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April 9, 2010

The Honorable Jocelyn Boyd
Interim Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC
Docket No. 2010-16-C

Dear Ms. Boyd:

AT&T South Carolina respectfully submits the following documents for filing in the above-referenced Docket:

1. AT&T South Carolina's Response to Motions to Dismiss and/or Stay and Reply to Responses to Motion to Consolidate.[1]

2. AT&T South Carolina's Motion to Dismiss or Sever Certain Counterclaims.

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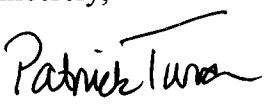
[1] This Response addresses both dPi's "Motion to Dismiss and/or Stay and Response to Motion for Consolidation" and NewPhones' "Motion to Dismiss and/or Stay and Response to Motion for Consolidation," in which Tennessee has joined. *See* Responses of Affordable Phone Services, Inc., d/b/a High Tech Communications, Dialtone and More, Inc., Tennessee Telephone Service, LLC d/b/a Freedom Communications, USA, LLC, and Onetone Telecom Inc. to AT&T's Motion for Consolidation, filed in Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, and 2010-17-C on or about February 25, 2010.

3. AT&T South Carolina's Response to Tennessee's Answer/Counterclaims.

By copy of this letter, I am serving all parties of record with a copy of these pleadings as indicated on the attached Certificate of Service.

Sincerely,



Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
799713

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

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

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

BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC
Docket No. 2010-16-C

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

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

BellSouth Telecommunications, Incorporated d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Image Access, Incorporated d/b/a New Phone
Docket No. 2010-19-C

AT&T SOUTH CAROLINA'S RESPONSE TO MOTIONS TO DISMISS AND/OR STAY AND REPLY TO RESPONSES TO MOTION TO CONSOLIDATE

BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T South Carolina") respectfully submits this Response to the "Motion to Dismiss and/or Stay and Response to Motion for Consolidation" filed by dPi Teleconnect, LLC ("dPi") and to the "Motion to Dismiss and/or Stay and Response to Motion for Consolidation" filed by Image Access, Inc. d/b/a NewPhone ("NewPhone"),

in which the remaining Defendants in the above-captioned dockets joined.[1] For ease of reference, this Response refers to the Defendants collectively as "the resellers."

In essence, the questions presented by the resellers' filings that are addressed herein are:

1. Should the Commission delay deciding whether AT&T South Carolina can apply the resale discount approved by this Commission to the cashback component of various promotional offerings that AT&T South Carolina makes available for resale?

2. Should a reseller that claims it has not sought credits or withheld payments for referral marking promotions (like the "word-of-mouth" promotion) be excused from a consolidation of these proceedings for the purpose of deciding whether such promotions are available for resale?

For the reasons set forth below, AT&T South Carolina respectfully requests that the Commission: not delay these proceedings for any reason; and excuse a reseller from consolidation for purposes of deciding the referral marketing issue only if that reseller submits a filing irrevocably waiving its right to contest any amounts AT&T South Carolina seeks in this proceeding on the grounds that it is entitled to any credits associated with referral marketing promotions.

I. INTRODUCTION

It is easy to see why the resellers want the Commission to delay these proceedings. In the aggregate, they owe AT&T South Carolina more than $4.8 million for services AT&T South Carolina provided them under the parties' interconnection agreements for resale to their end user customers. This unpaid balance increases every

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[1] *See* Responses of Affordable Phone Services, Inc., d/b/a High Tech Communications, Dialtone and More, Inc., Tennessee Telephone Service, LLC d/b/a Freedom Communications, USA, LLC, and Onetone Telecom Inc. to AT&T's Motion for Consolidation, filed in Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, and 2010-17-C on or about February 25, 2010.

month because the resellers continue to order and/or receive services from AT&T South Carolina for resale, and they continue to dispute and/or withhold substantial amounts of payment from AT&T South Carolina. The resellers attempt to justify a substantial portion of these disputes and/or withholdings by one or both of the following erroneous assertions: (1) that AT&T South Carolina cannot apply the resale discount approved by this Commission to the cashback component of various promotional offers that AT&T South Carolina makes available for resale; and (2) that AT&T South Carolina's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale. Each month of delay, therefore, is another month that the resellers do not pay substantial portions of their bills.

The delay the resellers seek clearly harms AT&T South Carolina because it increases the likelihood that the resellers will be unable to pay amounts they ultimately will be found to owe AT&T South Carolina. AT&T South Carolina, therefore, urges the Commission to summarily deny the resellers' motions to dismiss or delay these proceedings and promptly adjudicate AT&T South Carolina's Complaints. In the alternative, AT&T South Carolina respectfully requests that the Commission condition a delay or dismissal of these proceedings upon each resellers' depositing the amounts at issue pursuant to an appropriate escrow arrangement that provides for release of the deposited funds only upon Order of the Commission.

II. ARGUMENTS RELATED TO CASHBACK CREDITS

This Commission has already granted AT&T South Carolina's Motion to Consolidate these six dockets for the limited purpose of expeditiously resolving the two

common issues set forth in AT&T South Carolina's complaints,[2] and no reseller argues against that decision as it relates to whether the resale discount approved by this Commission applies to the cashback component of various promotional offerings that AT&T South Carolina makes available for resale. Instead, the resellers argue the pendency of three other proceedings warrants the Commission's dismissing or delaying these proceedings: the FCC's Resale Docket;[3] the *CGM* case in federal court in North Carolina,[4] and the *Budget Prepay* case at the Fifth Circuit.[5] The resellers are simply wrong.

There is no reason to believe the FCC will act on its Resale Docket at all, much less anytime soon (it has been languishing for nearly four years and counting), and even if the FCC ever does act in that docket, there is no guarantee that it will even discuss, much less decide, any issue presented in these dockets. While the *CGM* suit asks a federal court in North Carolina to address one of the issues in these dockets, a federal magistrate judge recently recommended that the case be dismissed. Even if the district court does not accept that recommendation (and there is no reason to believe it will not), this Commission should not effectively abdicate the enforcement of South Carolina interconnection agreements to a North Carolina court. Finally, the *Budget Prepay* case does not present any issue that is presented in AT&T South Carolina's Complaints. Instead, it addresses a new methodology for calculating wholesale rates for certain promotional offerings, and each of AT&T South Carolina's Complaints plainly states that

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2 *See* Directive dated January 20, 2010.

3 Federal Communications Commission ("FCC") WC Docket No. 06-129 (*In the matter of Petition of Image Access, Inc. d/b/a New Phone for Declaratory Ruling*).

4 *CGM, LLC v. BellSouth Telecommunications, Inc.*, Civil Case No. 3:09-CV-377-RJC-DCK (W.D.N.C.)

5 *Budget PrePay, Inc. v. AT&T Inc.*, Case Nos. 09-11188 and 09-11099 (5th Cir.).

"***AT&T South Carolina is not seeking any amounts billed under this new methodology in this Docket.***"[6] The Commission, therefore, should deny the resellers' motions to dismiss or delay these proceedings.

A. The Languishing FCC Resale Docket is not a Reason to Dismiss or Delay these Proceedings.

In July 2006, the FCC invited comments on a Petition Image Access (which does business as New Phone) filed in the FCC Resale Docket.[7] At that time, AT&T South Carolina (then BellSouth) was not making the cashback portion of retail promotional offerings available to resellers at all, and the main issue the FCC was asked to decide was whether ILECs had to make long-term cash-back (and other) promotions available for resale.[8] The FCC established a comment cycle that closed August 10, 2006.[9]

Interested parties filed comments, but the FCC took no action on Image Access' Petition. Three years later, Image Access filed a letter in that docket suggesting that the FCC should determine that an ILEC must "provide to [resellers] the retail value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users."[10] Image Access' letter notes that "the passage of time and recently

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6 *See* Footnote 1 to each Complaint (emphasis in the original).

7 Exhibit A to this Response is a copy of the FCC's Public Notice inviting comments in its Resale Docket.

8 *Id.* Image Access also asked the FCC to declare that "for all promotions greater than 90 days, ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion." *Id.*

9 *Id.*

10 Exhibit B to this Response is a copy of Image Access' letter.

announced policy changes by [AT&T][11] have made the need for a final Commission order on the pending petition more acute." Even after Image Access filed its letter, however, the FCC still has taken no action in its Resale Docket.

