promotions in Louisiana. These amounts reflect the full face value of the cash back component of the offerings at issue, and the amounts have not been reduced by the resale discount percentage adopted by the Commission, or by any other discount. Since the service orders and requests for promotional credits were first submitted, AT&T has destroyed, in the ordinary course of its business, the records that would be needed to verify whether dPi met the qualifications of the underlying promotions with regard to the credits it seeks in this docket. dPi's claims were rejected initially consistent with Bellsouth's position that cash back promotions were not available for resale, and qualifications of the individual account requests were not noted. dPi does not have copies of either the service orders submitted to AT&T or its own records created in the context of processing orders from its own retail customers with which to prove its claims.

It is not easily understood why dPi would not retain the request forms if it wished to pursue its claim. Particularly as dPi states that, "the credit requests must be meticulously documented, listing details of every order for which credit is requested." And that "getting the data to populate these forms is a Herculean task in itself:" Nevertheless, dPi states it did not make copies, or retain any records. dPi printed order screens until 1999 then quit because of the volume of paper. If it was too much trouble for dPi to keep the records needed to prove its own claims, one has to wonder why it would expect BellSouth to keep the records indefinitely? The Stipulated Facts inform that BellSouth's records were destroyed in the normal course of business. No one has suggested that BellSouth was destroying records in an effort to avoid suit.

It is not clear from the data submitted whether dPi initially filed its requests for cash back promotions in a timely manner. To qualify for the promotions at issue, dPi needed to purchase the services listed in the promotion and, to be consistent with the promotions offered to BellSouth's retail customers who were required to return their coupons within a number of days in order to receive a rebate check, it seems that dPi should have made its requests within the same time period as BellSouth's retail customers. No discussion was provided as to whether dPi's requests should have been, or were, submitted in a similar number of days. The Parties did not submit any stipulated facts dealing with whether dPi satisfied this aspect of qualification for the cash back promotions.

dPi, the Petitioner, has difficulty proving its claim due to the lack of records. In an attempt to overcome this difficulty, dPi argues that the doctrine of laches should be applied. Laches is principally a question of inequity of permitting a claim to be enforced. *Black's Law Dictionary,* 5th ed. West. Pub. St. Paul Minn. 1979. Laches is defined as, "neglect to assert a claim which, taken together with the lapse of time and other circumstances causing prejudice to

adverse party, operates to bar in court of equity." *Wooded Shores Property Owners Ass'n, Inc. v. Mathews,* 345 N.E.2d 186, 189 (Ill.App. 2 Dist. Mar 31, 1976). Estoppel by Laches arises when the defendant's alleged change of position for the worse has been induced by or resulted from the conduct, misrepresentation or silence of the plaintiff *Croyle ve. Croyle*, 184 Md. 126, 40 A.2d 374, 379. dPi argues that it cannot get records from BellSouth/AT&T and therefore BellSouth/AT&T should be stopped from denying its claim. BellSouth/AT&T points out that dPi delayed in bringing its claim which in turn caused BellSouth/AT&T to be disadvantaged by not having records available. As stated, neither Party was diligent in preserving records or moving towards resolving this matter. Difficulties were created for both Parties. **Under the circumstances, imposition of Laches is not called for.**

dPi finally notifies BellSouth it disputes BellSouth's denial of cash back promotions in January of 2007. Once BellSouth was put on notice that dPi disputed denial of cash back promotion, then clearly BellSouth/AT&T needed to maintain the records of cash back claims and denials, no matter what Bellsouth/AT&T was doing in the normal course of business before. AT&T would need to produce records once put on notice, for January of 2007 to July of 2007 when as part of the BellSouth/AT&T merger, AT&T Louisiana began to pay for cash back promotions. The FCC has established that restraints on resale are presumptively unreasonable and discriminatory. Records were in their control, notice had been received that denial of cash back promotions was being contested, and the presumption against restriction is in place, so BellSouth/AT&T has to be able to prove that their action was not unreasonable, nor discriminatory. **Subsequent to notification of the dispute, BellSouth/AT&T, regardless of dP's needs, must keep records regarding dPi's cash back promotion requests, to meet its own burden of proof.**

Should the cash back promotion be reduced by any error rate of 24.5% as urged by BellSouth/AT&T? This rate is developed from historical data gathered of the cash back promotions submitted by dPi to AT&T from July of 2007 through September 2009 which were rejected by AT&T as not qualifying for the promotions requested. For billing periods from July 2007 through September 2009, dPi has requested $270,883.34 in cash back promotional credits from AT&T Louisiana. AT&T has reviewed the $270,883.34 in cash back promotional credit requests to determine if they should be granted. As a result of this review, AT&T Louisiana agrees that dPi was entitled to $204,319.21 of these requested credits and contends that dPi is not entitled to $66,564.13 of these requested credits.[6] For the $66,564.13 of promotional credit requests that AT&T has denied since 2007, these cash back promotional credit requests were denied because AT&T contends that the dPi end user did not meet at least one of the requirements that an AT&T Louisiana end user would have to meet to qualify for the promotion.

It seems likely, based on the historical error rate for claims submitted to AT&T Louisiana by dPi since July 2007, that a portion of dPi's claims would be rejected by BellSouth/AT&T as non-qualifying. However, without the records, there is no way to rebut dPi's claims as to whether a portion of the claims would have been rejected for failure to meet qualifications or not. Once Bellsouth/AT&T is put on official notice of the dispute, BellSouth/AT&T is liable for total amount of cash back promotions claimed between January and July 2007 minus only the wholesale discount. Before that time neither party had been diligent in pursing or defending the claim. No records were kept by either party. The evidence presented is that dPi did submit claims, BellSouth denied the claims, dPi did not dispute the denial of the claims until January

[6] dPi does not concede that these requests properly were denied and reserves all rights to dispute these denials.