In other words, it has been forty-four months since the FCC issued its Public Notice in its Resale Docket, and the FCC has neither acted on Image Access' Petition nor done anything to suggest that it intends to do so. Despite the FCC's inaction, the resellers proffer a number of reasons the Commission should dismiss or delay the proceedings before this Commission until the FCC acts in the FCC Resale Docket. As explained below, none of the reseller's proffered reasons are valid.

The resellers ask the Commission to dismiss or delay these proceedings because the FCC's Public Notice seeks comment on an issue that is "the same as the first issue AT&T has raised in its Complaint before this Commission."[12] AT&T South Carolina does not concede that the two issues are the same. Even if they were, however, the mere fact that the FCC sought comment on Image Access's Petition does not mean that the FCC will address – much less decide – any particular issue Image Access asked it to consider. To the contrary, the FCC has taken no action on any issue Image Access raised in its Petition in the nearly four years since it sought and received comments on the Petition.

The resellers ask the Commission not to act on AT&T's Complaints because they require "interpretation of FCC regulations regarding AT&T's resale obligations," and

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[11] AT&T had recently announced its new methodology for calculating wholesale rates for certain promotional offerings, but as explained below, AT&T South Carolina is not seeking any amount billed under that new methodology in these dockets.

[12] New Phone Motion at 5.

"the FCC is the most appropriate agency to interpret its own regulations."[13] This argument, however, cannot be squared with the state-by-state scheme that Congress established in the 1996 Act. Under the resellers' approach, for instance, many issues arising in Section 252 arbitration proceedings would be decided only by the FCC, but Congress clearly intended for State commissions to apply federal law (including FCC rules implementing federal law) in deciding such issues.[14] Similarly, under the resellers' approach, many claims for breach of an interconnection agreement would be decided by the FCC, and enforcement of interconnection agreements – the centerpiece of the 1996 Act – would grind to a halt. That, however, clearly is not what Congress had in mind. To the contrary, the 1996 Act expressly authorizes State commissions to mediate interconnection agreement negotiations,[15] arbitrate interconnection agreements,[16] and approve or reject interconnection agreements,[17] and the courts have held that section 252 implicitly authorizes State commissions to interpret and enforce the interconnection agreements they approve.[18]

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13 *See* New Phone Motion at 4; dPi Motion at 4.

14 *See* 47 U.S.C. §252(b)(4)(C) ("The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement . . ..").

15 47 U.S.C. § 252(a)(2)

16 *Id.* § 252(b)

17 *Id.* § 252(e)

18 See, *e.g.*, *Bell Atl. Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001) ("The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements – we believe they do"), *vacated on other grounds in Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 65 (2002). *See also Core Commc'ns v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 342 n.7 (3rd Cir. 2007) ("[E]very federal appellate court to consider the issue has determined or assumed that state commissions have authority to hear interpretation and enforcement actions regarding approved interconnection agreements")

The resellers further claim that "judicial economy and efficiency would be best served" by waiting for the FCC's decision in its Resale Docket.[19] Nearly four years (and counting) of inaction by the FCC suggests otherwise.[20] But even if there were some reason to believe the FCC might make a decision in the Resale Docket in the foreseeable future (and there is not), dPi's argument is based on a false premise: that the rules governing the billing disputes presented in these dockets are ambiguous and need to be interpreted by the FCC. The first common issue presented in AT&T South Carolina's complaints, for instance, is a pricing issue under the parties' interconnection agreements, and those interconnection agreements – which incorporate the wholesale pricing standard of 47 C.F.R. § 51.607 – are crystal clear: telecommunications services (and long-term promotions associated with them) are to be resold to dPi at the retail price *minus the appropriate state wholesale discount*. NewPhone's letter in the FCC Resale Docket asks the FCC to change existing law, but current law and the parties' interconnection agreements – which this Commission is authorized to enforce – permit AT&T South Carolina to subtract the wholesale discount from the face amount of the retail promotion when selling that promotion to a reseller like dPi. Accordingly, there is no reason for this Commission to wait and see if the FCC decides to change the rules; instead, the Commission should enforce the existing rules in deciding the issues in this proceeding.

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19 New Phone Motion at 4; dPi Motion at 4.

20 Delay at the FCC is neither new nor unique to the FCC Resale Docket -- a number of FCC dockets have been open, and undecided, for years. For example, the FCC has had intercarrier compensation issues, particularly concerning Voice over Internet Protocol ("VoIP"), on its plate for a decade, but has failed to address those issues, notwithstanding their tremendous industry-wide importance.

B. The *CGM* Case, Which a Federal Magistrate Judge Has Recommended be Dismissed, is not a Reason to Dismiss or Delay these Dockets.

The resellers suggest that these dockets should be dismissed or delayed because of the *CGM* case pending in federal district court in North Carolina.[21] In that case, a billing agent for various resellers (but not any actual reseller) sued AT&T and alleged, among other things, that AT&T must pass on to resellers the "full dollar for dollar" face amount of the cashback component of a retail promotional offering without adjusting it by the applicable wholesale discount. AT&T filed a motion to dismiss the case on various grounds, and the District Court referred the pending motions to a federal Magistrate Judge. On March 16, 2010, the Magistrate Judge issued a Memorandum and Recommendation concluding that the case should be dismissed.[22] Although the district court could, in theory, reject that recommendation, the likelihood of dismissal eliminates the *CGM* case as a plausible excuse for the delay the resellers seek.

Nor would the pendency of *CGM* justify dismissal or a delay of these proceedings even if the case could be expected to proceed to decision. Any decision the North Carolina district court might make in that case would not be binding here; it would merely be one judge's expression of a view that this Commission might or might not find informative. Furthermore, any such decision would not be available – for whatever limited value it might have – any time in the near future. Notwithstanding that the plaintiffs in *CGM* filed a motion for expedited treatment along with the complaint they filed in August of 2009, the district court took no action on the complaint, or on the request for expedition, before the issuance of the dismissal recommendation on March

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[21] *See* dPi Motion at 4-5; New Phone Motion at 5-6.

[22] Exhibit C to this Response is a copy of the Magistrate Judge's Memorandum and Recommendation.

16, 2010. Inasmuch as there has been no activity in the case other than briefing on motions to dismiss, it is doubtful that a decision would be rendered in the case in less than a year – *if* the District Court Judge were to reject the Magistrate Judge's recommendation to dismiss the case. Plainly, it makes no sense to put this case on hold on the off chance that the district court *might* issue a decision a year or more from now that the Commission *might* find illuminating.

C. The *Budget Prepay* Case, Which Does Not Involve Any Issue In AT&T South Carolina's Complaints, is not a Reason to Dismiss or Delay these Dockets.

The resellers ask the Commission to dismiss or delay these dockets because of the *Budget Prepay* case that is pending before the Fifth Circuit Court of Appeals.[23] That case, however, challenged only the new methodology for calculating wholesale rates for certain promotional offerings, and it is clear from the face of each Complaint that AT&T South Carolina is not seeking any amounts billed under this new methodology in these dockets. The *Budget Prepay* case simply does not involve the existing practice of applying the wholesale discount to the face amount of the cashback component of retail promotions that is at issue in these dockets. In fact, Budget Prepay's brief on the merits in the Fifth Circuit actually concedes that application of the wholesale discount to cash-back credits is appropriate, stating:

> Plaintiffs are entitled to purchase and resell those same services at the promotional rate, less the wholesale discount. * * * Thus, . . . when a CLEC attracted a new customer away from another carrier or wireless provider, the CLEC reselling AT&T's services would also qualify to have its cost for that line ***credited by $50 (less the wholesale discount*** in

[23] *See* dPi Motion at 5-6; New Phone Motion at 6.

> situations where the wholesale discount had already been applied to the initial retail price) and have the installation charges waived.[24]

Thus, whatever the ultimate outcome of the *Budget Prepay* case may be, it will not establish a precedent that the Commission could look to for guidance in this case. In any event, a ruling by the Fifth Circuit – or the Texas federal district court on remand – would not bind this Commission. At most (even if a ruling in that case would be pertinent here, which it will not be), such a ruling would be one that the Commission might or might not find persuasive.

dPi correctly notes that AT&T Louisiana asked the Louisiana Commission to hold a matter in abeyance pending the outcome of the *Budget Prepay* decision, but it incorrectly suggests that Motion has some bearing on these proceedings.[25] In contrast to the pricing issue here, the issue before the Louisiana Commission was *identical* to the issue being litigated – on an expedited basis – in the Fifth Circuit case: whether the new methodology for calculating wholesale rates for certain promotional offerings is a restriction on resale that requires prior state commission approval. Following a series of discussions and correspondence with the Louisiana Commission Staff, AT&T Louisiana agreed to file a Petition seeking the Louisiana Commission's approval of the new methodology. After the Petition was filed, however, the Fifth Circuit expedited the appeal of the district court's injunction that addressed that same methodology. At that point, AT&T Louisiana asked the Louisiana Commission to delay its proceeding because the Fifth Circuit's quick resolution of the case addressing the same methodology could resolve many of the issues associated with the Louisiana docket. In sharp contrast,

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[24] Exhibit D to this Response is a copy of the relevant pages of the Brief *Budget Prepay* filed with the Fifth Circuit. One of dPi's lawyers in these proceedings, Christopher Malish, is Budget Prepay's counsel in the Fifth Circuit litigation.

[25] dPi Motion at 5-6.

AT&T South Carolina's Complaints have nothing to do with the new methodology. Accordingly, AT&T Louisiana's Motion for Abeyance is not a reason to dismiss or delay these proceedings.

D. If the Commission Delays a Decision in these Dockets (and it Should Not), It Should Require the Resellers to Deposit the Amounts at Issue Pursuant to an Appropriate Escrow Arrangement that Provides for Release of the Deposited Funds only upon Order of the Commission.

AT&T South Carolina is concerned that the resellers will not be able to pay any amounts they ultimately will be found to owe AT&T South Carolina. And as explained above, the amount the resellers ultimately will be found to owe AT&T South Carolina grows on a daily basis. Accordingly, if the Commission grants the resellers' request to delay these proceedings (and it should not), AT&T South Carolina respectfully requests that the Commission do so only if the resellers deposit the amounts at issue in an appropriate escrow arrangement that provides for release of the deposited funds only upon Order of the Commission. Exhibit E to this Motion is a template escrow agreement for the Commission's consideration.

II. ARGUMENTS RELATED TO REFERRAL MARKETING PROGRAMS (LIKE THE WORD OF MOUTH PROMOTION)

No reseller has suggested that the Commission should delay deciding whether AT&T South Carolina's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale. Three resellers (Dialtone & More,[26] Freedom,[27] and OneTone[28]) admit to asserting that AT&T South Carolina's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale, and

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[26] *See* Dialtone & More's Answer, ¶17

[27] Freedom Answer, ¶16.

[28] OneTone Answer, ¶15.

none of these three resellers argue against the Commission's decision to grant AT&T South Carolina's Motion to Consolidate these dockets for the limited purpose of expeditiously resolving that issue.[29] The other three resellers, however, suggest that they should be excused from such consolidation to the extent it applies to the referral marketing promotions addressed in AT&T South Carolina's Complaints.

Affordable supports this suggestion by stating it does not claim any credits under referral marketing promotions and that it has never withheld payment based on these promotions,[30] but Exhibit F to this Response demonstrates that Affordable, through its billing agent, has in fact requested resale promotional credits under these types of promotions. dPi and New Phone also assert that they do not claim any credits under referral marketing promotions and that they have never withheld payment based on these promotions.[31] AT&T South Carolina alleged in good faith that dPi and New Phone contend that AT&T South Carolina's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale. These allegations are based on the fact that even after excluding promotional credit requests that are under review, billing disputes that are being considered, and billing disputes that already have been denied, dPi and New Phone still have a substantial net past due amount on their respective accounts.

Accordingly, AT&T South Carolina has a good-faith basis to be wary of the assertions that Affordable, dPi, and New Phone do not claim credit for and are not withholding payment on the grounds of a position that referral marketing promotions are subject to resale. It is even more clear that these resellers should not be allowed to evade

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29 *See* Directive dated January 20, 2010.

30 Affordable's Answer at ¶¶15-17; New Phone' Motion at 6 (in which Affordable joined).

31 *See* dPi Answer at ¶ ¶2, 12; New Phone Answer at ¶14-16.

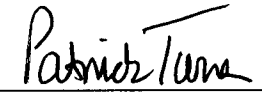
the Commission's consolidation for the purposes of deciding the referral marketing issue, only to later seek to escape the consequences of that decision by arguing that they really were not parties to that aspect of these proceedings. AT&T South Carolina, therefore, respectfully requests that the Commission excuse a reseller from consolidation for purposes of deciding the referral marketing issue only if that reseller submits a filing irrevocably waiving its right to contest any amounts AT&T South Carolina seeks in this proceeding on the grounds that it is entitled to any credits associated with referral marketing promotions.

CONCLUSION

For the reasons set forth above, AT&T South Carolina respectfully requests that the Commission: not delay these proceedings for any reason; and excuse a reseller from consolidation for purposes of deciding the referral marketing issue only if that reseller submits a filing irrevocably waiving its right to contest any amounts AT&T South Carolina seeks in this proceeding on the grounds that it is entitled to any credits associated with referral marketing promotions.

Respectfully submitted this 9th day of April, 2010.

BELLSOUTH TELECOMMUNICATIONS, INC.
d/b/a AT&T SOUTHEAST d/b/a AT&T SOUTH CAROLINA



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798459

EXHIBIT A

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 06-1421
Released: July 10, 2006

PETITION OF IMAGE ACCESS, INC. d/b/a NEWPHONE FOR DECLARATORY RULING PLEADING CYCLE ESTABLISHED

WC Docket No. 06-129

COMMENTS: July 31, 2006
REPLY COMMENTS: August 10, 2006

On June 13, 2006, Image Access, Inc. d/b/a NewPhone (NewPhone) filed a petition for declaratory ruling regarding the resale of incumbent local exchange carrier (ILEC) services. Specifically, NewPhone asks the Commission to declare that:

- an ILEC's refusal to make cash-back, non-cash-back, and bundled promotional discounts available for resale at wholesale rates is an unreasonable restriction on resale and is discriminatory in violation of the Act and the Commission's rules and policies;
- for all promotions greater than 90 days, ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion;
- the effective retail rate for a giveaway or discount shall be determined by subtracting the face value of the promotion from the ILEC-tariffed rate for the service that is the subject of the promotion, and the value of the discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months;
- for all ILEC promotions greater than 90 days, ILECs shall make available for resale the telecommunications services contained within mixed-bundle promotions (promotions consisting of both telecommunications and non-telecommunications services) and apply the wholesale avoided cost discount to the effective retail rate of the telecommunications service contained within the mixed bundle;
- the effective retail rate of the telecommunications service component(s) of a mixed-bundle promotion shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the bundle if added together at their retail, unbundled component prices; and
- telecommunications carriers shall be able to resell ILEC promotions greater than 90 days in duration as of the first day the ILEC offers the promotion to retail subscribers.

We invite comments on the NewPhone petition. Interested parties may file comments on or before **July 31, 2006** and reply comments on or before **August 10, 2006**. Comments may be filed using

the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[1] Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of the proceeding, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case, **WC Docket No. 06-129**. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). **Parties are strongly encouraged to file comments electronically using the Commission's ECFS.**

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C. 20002.

- The filing hours at this location are 8:00 a.m. to 7:00 p.m.
- All hand deliveries must be held together with rubber bands or fasteners.
- Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. Parties should also send a copy of their filings to Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A361, 445 12th Street, SW, Washington, D.C. 20554 or by e-mail to lynne.engledow@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

Documents in WC Docket No. 06-129 are available for public inspection and copying during business hours at the FCC Reference Information Center, 445 12th Street, SW, Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com. People with disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files,

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[1] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at telephone (202) 418-0530 or TTY (202) 418-0432.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. *See* 47 C.F.R. §§ 1.1200 *et seq.* Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules. *See* 47 C.F.R. § 1.1206(b).

For further information, contact Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, (202) 418-2350.