2007. No cash back promotions were being claimed or paid to any other CLECs by BellSouth during this time.

From 2005 through 2007, dPi would need to be able to demonstrate it qualified for promotion in order to support its claim. dPi does not have these records. Is BST required to keep these records? No one has indicated how long the records are kept normally if there is no notice of dispute or requirement of a stated term in an interconnection agreement. dPi quite printing out records because said it created too much paper. As dPi does not have the support documents, one approach would be to deny dPi's request for failure to prove the claim. However, BellSouth/AT&T has certain rebuttal burdens as well, and the record does contain stipulations that claims were submitted and stipulations regarding the amount of claims submitted.

For claims from 2005 through December 2006, the amount of the claim will be reduced by the error discount of 24.5%, as this reduced amount is the amount that all parties agree at least was submitted and likely qualified. The total amount dPi is seeking in this docket is $26,800. This amount reflects the full face value of the cash back component of the offerings at issue, and it has not been reduced by the resale discount percentage adopted by the Commission. AT&T's records indicate that for billing periods prior to July 2007, dPi submitted $26,550 in cash back promotions in Louisiana. This amount reflects the full face value of the cash back component of the offerings at issue, and it has not been reduced by the resale discount percentage adopted by the Commission. For the period after BellSouth/AT&T was placed on official notice that there was a dispute regarding refusal of cash back promotions. **From January 2007 through June of 2007, the claims amount will not be reduced by the error discount** as BellSouth had been put on notice it was going to need to show its refusal to offer cash back promotions to dPi was justified.

dPi argues unconvincingly that it should receive the entire amount of the cash back promotion, unreduced by any wholesale discount. dPi provides no statutory or regulatory basis for its position. AT&T urges that any cash back promotion that is required, should be reduced by the wholesale discount and an error discount. Imposition of the wholesale discount is consistent with instructions found in the 1996 Telecommunications Act, FCC Rulings including the First Report and Order, and the LPSC Rules of Local Competition; all of which say that telecommunications services must be offered for resale **at the wholesale discount.** dPi's own brief acknowledge the applicability of the wholesale discount. The introduction informs that "dPi is entitled by law to purchase **at a wholesale discount** services that BellSouth/AT&T offers its own retail customers at discounted promotional rates." The Telecommunications Act of 1996 SEC. 251 Interconnection (i)(d)(3) states that, "For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."

The FCC First Report, VIII Resale section 863 informs that Section 251(c)(4) imposes a duty on incumbent LECs "**to offer for resale at wholesale rates** any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Section 864 directs that State commission shall determine wholesale rates on the basis of retail rates charged to the 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.

The Preamble of Louisiana Public Service Commission Regulations for Competition in the Local Telecommunications Market stresses that These Regulations are intended to ensure that Louisiana consumers benefit from competition by having greater choices among telecommunications products, prices and providers, "Through the development of effective competition, which promotes the accessibility of new and innovative deployment of existing services at competitive prices, the public interest will be promoted." Section 1101. Resale provides that "Promotions that are offered for more than ninety (90) days must be made available for resale, **at the Commission established discount,** with the express restriction that TSPs shall only offer a promotional rate obtained from the LLEC for resale to those customers who would qualify for the promotion if they received it directly from the ILEC. (as amended 10/26/05). **All cash back promotions are to be reduced by the wholesale residential discount which in Louisiana has been established to be 20.72%.**

ATTACHMENT E

ATTACHMENT E

Illustration of Resellers' Erroneous "Wholesale is Higher than Retail" Argument

Monthly Price	$	32.50
Cashback Amount	$	50.00
Resale Discount		14.8%

Months Service is Kept

	1	2	3	4	5	6
AT&T Retail Customer						
Total Amount Paid	$ 32.50	$ 65.00	$ 97.50	$ 130.00	$ 162.50	$ 195.00
Total Cashback	$ (50.00)	$ (50.00)	$ (50.00)	$ (50.00)	$ (50.00)	$ (50.00)
Net Amount Paid	$ (17.50)	$ 15.00	$ 47.50	$ 80.00	$ 112.50	$ 145.00
Proposed Wholesale Price						
AT&T's Method						
Total Paid	$ 27.69	$ 55.38	$ 83.07	$ 110.76	$ 138.45	$ 166.14
Total Cashback	$ (42.60)	$ (42.60)	$ (42.60)	$ (42.60)	$ (42.60)	$ (42.60)
Net Amount Paid	$ (14.91)	$ 12.78	$ 40.47	$ 68.16	$ 95.85	$ 123.54

ATTACHMENT F

ATTACHMENT F

Resellers' Method 1 is Mathematically Identical to Resellers Paying the Standard Wholesale Price for the Service and then Receiving a Credit in the Full Retail Amount of the Cashback Beneft

Standard Retail Price	$ 80.00
Cashback Amount	$ 50.00
Resale Discount	14.8%

Promotional Price	$ 30.00	Standard Wholesale Price	$ 68.16
Less Standard Price x Discount	$ 11.84	Less Full Retail Cashback	$ 50.00
Wholesale Price	$ 18.16	Wholesale Price	$ 18.16

Price Retail Customer Pays	$ 30.00
Price Reseller Pays	$ 18.16
% Discount	39.5%

ATTACHMENT G

ATTACHMENT G

Resellers' Method 2 Produces the Same Results as AT&T South Carolina's Method When the Cashback Benefit is Less than the Monthly Price of the Service.

Standard Retail Price	$	80.00
Cashback Amount	$	50.00
Resale Discount		14.8%

AT&T's Method

Promotional Price	$ 30.00
Less Discount	$ 4.44
Wholesale Price	$ 25.56

OR

Standard Wholesale Price	$ 68.16
Less Discounted Cashback	$ 42.60
Wholesale Price	$ 25.56

Resellers' Method 2

Net Retail Price	$ 30.00
Less 14.8% of Net Retail	$ 4.44
Wholesale Price	$ 25.56

ATTACHMENT H

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2009-422-C

IN RE:		
Application of Bellerud Communications, LLC for Designation as an Eligible Telecommunications Carrier	)))	**OFFICE OF REGULATORY STAFF'S MOTION TO DISMISS**

The South Carolina Office of Regulatory Staff ("ORS") hereby moves to dismiss the Application of Bellerud Communications, LLC (hereafter referred to as "Bellerud" or "the Company") for designation as an Eligible Telecommunications Carrier ("ETC") pursuant to 26 S.C. Code Ann. Regs. 103-829 and 103-690 (C)(b) (Supp. 2009), 47 U.S.C. §214(e)(2), and 47 C.F.R. §54.201(i).

Bellerud filed its Application for ETC designation on October 7, 2009. Bellerud is a wholly owned subsidiary of Associated Telecommunications Management Services ("ATMS"). Other subsidiaries include, but are not limited to, Lifeconnex Telecom, LLC, BLC Management, LLC, and Dialtone and More, Inc.[1]

In order to qualify as an ETC, a company must provide the nine (9) "supported services" identified in 47 C.F.R. 54.101 either using its own facilities or a combination of its own facilities and resale of another carrier's services. The nine services are:

i. Voice grade access to the public switched network;
ii. Local usage;
iii. Dual tone multi-frequency signaling or its functional equivalent;
iv. Single-party service or its functional equivalent;

[1] Dialtone and More, Inc. and BLC Management, LLC, have filed ETC applications with the Commission, but hearings were canceled in both dockets. An organizational chart is attached as Exhibit 1.

EXHIBIT
H

v. Access to emergency services;
vi. Access to operator services;
vii. Access to interexchange service;
viii. Access to directory assistance; and
ix. Toll limitation for qualifying low-income consumers.

It is ORS's position that an ETC in this state must provide all (or substantially all) of the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services." The Company has failed to demonstrate that it will provide all of the nine required services in compliance with the Federal Communication Commission's ("FCC's") regulations.

As grounds for this Motion, ORS states as follows:

1. Bellerud has failed to state clearly how it would provide facilities-based service and fails to meet the requirements of 47 C.F.R. 54.201(d)(1).

ORS has received conflicting information from Bellerud regarding how it would provide facilities-based services throughout ORS's review of Bellerud's Application. In its Application, Bellerud states alternatively that it will provide service using a combination of resale and unbundled network elements ("UNE")[2] while stating on the next page that it will provide the supported services using facilities obtained as UNEs or its equivalent.[3] Curiously, the Application then states the FCC has concluded "that even pure resellers may qualify as an ETC . . ."[4] Further, in Exhibit 2 of the Application, Bellerud notes it currently uses a combination of resale and UNEs to provide local and exchanges access services.[5] In his prefiled testimony filed with the Commission, Paul Watson testified the Company would offer supported services

[2] App. § I, para. 1.
[3] App. § II, para. 5.
[4] App. § II, para. 7.
[5] App. Exh. 2, p. 1.

through the purchase of switched port/loop combinations UNEs or through resale of another carrier's services.[6]

In contrast, Bellerud stated in its responses to ORS's information requests that Bellerud does not currently utilize any UNE platforms of incumbent carriers but instead utilizes the facilities[7] of 321Communications.[8] Later in the responses, Bellerud states it is requesting a wholesale agreement with AT&T to allow them to purchase UNEs.[9] Bellerud confirms it is offering current services only through resale and does not use wholesale platforms currently in South Carolina.[10]

When taken as a whole, Bellerud's testimony, Application and other information paint a confusing picture of what facilities the Company currently uses and what, if any, it intends to obtain in the future. The Company states in Exhibit 2 of its Application that it is currently providing service through resale and UNEs. However, information provided in response to ORS questions states clearly that the Company is currently operating purely as a reseller of services using the facilities of 321Communications, a Company that does not hold a certificate to provide services in South Carolina. Moreover, in a June 23, 2010 meeting with ORS regarding a sister company that also utilizes 321Communications, company representatives were unable to explain the physical components of the network provided by 321 Communications. Bellerud states it is only providing resale services at this time and does not have other network facilities in South Carolina. While Bellerud claims it is seeking a wholesale agreement with AT&T to purchase UNEs, the Company has failed to provide proof of an agreement. A review of all agreements

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[6] Test. pg. 11, lines 7-9.
[7] Response 2.4 submitted March 22, 2010 (attached as Exhibit 2).
[8] As of today's date, ORS has been unable to find any evidence of 321Communications holding a certificate to operate in South Carolina.
[9] Response 2.16 submitted March 22, 2010 (attached as Exhibit 3).
[10] Response 1.5 submitted February 12, 2010 (attached as Exhibit 4).

associated with Bellerud on the Commission's website reflects resale agreements but no interconnection or commercial agreements.

Given the confusing or incomplete statements by Bellerud and its current arrangement utilizing an uncertificated 321Communications, ORS has serious concerns about whether Bellerud can provide the "supported services" identified in 47 C.F.R. 54.101 either using its own facilities or a combination of its own facilities and resale of another carrier's services.