- FCC -

EXHIBIT B

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August 12, 2009

FILED IN PDF FORMAT VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 *et seq.* of the Commission's Rules, WC Docket No. 06-129** -- *Notice of Ex Parte Presentation*

Dear Ms. Dortch:

On Tuesday, August 10, 2009, Gene Dry of NewPhone and I met with Priya Aiyar of Chairman Genachowski's office to discuss the above-captioned proceeding. The discussion focused on and was consistent with NewPhone's prior submissions in this docket. We also explained that the passage of time and recently announced policy changes by AT&T have made the need for a final Commission order on the pending petition more acute. The attached materials were discussed and distributed during the meeting.

In accordance with the Commission's rules, this letter is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Respectfully submitted,

John J. Heitmann
Counsel for NewPhone

DC01/HEITJ/272035.9

cc: Priya Aiyar
Pamela Arluk
Bill Cook
Lynne Engledow
Al Lewis

PETITION OF IMAGE ACCESS dba NEWPHONE
WC Docket No. 06-129
August 11, 2009

(1) Declaration Regarding Long Term Promotion – Telecommunications Services at Promotional Price Plus Gift Card or Other Incentive

For all promotions greater than 90 days in duration, ILECs shall make available for resale the telecommunications service that is the subject of the promotion at the promotional price minus the wholesale avoided cost service discount, and provide to the reseller the retail value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users within the same time frame that such items would be provided to a retail customer.

Explanation

This simplified, proposed declaration eliminates the alternative formulation proposed previously in the NewPhone Petition and by the Resale Coalition. The result is a single, clean and straightforward piece of guidance on how the FCC's resale rules apply to promotional offerings including cash-back, gift card, coupon, or other similar giveaways or incentives.[1] With this guidance, the FCC will ensure that resellers can resell ILEC retail services subject to the same terms and conditions applicable to retail customers at a price that reflects the true retail (rather than tariffed) rate minus the wholesale discount.[2]

In the absence of such guidance, ILECs will continue to misapply the Commission's resale rules by limiting their application to tariffed offerings only *or by inappropriately discounting the retail value of the cash-back, gift card, coupon, or other giveaways or incentives*. These unjust and unreasonable practices result in unlawful discrimination against resellers and their customers as resellers pay more on a wholesale basis for services than the Act requires and than ILEC retail customers do.

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1 ILECs typically provide to resellers the service connection fee waiver often associated with these types of promotions, but only when the reseller is reselling a package of telecommunications services that is not bundled with non-telecommunications services. The Commission should clarify that such fee waivers must be provided to resellers in the same manner as they are provided to retail customers regardless of the type of service bundle involved.

2 Such guidance is entirely consistent with Commission precedent. *See, e.g., In the Matter of Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended*, Memorandum Opinion and Order, 14 FCC Rcd 21579, ¶ 47 ("*our rules require the incumbent LEC to apply the wholesale discount to the special reduced rate*") (rel. Dec. 23, 1999).

(2) Declaration Regarding Long Term Promotion – Telecommunications Services within Mixed Bundle

For all promotions greater than 90 days in duration, ILECs shall make available for resale the telecommunications services contained within "mixed bundle" promotions, *i.e.*, bundles consisting of both telecommunications service and non-telecommunications service (*e.g.*, information service), and apply the wholesale avoided cost discount to the effective "retail rate" of the telecommunications services contained within the mixed bundle.

The effective "retail rate" of the telecommunications component of a mixed service bundle shall be determined by ***either:***

(a) ***prorating*** the telecommunications service component subject to section 251(c)(4) resale based on the percentage that each unbundled component is to the total of the mixed service bundle if added together at their standard retail unbundled component prices; ***or***

(b) using a reasonable, consistent and publicly disclosed ***allocation*** set by the ILEC and used for the purpose of reporting for *state* universal service and regulatory fees, taxation, etc.

Once an allocation is declared, it is not subject to retroactive revision.

Any declared allocation above a standard/tariffed rate for the same or comparable service offering is per se unreasonable and *unreasonably discriminatory and* is deemed to be in violation of 47 U.S.C. §§ 201(b) and 202(a).

The *retail* value of all cash-back, gift card, coupon, or other similar giveaways or incentives that the ILEC provides to retail end-users must be provided to the reseller consistent with such prorating or allocation. The prorated or allocated *retail* value of all cash-back, gift card, coupon, or other similar giveaways or incentives must be provided to the reseller within the same time frame that such items would be provided to a retail customer.

Explanation

This modified, proposed declaration allows an ILEC to elect either a prorated or allocated method of arriving at the effective/true/actual retail rate enjoyed by consumers of telecommunications services incorporated into mixed bundles. This modified proposal allows the ILEC flexibility bounded only by the principles of transparency, consistency and reasonableness. The result is simple and straightforward guidance on how the FCC's resale rules apply to telecommunications services included in mixed bundles. With this guidance, the FCC will ensure that resellers can resell ILEC retail services subject to the same terms and conditions applicable to retail customers at a price that reflects the actual retail (rather than tariffed) rate minus the wholesale discount.

To the extent a bundled offering is coupled with a cash-back or similar offer, the ILEC should be required to provide to the reseller the *retail* value of all cash-back, gift card, coupon, or other similar giveaways or incentives that the ILEC provides to retail end-users within the same timeframe such incentive would be provided to a retail customer, *subject to the same method (prorated or allocated) selected to arrive at the effective retail rate.*

In the absence of such guidance, ILECs will continue to misapply the Commission's resale rules by limiting their application to tariffed offerings only *or by inappropriately discounting the retail value of the cash-back, gift card, coupon, or other giveaways or incentives*. This results in unlawful discrimination against resellers and their customers as resellers pay more on a wholesale basis for services than the Act requires and than ILEC retail customers do.

(3) Declaration Regarding Timing of Availability of Long Term Promotions for Resale

A requesting telecommunications carriers shall be entitled to resell an ILEC's promotions of greater than 90 days in duration at the wholesale avoided cost discount as of the first day the ILEC offers the promotion to retail subscribers.

An ILEC refusal to apply the wholesale discount to a promotion without a set expiration date as of the first day it is offered is an unjust and unreasonable restriction on resale, and an unjust, unreasonable and unjustly and unreasonably discriminatory practice, in each case where the promotion is not terminated in 90 days or less.

Explanation

This proposed declaration provides guidance that will eliminate the ILECs' unreasonable and unreasonably discriminatory practice of refusing to apply the wholesale discount to a long term promotion (one lasting more than 90 days) until day 91. Consistent with the Commission's rules and policies, the avoided cost discount should apply to a long term promotion as of the first day it becomes available. An ILEC refusal to apply the wholesale discount to a promotion without a set expiration date as of the first day it is offered should be deemed an unjust, unreasonable and unjustly and unreasonably discriminatory practice, in each case where the promotion is not terminated in 90 days or less.

(4) Declaration Regarding Short Term Promotions

For all promotions of 90 days or fewer in duration, ILECs shall:

(i) make available for resale the telecommunications service that is the subject of the promotion as of the first day the ILEC offers the promotion to retail subscribers; and

(ii) make available for resale the telecommunications service that is the subject of the promotion at the promotional price, and provide to the reseller the retail value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users within the same time frame that such items would be provided to a retail customer.

Explanation

This proposed declaration is intended to eliminate potential gamesmanship that may result if ILECs' current abuses and violations of the Commission's resale rules and policies are curbed by the Commission's adoption of the proposed declarations specified herein. The only distinction in the Commission's resale rules and policies applicable to long term and short term promotions is that short term promotions (those offered for 90 days or less) are not subject to the wholesale avoided cost discount. Short term promotions are subject to all other resale rules and obligations. Thus, short term promotions must be available for resale: (1) as of the first day they are offered; (2) at the promotional price; and (3) with the *retail* value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users provided to the reseller within the same time frame that such items would be provided to a retail customer. To the extent a short term promotion includes a mixed bundle of telecommunications and non-telecommunications services, the declarations set forth above with respect to mixed bundles apply and the ILEC may elect to either prorate or allocate to arrive at the effective retail rate.

(5) Declaration Regarding Unreasonable Restrictions on Resale and Unjust and Unreasonable Practices and Discrimination

An ILEC's refusal to make available for resale at wholesale rates telecommunications services subject to cash-back, non-cash-back, coupons, giveaways and bundled promotional discounts is an unreasonable restriction on resale, an unjust and unreasonable practice, and unjust and unreasonable discrimination in violation of the Act and the Commission's rules and policies.