2. The Company relies exclusively on resale to provide the services supported by Federal universal service support.

ORS cannot substantiate that Bellerud will offer basic local exchange service through a combination of its own facilities and resale of another carrier's services as required by 47 C.F.R. 54.201(d)(1). A state commission shall not designate as an ETC a carrier that offers the services supported by federal universal service support mechanisms exclusively through resale.[11]

Mr. Watson states in his prefiled testimony that Bellerud offers the supported services either through the purchase of switched port/loop combinations UNEs or through resale of another carrier's services, depending upon the type of service requested and the precise location of the customer.[12] Mr. Watson goes on to explain that UNEs meet the FCC's definition of "own facilities" and "thereby make the method by which Bellerud provisions the supported services consistent with the FCC's rules found at 47 C.F.R. § 54.201(d)(1) through (i)."[13]

As a result of the Triennial Review Remand Order[14] ("TRRO"), switching is no longer subject to Total Element Long Run Incremental Cost pricing and consequently the only way to obtain a "port/loop combination" from AT&T is through a commercial agreement. In response to

[11] 47 C.F.R. 54.201(i).
[12] Test. pg. 11, lines 2-16; App. § II, note 8.
[13] Test. pg. 11, lines 9-16.
[14] *In re Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*," or "*TRRO*").

an ORS information request, AT&T has confirmed that Bellerud does not have a commercial agreement with AT&T for port/loop combinations.[15]

In its responses dated March 22, 2010, Bellerud stated that it does not utilize any UNE platform of the incumbent carrier but rather uses the facilities of 321Communications.[16] 321Communications is not certified by this Commission to provide telecommunications services in the state of South Carolina. In the same response, Bellerud elaborates to reveal that the facilities it uses are not based in South Carolina and "at present, no customers are provisioned on a UNE platform with an incumbent carrier. Bellerud, does, however, use resale with most customers utilizing facilities through 321Communications."[17]

Further, Bellerud made the curious assertion in its Application that the "FCC has concluded that even pure resellers may qualify as an ETC and properly use universal service support for the purposes for which it was intended by offering reduced price Lifeline service."[18] In an explanatory parenthetical, Bellerud asserts that the FCC found it was "impossible for any carrier to receive a double recovery" of Lifeline support.[19]

It is ORS's opinion that Bellerud misinterprets the FCC order it cites in support of this broad statement. In the cited order, the FCC addresses a request by TracFone Wireless, Inc. (TracFone), a pure wireless reseller, for forbearance from the requirement that a carrier designated as an ETC provide services at least in part over its own facilities.[20] The FCC granted forbearance for TracFone, noting the carrier had limited its request to providing Lifeline-support

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[15] AT&T Response 1.5 submitted June 25, 2010 (attached as Exhibit 5).
[16] Response to 2.4 submitted March 22, 2010
[17] Id.
[18] App. § II, para. 7.
[19] App. § II, note 10.
[20] *Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc.*, 20 FCC Rcd 15095, 15098 (2005).

services and listing a litany of requirements and limitations for TracFone in order for the forbearance to be approved.[21]

First, the FCC's order did not broadly open ETC designation to pure resellers.[22] Unlike Bellerud, TracFone was a wireless carrier. Additionally, TracFone went to the FCC to request forbearance for the facilities-based requirement. Bellerud has not done so. In order to satisfy some of the FCC's concerns, TracFone agreed to limit its ETC offerings to Lifeline services and agreed to comply with a list of other requirements and limitations. Bellerud has not offered to do so. Bellerud cites the FCC order to stand for the proposition that pure resellers can be awarded ETC designation because it is "impossible for any carrier to receive a double recovery" of support for Lifeline services. However, the FCC clearly distinguishes that a wireless carrier could not receive a double recovery when receiving Lifeline support directly from the fund while a reseller of an incumbent LEC's services could recover twice – "first because the benefit of Lifeline support is reflected in the wholesale price and second because the reseller also receives payment directly from the fund for the Lifeline customer."[23]

Therefore, it is ORS's opinion that the FCC has not broadly held that pure resellers are entitled to ETC designation, at least not without seeking and obtaining forbearance from the FCC first. Further, the reasoning behind the facilities-based requirement and refusal to extend ETC status to pure resellers – that of double recovery – still applies for wireline pure resellers like Bellerud. While ORS does not find the FCC order to be necessarily relevant to Bellerud's Application since Bellerud has not sought forbearance from the FCC and is a wireline reseller,

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[21] *Id.*
[22] *Id.* at note 4. It should be noted that the FCC's order did not designate TracFone as an ETC; it merely ruled on whether forbearance should be granted.
[23] *TracFone Wireless*, 20 FCC Rcd at 15100-101.

ORS does find it noteworthy that Bellerud would cite the FCC's order and argue that the FCC supports ETC designation of pure resellers.

As stated above, Bellerud has made conflicting statements about whether it is a pure reseller or intends to offer services through a combination of its own facilities and resale of another carrier's services. To the extent Bellerud's status can be determined, it appears Bellerud is operating as a pure reseller but is also in some manner utilizing the facilities of 321Communications. Although Bellerud claims at different times to already be utilizing UNEs or be seeking UNEs for future use, no evidence has been provided to substantiate either claim. No agreements other than resale agreements have been filed with the Commission, and AT&T, in response to an information request from ORS, stated it had not entered into any commercial agreements with Bellerud for the loop/port combinations. Further, the FCC order underscores the importance of obtaining forbearance where a reseller seeks ETC designation.

3. The Company is not currently in compliance with Commission rules and regulations.

Bellerud has not filed its quarterly quality of service reports for the first quarter of 2010. Bellerud was also late in filing its 2007 USF contribution report. ORS has concerns as to whether Bellerud is willing and able to comply with Commission rules and regulations.

WHEREFORE, for all the reasons set forth above, ORS finds that granting the Company's application is not in the public interest and respectfully requests the Commission to dismiss this Application for ETC designation.

Respectfully submitted,

Shealy Boland Reibold

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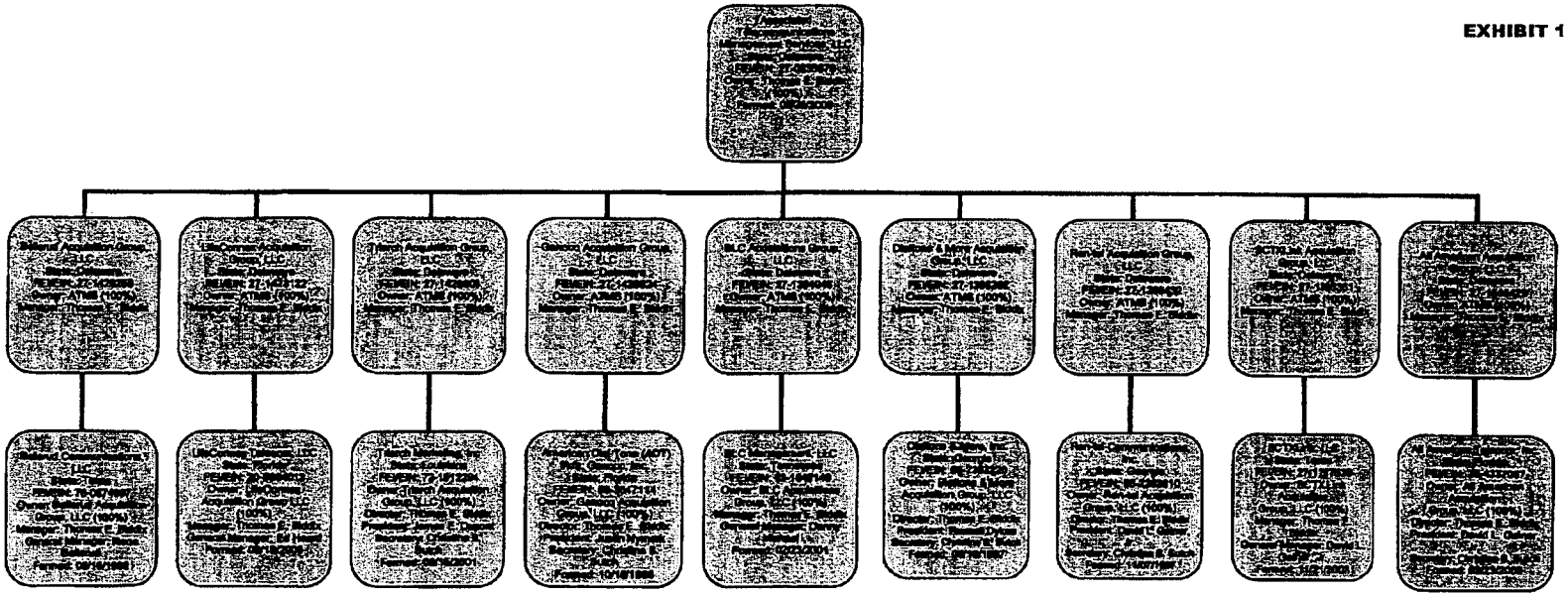
July 9, 2010

EXHIBIT 1



PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA STAFF'S SECOND AUDIT INFORMATION REQUEST TO BELLERUD COMMUNICATIONS, LLC ("BELLERUD")
Docket No. 2009-422-C
March 22, 2010

EXHIBIT 2

2.4 Does Bellerud provide any services in South Carolina through the use of its own facilities or unbundled network elements?

RESPONSE: Bellerud does not utilize any UNE platform of the incumbent carries but rather the facilities of 321 Communications.

a. If Bellerud provides service using its own facilities, provide a listing of all Bellerud telecommunications equipment located in South Carolina.

b. Identify the criteria used by Bellerud to determine when and where unbundled network elements are purchased and used to provide service.

RESPONSE:

a. **Currently facilities employed are not based in South Carolina.**

b. **At present no customers are provisioned on a UNE platform with an incumbent carrier. Bellerud does, however, use resale with most customers utilizing facilities through 321Communications.**

All Contacts Providing Information/Response for the above question:

Rene Bellerud, General Manager, Bellerud Communications, LLC, 401-B W. Montgomery St, Willis, TX 77378; E-mail: rbellerud@bellerudtel.com; Telephone: (936) 295-9600

Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: lsteinhart@telecomcounsel.com; Telephone: (770) 232-9200

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA **EXHIBIT 3**
STAFF'S SECOND AUDIT INFORMATION REQUEST TO
BELLERUD COMMUNICATIONS, LLC ("BELLERUD")
Docket No. 2009-422-C
March 23, 2010

2.16 Provide a copy of the current Local Wholesale Commercial Agreement between Bellerud and BellSouth Telecommunications dba AT&T South Carolina.

RESPONSE: Bellerud Communications, LLC currently has a 22 State Resale agreement between AT&T / Bellsouth. See attached. The Company is in the process of requesting a wholesale agreement that will allow them to purchase unbundled network elements.

All Contacts Providing Information/Response for the above question:

Rene Bellerud, General Manager, Bellerud Communications, LLC, 401-B W. Montgomery St, Willis, TX 77378; E-mail: rbellerud@bellerudtel.com; Telephone: (936) 295-9600

Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: lsteinhart@telecomcounsel.com; Telephone: (770) 232-9200

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA **EXHIBIT 4**
STAFF'S FIRST AUDIT INFORMATION REQUEST TO
BELLERUD COMMUNICATIONS, LLC ("BELLERUD")
Docket No. 2009-422-C
February 12, 2010

1.5 Does Bellerud offer any residential services through the use of a wholesale platform in South Carolina?

RESPONSE: No, Bellerud offers resale only.