Explanation

This proposed declaration is intended to clarify that an ILEC's avoidance of compliance or refusal to comply with its resale obligations under the Act and the Commission's rules and policies is unlawful.

Section 251(c)(4) requires ILECs:

> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) ***not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service***, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.[3]

Section 271(c)(2)(B)(xiv) provides that, in order for a Bell Operating Company to provide in-region interLATA services, it must offer telecommunications services for resale in accordance with section 251(c)(4) and the avoided cost pricing standard enunciated in Section 252(d)(3).[4]

In the ***Local Competition Order***, the Commission concluded that "resale restrictions are presumptively unreasonable" and "in violation of section 251(c)(4)."[5]

Similarly, **section 51.605(e)** of the Commission's rules provides that,"[e]xcept as provided in Sec[tion] 51.613, an [I]LEC shall not impose restrictions on the resale by a

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3 47 U.S.C. § 251(c)(4) (emphasis added).

4 47 U.S.C. § 271(c)(2)(B)(xiv). 47 U.S.C. § 252(d)(3) provides, in pertinent part, "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."

5 *Local Competition Order*, 11 FCC Rcd. at 15966, ¶ 939.

requesting carrier of telecommunications services offered by the [I]LEC."[6] Section 51.613(a), in turn, provides that the only restriction on resale that may be imposed by ILECs are those concerning cross-class selling and short term promotions of 90 days or less.[7] **Section 51.613(b)** states that"[w]ith respect to any restrictions on resale not permitted under paragraph (a), an [I]LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."[8] The Resale Coalition is not aware of any state in which an ILEC has proven that its restrictions on resale are either reasonable or nondiscriminatory.[9]

Section 51.603(a) of the Commission's rules requires all LECs to make their telecommunications services available for resale on "terms and conditions that are reasonable and non-discriminatory."[10]

Section 51.603(b) of the Commission's rules requires all LECs to make their telecommunications services available for resale "subject to the same conditions and provided within the same provisioning time intervals that the LEC provides these services to others, including end users."[11]

ILEC practices that:

(1) offer services for resale at the standard (tariffed/posted) rate only and not at the retail rate;

(2) for resale promotions of greater than 90 days in duration, apply the resale avoided cost discount to the standard (tariffed/posted) rate rather than retail rate;

(3) refuse to provide to resellers connection fee and other fee waivers as provided to retail customers;

(4) refuse to provide to resellers the value of all cash-back, gift card, coupon, or other similar giveaways or incentives within the same time frame that such items would be provided to a retail customer;

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6 47 C.F.R. § 51.605(e).

7 *See* 47 C.F.R. § 51.613(a). Cross-class selling, *e.g.*, offering business customers a residential customer promotion, is only prohibited to the extent that a state commission relieves an ILEC of its resale obligations with respect to cross-class promotions.

8 47 C.F.R. § 51.613(b).

9 *The Commission should clarify that the ILECs have both the burden of proceeding and of proof and that they must obtain state commission approval* <u>*before*</u> *any restriction is imposed.*

10 47 C.F.R. § 51.603(a).

11 47 C.F.R. § 51.603(b).

(5) refuse to make available for resale the telecommunications services contained within "mixed bundle" promotions, *i.e.,* bundles consisting of both telecommunications service and non-telecommunications service (*e.g.,* information service);

(6) for resale promotions of greater than 90 days in duration, refuse to apply the wholesale avoided cost discount to the effective retail rate of the telecommunications services contained within a mixed bundle;

(7) refuse to make available for resale promotions of greater than 90 days in duration at the wholesale avoided cost discount as of the first day the ILEC offers the promotion to retail subscribers;

(8) refuse to apply the wholesale discount to a promotion without a set expiration date as of the first day it is offered, in each case where the promotion is not terminated in 90 days or less;

(9) refuse to make available for resale the telecommunications service that is the subject of a short term promotion as of the first day the ILEC offers the promotion to retail subscribers; and

(10) refuse to make available for resale the telecommunications service that is the subject of a short term promotion at the promotional price, and provide to the reseller the retail value of all cash-back, gift card, coupon, or other giveaways or incentives that the ILEC provides to retail end-users within the same time frame that such items would be provided to a retail customer

are unjust, unreasonable and discriminatory and constitute unreasonable restrictions on resale in violation of sections 251(c)(4)(B), 271(c)(2)(B)(xiv), 201(b) and 201(a) of the Act, the *Local Competition Order*, and sections 51.603 (a) and (b), 51.605(e), and 51.613(b) of the Commission's rules.

at&t

Accessible

Date: **July 1, 2009** Number: **CLECSE09-100**

Effective Date: **September 1, 2009** Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Resale of Cash-Back Promotions**

Related Letters: **NA** Attachment: **NA**

States Impacted: **Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee**

Issuing AT&T ILECS: **AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee (collectively referred to, for purposes of this Accessible Letter, as "AT&T Southeast Region")**

Response Deadline: **NA** Contact: **Account Manager**

Conference Call/Meeting: **NA**

AT&T Southeast Region is sending this letter to provide notice that it will change the manner in which it calculates the credits available to CLECs that purchase certain retail cash-back promotional offers (including but not limited to promotional offers involving checks, coupons, and other similar items) that are available for resale.

The change will be implemented initially for residential acquisition cash-back promotion offers requested on or after September 1, 2009, in all AT&T ILEC states, regardless of whether the underlying promotion is new or existing.

Details regarding the specific resale credits available for applicable promotions will be communicated via separate Accessible Letters. The formulae AT&T Southeast Region will use to calculate these credits is available in the Resale Product section of the CLEC Handbook on CLEC Online at:

https://clec.att.com/clec/hb/index.cfm

AT&T Southeast Region reserves the right to make any modifications to or to cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. Should the information be canceled, AT&T Southeast Region will send additional notification at the time of cancellation. AT&T Southeast Region will incur no liability to the CLECs if the above mentioned information and/or approach is modified or discontinued for any reason.

at&t

Accessible

Date: **July 1, 2009**

Number: **CLECSE09-106**

Effective Date: **September 1, 2009**

Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Revision to Win-back Cash Back Promotion - GA**

Related Letters: **CLECSE09-100**

Attachment: **NA**

States Impacted: **Georgia**

Response Deadline: **NA**

Contact: **Account Manager**

Conference Call/Meeting: **NA**

Effective September 1, 2009, Competitive Acquisition Customers who purchase Complete Choice® Basic or Enhanced will receive a one-time cashback amount of $3.73 using the methodology announced in **CLECSE09-100**, dated July 1, 2009.

AT&T Georgia reserves the right to modify or cancel the above information. Should any such action be taken, it will be reflected in a subsequent letter to CLECs. AT&T Georgia will incur no liability for the foregoing.

RPMA (Resale Promotion Methodology Adjustment)

The following model reflects the calculation AT&T will use effective September 1, 2009, to determine the impact that the retail cash-back offer has on the monthly rate the average AT&T retail customer pays for the telecommunications service(s) eligible for a cash back type promotion, as well as the promotional credits available to resellers.

The model inputs and calculations are as follows:

(A)	$	Retail Cash-Back Offer - One-Time	
(B)	$	Effective Retail Cash-Back Offer - One Time	(A) × (G)
(C)	$	Effective Retail Cash-Back Offer - Monthly	PMT((F)/12,(E),(B),,)
(D)	$	Resale Cash-Back Offer - Monthly	(C) × (1-H)
	$	Resale Cash-Back Offer - One Time	PV((F)/12,(I),(D),,,)
(E)	#	Average Retail In-Service Life (months)	
(F)	%	Cost of Capital (annual)	
(G)	%	Retail Redemption Rate	
(H)	%	Resale discount (State specific as applicable)	
(I)	#	Average Wholesale In-Service Life (months)	

where PMT(F/12,E,B,,) is the monthly payment equivalent over E months of an upfront payment of $B and PV(F/12,I,D,,) is the discounted present value of $D per month over an I-month period; formulae are standard Microsoft Excel functions.