All Contacts Providing Information/Response for the above question:

Rene Bellerud, General Manager, Bellerud Communications, LLC, 401-B W. Montgomery St, Willis, TX 77378; E-mail: rbellerud@bellerudtel.com; Telephone: (936) 295-9600

Lance J.M. Steinhart, Esq., Lance J.M. Steinhart, P.C., 1720 Windward Concourse, Suite 115, Alpharetta, Georgia 30005; E-mail: lsteinhart@telecomcounsel.com; Telephone: (770) 232-9200

EXHIBIT 5

Cindy Cox

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www.att.com

June 25, 2010

Ms. Nanette Edwards
Office of Regulatory Staff
1401 Main St., Suite 900
Columbia, SC 29201

Dear Ms. Edwards:

This letter and its attachments respond to the Information Request, dated June 14, 2010, that the Office or Regulatory Staff propounded to AT&T South Carolina pursuant to S.C. Code Ann. §58-4-55. One or more of the attachments are considered proprietary and are stamped "Confidential/Proprietary Information Pursuant to S.C Code Ann. Section 58-4-55-C".

1-1. Please identify and provide guidebook references to all toll blocking (which allows customers to block outgoing toll calls) and toll control (which allows customers to limit in advance their toll usage per month or per billing cycle) functionality that AT&T South Carolina offers its retail residential customers.

AT&T South Carolina does not offer toll control to its retail residential customers. AT&T South Carolina offers its retail residential customers the toll blocking functionality provided by the four customized code restriction options (coded CREX1, CREX2, CREX3, and CREX4) described at §§A13.20.2.A.1 to .4 of its General Exchange Price List ("GEPL"). The retail non-recurring and recurring prices for these customized code restrictions are set forth in §§A13.20.3.A.1 to .4 of its GEPL. Exhibit A to this response is a copy of these sections.

A. Are the rates, terms, and conditions of the items identified in response to Request No. 1 different for retail customers who qualify for Lifeline than for retail customers who do not qualify for Lifeline?

Yes. Retail customers who qualify for Lifeline and who order the customized code restriction options identified in response to Request No. 1-1 receive those options free of charge. *See* Exhibit A, §A13.20.1.H ("Customized Code Restriction will be established and provided at no charge for customers receiving Lifeline service from A3.31 . . . ."); Exhibit B, §A3.31.2.A.4 ("Toll blocking, if elected, will be provided at no charge to the Lifeline subscriber.").

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be adjusted to equal the total of the non-discounted local service rates and charges." *See* Exhibit B.

In states in which AT&T does not recover the $3.50 state credit amount from an external source, it does not provide the $3.50 state credit amount to resellers.

B. to CLECs operating under a commercial agreement?

AT&T does not know whether any CLEC with a commercial agreement provides Lifeline discounts to its end users, and AT&T is unaware of any CLEC with a commercial agreement having raised any Lifeline issues, including without limitation passing along Lifeline credits, with AT&T.

1-4. Does Lifeconnex have a commercial agreement with AT&T? No.

1-5. Does Bellerud have a commercial Agreement with AT&T? No.

1-6. To what extent does AT&T pass along Linkup credits:

A. to resellers

The Link-Up program is designed to increase the availability of telecommunications services to low income subscribers by providing a credit to the non-recurring installation and service charges to qualifying residential subscribers. The credit, which AT&T recovers from the federal USF, currently is fifty percent of the non-recurring charges for connection of service, up to a maximum of thirty dollars.

As explained in §A4.7.2.A.6 of the GEPL, "[t]he non-discounted federal credit amount will be passed along to resellers ordering local service at the prescribed resale discount from this Tariff, for their eligible end users. Eligible carriers, as defined by the FCC, are required to establish their own Link-Up programs." *See* Exhibit D.

B. to CLECs operating under a commercial agreement?

AT&T does not know whether any CLEC with a commercial agreement provides Linkup discounts to its end users, and AT&T is unaware of any CLEC with a commercial agreement having raised any Linkup issues, including without limitation passing along Linkup credits, with AT&T.

1-7 Provide the amounts AT&T is reimbursed by USAC for the items identified in 1-1.

BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2009-422-C

IN RE:

Application of Bellerud Communications, LLC for Certification as an Eligible Telecommunications Carrier	))))	**CERTIFICATE OF SERVICE**

This is to certify that I, Chrystal L. Morgan, have this date served one (1) copy of the **MOTION TO DISMISS** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

Scott Elliott, Esquire
Elliott & Elliott, P.A.
721 Olive Street
Columbia, SC, 29205

Chrystal L. Morgan

Chrystal L. Morgan

July 9, 2010
Columbia, South Carolina

ATTACHMENT I

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2009-414-C

IN RE: Application of LifeConnex Telecom, LLC for Designation as an Eligible Telecommunications Carrier	))))	**OFFICE OF REGULATORY STAFF'S MOTION TO DISMISS**

The South Carolina Office of Regulatory Staff ("ORS") hereby moves to dismiss the Application of LifeConnex Telecom, LLC (hereafter referred to as "LifeConnex" or "the Company") for designation as an Eligible Telecommunications Carrier ("ETC") pursuant to 26 S.C. Code Ann. Regs. 103-829 and 103-690 (C)(b) (Supp. 2009), 47 U.S.C. §214(e)(2), and 47 C.F.R. §54.201(i).

Lifeconnex filed its Application for ETC designation on October 5, 2009. Lifeconnex is a wholly owned subsidiary of Associated Telecommunications Management Services ("ATMS"). Other subsidiaries include, but are not limited to, Bellerud Communications, LLC, BLC Management, LLC, and Dialtone and More, Inc.[1]

In order to qualify as an ETC, a company must provide the nine (9) "supported services" identified in 47 C.F.R. 54.101 either using its own facilities or a combination of its own facilities and resale of another carrier's services. The nine services are:

i. Voice grade access to the public switched network;

ii. Local usage;

[1] Dialtone and More, Inc. and BLC Management, LLC, have filed ETC applications with the Commission, but hearings were canceled in both dockets. An organizational chart is attached as Exhibit 1.

EXHIBIT

I

iii. Dual tone multi-frequency signaling or its functional equivalent;

iv. Single-party service or its functional equivalent;

v. Access to emergency services;

vi. Access to operator services;

vii. Access to interexchange service;

viii. Access to directory assistance; and

ix. Toll limitation for qualifying low-income consumers.

It is ORS's position that an ETC in this state must provide all (or substantially all) of the supported services "either using its own facilities or a combination of its own facilities and resale of another carrier's services." The Company has failed to demonstrate that it will provide all of the nine required services in compliance with the Federal Communication Commission's ("FCC's") regulations.

As grounds for this Motion, ORS states as follows:

1. LifeConnex's "Implementation Plan" is significantly altered from its Application filed on October 5, 2009 and fails to meet the requirements of 47 C.F.R. 54.201(d)1.

LifeConnex, in its Application, claimed that it would provide facilities-based service "using facilities obtained as UNEs" from AT&T. (Application at page 5, section 5). As explained later in this Motion, the Company now appears to have a different business plan, one that fails to meet the requirements of 47 C.F.R. 54.201(d)1.

This new approach, which LifeConnex proposed through responses to questions from ORS and in a meeting on June 23, 2010 where members of ORS met with LifeConnex's management team, is different than the plan proposed in its Application and its prefiled direct

testimony. LifeConnex has failed to provide evidence that it's new implementation plan meets the FCC's facilities-based requirements found in 47 C.F.R. 54.201(d)1.

Through responses to data requests propounded by ORS, and further revealed in the June 23rd meeting, LifeConnex has proposed a new approach to offering facilities-based service; an approach not found in its Application, or in the testimony of Paul Watson, and one that the Company has not received approval for from the FCC. This new approach uses no Company-owned local facilities or local facilities of the Incumbent LEC purchased as unbundled network elements ("UNE"), and most importantly, it does not use a combination of its own facilities and resale of another carrier's services in offering the services that are supported by federal universal service support mechanisms.[2] As such, ORS cannot find **any** evidence that this new approach complies with either the letter or the intent of 47 C.F.R. 54.201(d)(1).

The FCC envisioned carriers would use UNEs as a stepping stone, giving new entrants to the local marketplace a method to start first by buying unbundled network elements from the incumbent LEC and then adding components of their own network as they built out toward the end user. The FCC recognized that a company could startup by purchasing UNEs for each of its customers, thus leasing its own local network, and this would satisfy the facilities-based requirement. Without purchasing UNEs, leasing the local loop, or providing its own local loop, ORS submits that LifeConnex does not meet the requirements of 47 C.F.R. 54.201(d)(1).[3]

2. The Company relies exclusively on resale to provide the services supported by Federal universal service support.

[2] While LifeConnex's new approach may provide one or possibly two of the ancillary supported services, its approach fails to provide the primary supported service, local service, in compliance with the facilities-based requirements of 47 C.F.R. 54.201 (d)(1).

ORS cannot substantiate that LifeConnex will offer basic local exchange service through a combination of its own facilities and resale of another carrier's services as required by 47 C.F.R. 54.201(d)(1). A state commission shall not designate as an ETC a carrier that offers the services supported by federal universal service support mechanisms exclusively through resale. See 47 C.F.R. 54.201(i).

Based on information obtained at the June 23rd meeting, the Company apparently intends to either: (1) place a de minimus number of orders for UNE combinations (although ORS can find no evidence that the Company has ever ordered UNEs or the loop/port combination); or (2) use long distance switches which the Company asserts provide "supported services" and meets the requirements of Section 54.201(d)(1). Yet, as described further below, LifeConnex's explanation of its facilities-based service model is a constantly moving target.

In contrast to the information provided to ORS at the June 23, 2010 meeting, the Company's testimony relies on the purchase of the port/loop combination to meet the FCC's "facilities" requirement. Mr. Watson states in his prefiled testimony that LifeConnex has an interconnection agreement with BellSouth/AT&T.[4] (Test. p. 4, lines 14-16). During the course of ORS's investigation, ORS inquired about this interconnection agreement. On April 6, 2010, the Company and AT&T submitted for approval an interconnection agreement, which was approved by the Commission on April 21, 2010, in Docket No. 2010-136-C.

Further, Mr. Watson states in his prefiled testimony that LifeConnex offers the supported services either through the purchase of switched port/loop combinations or through resale of another carrier's services, depending upon the type of service requested and the precise location of the customer. (Test. pgs. 11, lines 2-16; see also, Test. pgs. 4-5 and footnote 8 of the

[4] On the other hand, the Company responded on April 29, 2010 to information request number 3.6 that it planned to add South Carolina as an addendum to its southeast agreement.

Company's Application). Mr. Watson goes on to explain that UNEs meet the FCC's definition of "own facilities" and "thereby make the method by which LifeConnex provisions the supported services consistent with the FCC's rules found at 47 C.F.R. § 54.201(d)(1) through (i)." As a result of the Triennial Review Remand Order[5] ("TRRO"), switching is no longer subject to Total Element Long Run Incremental Cost pricing and consequently the only way to obtain a "port/loop combination" from AT&T is through a commercial agreement. In response to an ORS information request, AT&T has confirmed that LifeConnex does not have a commercial agreement with AT&T for port/loop combinations. (See Exhibit 2, Response 1-4).

Later, on March 22, 2010, in response to information request number 2.1 attached as Exhibit 3, the Company states that it does not plan to utilize any UNE platform of the incumbent carrier but rather the facilities of 321 Communications. 321 Communications is not certified by this Commission to provide telecommunications services in the state of South Carolina. In response to information request number 2.9, the Company responded that it does not plan to offer Lifeline discounted local service through the purchase of AT&T UNEs. (See Exhibit 4). Furthermore, in response to information request 2.11, the Company stated that out of 23,796 lifeline customers in Alabama, all are served via resold AT&T local service. In responses to information requests 2.13 and 3.1, the Company indicated that all customers are resale and none are served via UNEs. (See Exhibit 5).