The process for notification of promotion availability will not change. AT&T will notify the CLEC community of impacted promotions subject to the RPMA change via Accessible Letter and/or CLEC Notification, as appropriate in each ILEC region.

at&t

Accessible

Date: **July 1, 2009** Number: **CLECALL09-048**

Effective Date: **September 1, 2009** Category: **Resale**

Subject: **(ORDERING AND PROVISIONING) Resale of Cash-Back Promotions**

Related Letters: **NA** Attachment: **NA**

States Impacted: **Illinois, Indiana, Ohio, Michigan, Wisconsin, California, Nevada, Arkansas, Kansas, Missouri, Oklahoma, Texas and Connecticut**

Issuing AT&T ILECS: **AT&T Illinois, AT&T Indiana, AT&T Ohio, AT&T Michigan, AT&T Wisconsin, AT&T California, AT&T Nevada, AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, AT&T Texas, and AT&T Connecticut, (collectively referred to, for purposes of this Accessible Letter, as "AT&T 13-State")**

Response Deadline: **NA** Contact: **Account Manager**

Conference Call/Meeting: **NA**

AT&T 13-State is sending this letter to provide notice that it will change the manner in which it calculates the credits available to CLECs that purchase certain retail cash-back promotional offers (including but not limited to promotional offers involving checks, coupons, and other similar items) that are available for resale.

The change will be implemented initially for residential acquisition cash-back promotion offers requested on or after September 1, 2009, in all AT&T ILEC states, regardless of whether the underlying promotion is new or existing.

Details regarding the specific resale credits available for applicable promotions will be communicated via separate Accessible Letters. The formulae AT&T 13-State will use to calculate these credits is available in the Resale Product section of the CLEC Handbook on CLEC Online at:

https://clec.att.com/clec/hb/index.cfm

AT&T 13-State reserves the right to make any modifications to or to cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. Should the information be canceled, AT&T 13-State will send additional notification at the time of cancellation. AT&T 13-State will incur no liability to the CLECs if the above mentioned information and/or approach is modified or discontinued for any reason.

A copy of AT&T Texas' filing with the Public Utility Commission of Texas and any accompanying tariff sheets (if applicable) can be viewed on the Internet at the following website, typically on the effective date of the changes. http://cpr.bellsouth.com/pdf/tx/filings/txfiling.htm

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL CASE NO: 3:09-CV-377-RJC-DCK

CGM, LLC,	)	
	)	
Plaintiff,	)	
	)	**MEMORANDUM AND**
v.	)	**RECOMMENDATION**
	)	
BELLSOUTH TELECOMMUNICATIONS, INC., AT&T BILLING SOUTHEAST, LLC, and AT&T, CORP.,	)	
	)	
Defendants.	)	
	)	

THIS MATTER IS BEFORE THE COURT on Defendant BellSouth Telecommunications, Inc.'s ("BellSouth") "Motion to Dismiss" (Document No. 25), and Defendants AT&T Billing Southeast, LLC, and AT&T Corporation's jointly filed "Motion to Dismiss" (Document No. 27). Plaintiff CGM, LLC ("Plaintiff" or "CGM") opposes both motions. The motions have been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §636(b), and are ripe for disposition. Having carefully considered the record, including the parties' briefs, and applicable authority, the undersigned will respectfully recommend that the motions to dismiss be granted. CGM lacks standing to bring this lawsuit.

I. BACKGROUND

This is an action for declaratory judgment brought by CGM (a billing agent for about forty competitive local exchange carriers or "CLECs") against BellSouth (an incumbent local exchange carrier or "ILEC") over promotional discounts to BellSouth/AT&T telephone customers and the calculation of corresponding credits to CGM's client CLECs. These credits affect the wholesale price of telephone services, and in turn, the retail price that the CLECs can offer to their own

customers. At the heart of the dispute is whether BellSouth has impermissibly placed CGM's CLEC clients at a competitive disadvantage through unfair and improper wholesale pricing. In addition to BellSouth, CGM has named AT&T Billing Southeast, LLC, and AT&T Corporation (collectively, "AT&T Defendants") as parties to this lawsuit.

On July 1, 2009, AT&T Southeast Region sent a notice letter advising that it planned to change its method for calculating promotional credits issued to CLECs, effective September 1, 2009. (Document No. 1, ¶ 64; Ex.1 and 2). The letter indicates that it was sent on behalf of nine issuing AT&T ILECS, including AT&T North Carolina, and appears to be the root cause of the instant litigation. The new method of calculation was apparently intended to "determine the impact that the retail cash-back offer has on the monthly rate the average AT&T retail customer pays for the telecommunications service(s) eligible for a cash back type promotion, as well as the promotional credits available to resellers." (Id., Ex. 1, p. 2). Purportedly, a percentage of the promotional credits received by its client CLECs is paid to CGM for its services. Exhibits attached to the Complaint show that correspondence was exchanged between AT&T Services, Inc. and CGM regarding the dispute over proper billing for the promotional credits. (Document No. 1, Ex. 3-4).

CGM filed its "Complaint for Expedited Declaratory Judgment" (Document No. 1) ("Complaint") in this action seeking to raise claims on behalf of itself and its CLEC clients, pursuant to alleged violations of the Federal Telecommunications Act of 1996 ("1996 Act"). These CLECs are not named as parties or otherwise identified in the Complaint. CGM asserts that it has a financial interest in this matter by virtue of its separate contracts with the CLECs and is therefore entitled to the relief sought. CGM contends that BellSouth is "failing to calculate wholesale prices to CLEC resellers properly," thereby affecting CGM's revenue from its contractual percentage of CLEC sales.

(Document No. 1, ¶ 1). CGM alleges that BellSouth overcharges the CLECs by calculating promotional credits that do not provide the CLECs with "the full, dollar for dollar, value of the credit offered to . . . BellSouth's retail customers" for cash-back promotions. CGM challenges BellSouth's use of this new formula in part because BellSouth did not *first* prove to the relevant state public utility commissions that these credits were "reasonable and nondiscriminatory." (Id. ¶¶ 2, 18(1)).

The Complaint alleges that both the former and the revised formulas are improper, and insists that BellSouth must pass on to the CLECs the "full dollar for dollar" face amount of the promotion. (Id., ¶¶ 43, 70). CGM asserts that both formulas amount to "restrictions" on resale, are "presumptively unlawful," and require the ILEC (not the CLECs) to obtain prior approval by a state utility commission. (Id. ¶ 72). CGM asserts that this result is required by 47 C.F.R. § 51.613(b) and BellSouth Telecommunications, Inc. v. Sanford, 494 F.3d 439, 450 (4th Cir. 2007). CGM alleges that BellSouth and the AT&T Defendants acted in concert in engaging in an "illegal billing scheme" and "violated federal telecommunications law by acting inconsistently with the dictates of Sanford." (Document No. 33, p.5).

In terms of relief, CGM seeks a declaration that the Defendants must credit the CLECs with the "full, dollar for dollar, value of the credit offered to BellSouth's retail customers in the absence, as here, of Defendants having first proved to the appropriate regulatory body that their contrary practice to date is reasonable and nondiscriminatory." (Document No. 1, ¶ 80). CGM also seeks a declaration that BellSouth may not use *either* the pre-September 1, 2009 methodology or the new "Formula" until it has obtained approval from the relevant state commissions. CGM asks this Court to declare that "its reading of Sanford is the correct one, and asks this Court to so declare by validating CGM's position." (Id. ¶ 68).

On September 21, 2009, BellSouth and the AT&T Defendants filed separate motions to dismiss. After the initial round of briefing was complete, supplemental briefs were filed. In addition, CGM has filed a "... Notice Regarding Subsequently Decided Authority"(Document No. 45) on December 7, 2009, based on a decision of the U.S. District Court for the Northern District of Texas: 1) granting the CLECs' request for preliminary injunction against BellSouth's use of the revised formula at issue here; and 2) staying that case while BellSouth sought a determination from various state commissions. (Document No. 45-1). The issues raised by Plaintiff here have not been presented to the relevant state commissions for review.

II. STANDARD OF REVIEW

Defendants argue that the Complaint fails to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, – U.S. –, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).[1] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 129 S.Ct. at 1954 (explaining that "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context."). The facts alleged "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555; see also, Robinson v. American Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009). A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009); Fed.R.Civ.P. 12(b)(6). The Court must accept as

[1] Twombly involved a consumer class action against ILECs for alleged antitrust conspiracy. The United States Supreme Court held that allegations of parallel business conduct and a bare assertion of conspiracy were insufficient to state a claim under the Sherman Act.

true all well-pleaded factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff, but "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments," Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008).