ORS learned through response number 3.3 on April 29, 2010, that the Company's interpretation of 47 C.F.R. 54.201(d)(1) is that it would meet the FCC's facilities requirement by obtaining "facilities via 321 Communications their Long Distance provider as every line is provisioned with this long distance services." (See Exhibit 6). Nowhere in Mr. Watson's

[5] *In re Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*," or "*TRRO*").

prefiled direct testimony or in the Company's Application is this argument advanced. To aid in resolving the apparent discrepancies, ORS requested at the June 23, 2010 meeting information such as but not limited to call flow diagrams detailing how each supported service will be provisioned.[6] As of the date of this filing, ORS has not received that information.

3. ORS has received contradictory responses from the Company during the course of ORS's review of the Company's application.

Mr. Watson states in his February 8, 2010 prefiled testimony that LifeConnex has not been audited by USAC, or any other entity, with regard to Lifeline and Link-Up. (Test. p.19, lines 2-4). ORS representatives have reviewed the filings of LifeConnex in other jurisdictions as well as at the FCC and have spoken to individuals at the Universal Service Administration Company ("USAC"). Thus, ORS was made aware through those conversations that the Company is currently being audited by USAC. During the June 23, 2010 meeting, ORS was informed that the USAC audit had been going on for approximately three (3) years, which is inconsistent with the prefiled testimony. ORS was also informed by the Company at the June 23, 2010 meeting that the results of USAC's audit will be released in July/August of 2010. ORS is concerned that the Company stated in its prefiled testimony that it was not subject to an audit by USAC when in fact it had been subject to an audit for three years.

4. The Company is not currently in compliance with Commission rules and regulations.

As of today's date, Lifeconnex has not submitted its USF contribution report, which was due July 1, 2010. ORS has concerns as to whether Lifeconnex is willing and able to comply with Commission rules and regulations.

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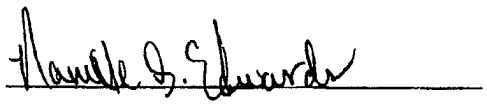
[6] See also, discussion of FCC's facilities requirement in Florida Staff Recommendation in Docket No. 070348-TX attached as Exhibit 7.

WHEREFORE, for all the reasons set forth above, ORS finds that granting the Company's application is not in the public interest and respectfully requests the Commission to dismiss this Application for ETC designation. Should the Commission decide to deny ORS's request, ORS asks that this Commission delay any hearings in this matter until after USAC releases its audit findings.

Respectfully submitted,



Nanette S. Edwards, Esquire
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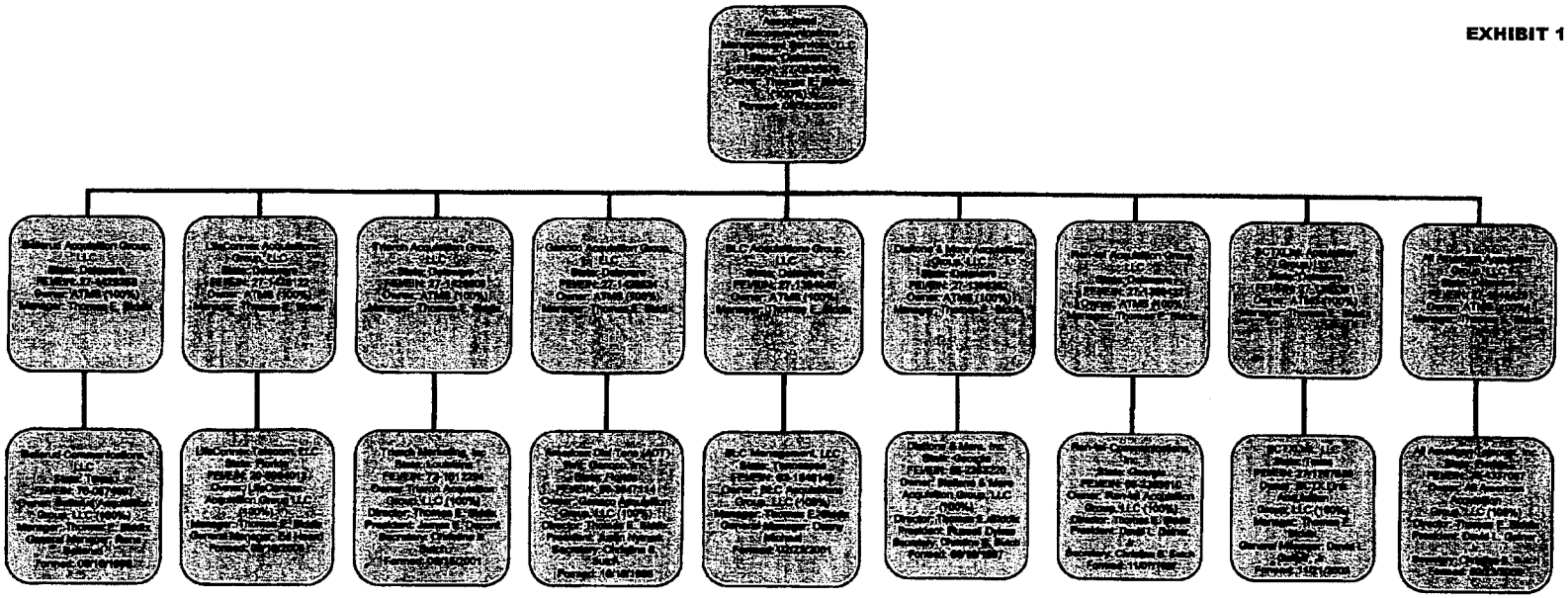
July 7, 2010

EXHIBIT 1



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