> It is well settled that under Article III of the United States Constitution, a plaintiff must establish that a "case or controversy" exists "between himself and the defendant" and "cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. 490, 498-99 (1975). Standing has three elements:
>
> > First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Smith v. Frye, 488 F.3d 263, 272 (4th Cir. 2007) quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

> The nature of the injury is central to the Art. III inquiry, because standing also reflects a due regard for the autonomy of those most likely to be affected by a judicial decision. "The exercise of judicial power ... can so profoundly affect the lives, liberty, and property of those to whom it extends," that the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." It is not to be placed in the hands of "concerned bystanders," who will use it simply as a "vehicle for the vindication of value interests."

Diamond v. Charles, 476 U.S. 54, 106 S.Ct. 1697 (1986) (internal citations omitted).

III. ISSUES PRESENTED

BellSouth moves for dismissal pursuant to Rule 12(b)(6) because CGM lacks standing to

assert the claims alleged in the Complaint and the Complaint fails to state a claim upon which relief can be granted. (Document No. 25). Specifically, BellSouth argues: 1) that CGM is a billing agent, not a CLEC, and is not a party to any interconnection agreement ("ICA"), and thus, is not the real party in interest and lacks standing; 2) that the prices BellSouth charges CLECs for telecommunication services are governed exclusively by ICAs between the CLECs and BellSouth, and no breach of any ICA is alleged here; 3) that no order of any relevant state commission is challenged here, which BellSouth argues is the only basis to proceed in federal court under the 1996 Act; 4) that CGM has no direct rights under the 1996 Act and has no cognizable claim for a direct violation of § 251(c)(4); 5) that prior approval by the relevant state commissions is not required for BellSouth to change its calculation method because the new formula is not a "restriction on resale" for purposes of 47 C.F.R. § 51.613; and 6) CGM is not entitled to "the full dollar for dollar value of the promotion," based on the 1996 Act and BellSouth's reading of the Fourth Circuit's decision in Sanford. (Document No. 26).

By separate motion, the AT&T Defendants move for dismissal pursuant to Rule 12(b)(6) "because CGM lacks standing to assert the claims alleged in the Complaint; the Complaint fails to state a claim upon which relief can be granted against any Defendant in any event; and the Complaint fails to state a claim upon which relief can be granted with respect to AT&T Corp. and [AT&T] Billing in particular because neither of them owes the legal duties that the Complaint alleges were violated." (Document No. 27).

IV. DISCUSSION

The parties disagree on nearly every aspect of this action. They dispute standing, characterize the legal basis for this action differently, disagree over regulatory requirements,

disagree as to who (CLECs or ILECs) must proceed in which forum (state commission or federal court), and argue over the meaning and application of numerous terms in the 1996 Act and its implementing regulations, including whether BellSouth's new *and* prior calculation methods amount to restrictions on resale.

The undersigned concludes in the end that Plaintiff CGM lacks standing to bring this specific action. Having said that, some discussion of the Federal Telecommunications Act of 1996, the Sanford decision, and the contentions of the parties inform this conclusion and are a necessary part of this order.

A. The Federal Telecommunications Act of 1996

The Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (47 U.S.C. § 151 *et seq.*) introduced competition into local telecommunications markets.[2] The Federal Communications Commission ("FCC") is responsible for regulating the substantive requirements of the 1996 Act. See 47 U.S.C. § 251(d)(1) and 47 U.S.C. § 154. Under the 1996 Act, an ILEC must provide network access to requesting CLECs under the terms of interconnection agreements ("ICAs"). 47 U.S.C. § 251(c). In other words, large telephone companies with existing telecommunications infrastructure must share their networks with smaller competitors. This was intended to promote competition in telecommunication markets. Verizon Communications, Inc. v.

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[2] The 1996 Act was enacted subsequent to the Government's antitrust suit against American Telephone and Telegraph Company ("AT&T"). Pursuant to a 1982 consent decree, AT&T was divested of its local operating companies and was required to provide equal access to interconnection facilities. AT&T remained as a long-distance and equipment company, and the divested carriers were limited to providing local telephone service. See United States v. American Telephone & Telegraph Co., 552 F.Supp. 131 (D.D.C.1982), aff'd. *sub nom*. Maryland v. United States, 460 U.S. 1001 (1983). The provisions of the 1996 Act were designed to eliminate the local monopolies formerly held by AT&T's local operating companies.

F.C.C., 535 U.S. 467, 473 (2002).

The rates, terms and conditions under which a CLEC obtains telecommunications services from an ILEC are governed by an ICA agreement between the CLEC and ILEC. 47 U.S.C. § 251(c)(2). The 1996 Act provides the procedures for negotiation, arbitration, and approval of ICA agreements. 47 U.S.C. § 252. The ICA agreements may be reached through voluntary negotiation or compulsory arbitration. Id. at § 252(a)-(b). Any ICA adopted by negotiation or arbitration shall be submitted to the relevant state utilities commission, which approves or rejects the ICA. Id. at § 252(e)(1).

Federal district courts have exclusive jurisdiction to review the state commission's determinations relating to ICAs under the 1996 Act. Id. at § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section [252].").

In connection with the duty to make network access available, the 1996 Act also requires ILECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4). In other words, CLECs may purchase telephone services from the ILEC at a discounted wholesale price and then resell those telephone services to individual customers at retail rates.

The purpose of Title 47 of the Code of Federal Regulations, Chapter I, Subchapter B, Part 51, is to provide rules for the implementation of sections 251 and 252 of the 1996 Act. 47 C.F.R. § 51.1. Under the implementing regulations, an ILEC's resale obligation extends to promotional offerings that last longer than 90 days. 47 C.F.R. § 51.613(a). "With respect to any restrictions on

resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 C.F.R. § 51.613(b).

In considering issues related to the 1996 Act and promotions, the U.S. District Court for the Eastern District of North Carolina has concluded "that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions." dPi Teleconnect, L.L.C. v. Sanford, 2007 WL 2818556, *7 (E.D.N.C. 2007) quoting *In re Implementation of the Local Competition Provisions of the Telecomm. Act of 1996*, 11 F.C.C.R. 15,449 ¶ 952 (1996).

47 U.S.C.251(c)(1) requires an ILEC "to negotiate in good faith in accordance with section 252 . . . to fulfill the duties prescribed in paragraphs (1) through (5)," including the duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of telecommunication services." 47 U.S.C. § 251(c)(1) and (b)(1). CGM has not alleged that any Defendant has refused, or failed, to negotiate in good faith. It is unclear what, if any, ICAs exist between Defendants and the CLECs purportedly represented by CGM that may be relevant to the issues here. No ICAs are cited in the Complaint. Plaintiff itself does not claim to be an ILEC, or a CLEC, or a party to any ICA or other contract with Defendants. Therefore, it appears to the undersigned that Plaintiff lacks standing to pursue the relief it seeks under the 1996 Act.

B. The Sanford Decision

Plaintiff contends that the BellSouth Telecomms., Inc. v. Sanford, 494 F.3d 439 (4th Cir. 2007) decision is central to the present dispute and that "CGM has been damaged by Defendants' refusal to follow Sanford, and will be damaged in the future by implementation of the Formula." (Document No. 1, ¶ 17). In the Sanford case, BellSouth (as ILEC) challenged several orders of the North Carolina Utilities Commission ("NC Commission"). CGM's Complaint requests declaratory judgment interpreting the Act pursuant to 47C.F.R. § 51.613(b) and Sanford. (Document No. 1, ¶ 18).

In the Sanford matter, the Public Staff of the NC Commission had filed a motion with the NC Commission for a ruling on ILEC incentive offers. Id. at 442.[3] In response, the NC Commission issued an "Order Ruling on Motion Regarding Promotions" on December 22, 2004, followed by a clarifying order on June 3, 2005, under the authority of § 47 U.S.C. 252(d)(3). Id. at 443-44. The NC Commission's orders held that the value of BellSouth's incentive offers, when extended to subscribers for more than 90 days, created a promotional rate that had to be offered to competing providers in the form of a reduced wholesale price.

Dissatisfied with the NC Commission's ruling, BellSouth filed suit in the Western District of North Carolina pursuant to 47 U.S.C. § 252(e)(6). This Court granted summary judgment to BellSouth on the basis that the incentives were not "telecommunication services." The Fourth Circuit Court of Appeals ("Fourth Circuit") reversed, thereby upholding the NC Commission's orders. Sanford, 494 F.3d at 442. The Fourth Circuit pointed out that although BellSouth did not

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[3] "The Public Staff of the NC Commission is an independent arm of the Commission responsible for representing consumers in matters before the Commission" and "is not supervised by the Commission." Sanford, 494 F.3d at 442, FN1.

have to furnish the CLECs with the actual promotional items, such as cash rebates, gift cards, toasters, coupons, and the like, the *value* of these promotions extending for more than 90 days had to be reflected in the retail rate used to compute wholesale rate charged to CLECs under the 1996 Act. Id. at 442-43, 450.

Specifically, the Fourth Circuit held that "[e]ven though we agree with the district court's conclusion that such incentives are not themselves 'telecommunications' that must be resold under § 251(c)(4), we agree with the NC Commission that incentives may nonetheless implicate the fee for telecommunications-the retail rate or consideration given by the consumer in exchange for telecommunications-and thereby affect the incumbent LEC's resale duty." Id. at 450. The Fourth Circuit explained that "as the NC Commission observed, by structuring its offerings with incentives, BellSouth would be able to price its competitors out of the market." Id. at 451. In upholding the NC Commission's orders, the Fourth Circuit stated that "we emphasize that the NC Commission has invited BellSouth to show that any particular restriction on resale is pro-competitive, reasonable, and not discriminatory." Id at 453.

The Fourth Circuit further opined that "[t]he degree of difficulty in valuing incentives, might, in some circumstances, support a claim that resale restrictions are reasonable and nondiscriminatory. But **such issues can be negotiated between BellSouth and competitive LECs or, failing success in negotiations, resolved by the NC Commission**." Id. at 454 (emphasis added). The Sanford decision discusses the special role played by actions of state commissions pursuant to U.S.C. ¶¶ 251 and 252 and the measure of respect those orders deserve. Id. at 447. Specifically, the Fourth Circuit opined that

> [t]he NC Commission's expertise and experience in applying communications law are considerable and even predate the enactment

> of the Telecommunications Act of 1996 . . . in a scheme involving cooperative federalism, federal courts should recognize the considered role of state agencies that have accepted Congress' invitation to become crucial partners in administering federal regulatory schemes. State commissions are granted authority under the Telecommunications Act, and, to the extent they voluntarily accept that authority, they become an important part of the entire regulatory scheme.

Id. at 448.

Without reaching the merits of Plaintiff's claims, the undersigned finds that the dictates of Sanford support a finding that Plaintiff lacks standing to bring this action.

C. Standing

"[S]tanding is a threshold jurisdictional issue that must be determined first because [w]ithout jurisdiction the court cannot proceed at all in any cause." Covenant Media of North Carolina, L.L.C. v. City of Monroe, N.C., 285 Fed.Appx. 30, 34 (4th Cir. 2008) (quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998)). The "core component" of the requirement that a litigant have standing to invoke the authority of a federal court "is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004) ("Article III standing ... enforces the Constitution's case-or-controversy requirement."). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). .

Plaintiff CGM, as the party invoking federal jurisdiction, bears the burden of establishing its standing. Lujan, 504 U.S. at 561; see also, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006); Renne v. Geary, 501 U.S. 312, 316 (1991); and Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002).

To satisfy the constitutional standing requirement, a plaintiff must show that: (1) plaintiff suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision of the court. Lujan, 504 U.S. at 560-61 (citations and internal quotation marks omitted); South Carolina Wildlife Federation v. Limehouse, 549 F.3d 324, 329 (4th Cir. 2008) (same); Marshall v. Meadows, 105 F.3d 904, 906 (4th Cir. 1997).

Defendants point out that CGM is not a telecommunications carrier or a party to any ICA with BellSouth. Defendants assert that CGM is not the "real party in interest" and lacks standing to assert claims on behalf of the CLECs. Defendants also point out that CGM is a billing agent, not a CLEC. Indeed, this is not disputed. In the exhibits attached to the Complaint, CGM identifies itself as a "billing and carrier relations outsourcing company which serves about 40 BellSouth resellers" and that "CGM serves as the interface between its clients and BellSouth for inter-carrier billing and compensation issues." (Document No. 1, Ex. 3).

In the Complaint, Plaintiff asserts that it is "the authorized agent for certain CLEC resellers of BellSouth's ILEC services who operate within the BellSouth states" in the AT &T Southeast Region and has "contracts with its resellers to act as their agent in dealings with BellSouth." (Document No. 1, ¶3). Even assuming these facts to be true, this does not mean that CGM has authority to litigate on behalf of its clients. No documentation of such authority is in the record. Moreover, research has not revealed any telecommunication cases involving actions by "billing

agents" on behalf of CLECS.[4] Indeed, even the order submitted by CGM in its "Notice of Subsequent Authority" (Document No. 45) pertains to a case where the CLECs themselves sought a preliminary injunction against implementation of the revised formula also at issue here.

When the source of a plaintiff's claim is a statute that creates legal rights, "the standing question . . . is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Warth, 422 U.S. at 500. The judicial relief available under the 1996 Act, conferred by § 252(e)(6), is the review of a determination by a state commission related to an ICA: "In any case in which a State commission makes a determination under this section, any part aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). "Access to an ILEC's network facilities comes only through specified procedures for forming "interconnection agreements," the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act." Michigan Bell Telephone Co. v. Strand, 305 F.3d 580, 582 (6th Cir. 2002).

BellSouth contends, and the undersigned agrees, that the 1996 Act spells out the duties of ILECs to CLECS, and that because CGM is not a CLEC, and not alleging violation of an ICA, it is not entitled to relief under the 1996 Act. Accordingly, the undersigned is not persuaded that the CGM has standing for its claims pursuant to Sanford and 47 C.F.R. ¶ 51.613(b), or that declaratory

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[4] Research *does* reveal cases of CLECs bringing suit themselves. See, e.g., dPi Teleconnect, L.L.C. v. Sanford, 2007 WL 2818556, *1 (E.D.N.C. 2007). Pursuant to the 1996 Act, dPi and BellSouth voluntarily negotiated an ICA which the NC Commission approved. dPi subsequently filed a complaint against BellSouth with the NC Commission which was dismissed, and then sought judicial review of the Commission's decisions in federal court.

judgment is appropriate prior to review by the relevant state commissions.

CGM alleges that it is paid, in part, based on a percentage fee of the money it collects for the CLECs from promotions that the Defendants offer and give to BellSouth/AT&T customers. (Document No. 1, ¶ 3). CGM argues that its CLEC clients, and therefore CGM, face substantial monetary losses if the Defendants are permitted to implement the new formula for calculating promotional credits. However, the allegation that CGM derives its revenue from a percentage of the unnamed CLECs' revenue does not set forth a violation of CGM's own "legally protected interest" and is insufficient to confer standing. Lujan, 504 U.S. at 560-61 (requiring that a plaintiff must have "suffered an injury in fact, which is an invasion of a legally protected interest ..."). CGM has not satisfied "the prudential standing requirement that [it] assert [its] own legal rights and not those of third parties." Dixon v. Edwards, 290 F.3d 699, 711, fn. 19 (4th Cir. 2002) (citing Valley Forge Christian Coll v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (citation and quotations omitted).

CGM argues that it is asking the Court for a declaration of federal law, not enforcement of an ICA or interpretation of any ICA contract terms. Specifically, CGM seeks a declaration that its interpretation of the decision in BellSouth Telecommunications, Inc. v. Sanford, 494 F.3d 439, 450 (4th Cir. 2007) is correct. However, CGM has not carried its burden of showing that it has standing to assert claims on behalf of its CLEC clients, or its own interests pursuant to the Act and Sanford.

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the

> in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them.

Singleton v. Wulff, 428 U.S. 106, 113-14, (1976) (internal citation omitted). In this case, it appears that the CLECs Plaintiff purports to represent would be the best proponents of the relief sought.

V. CONCLUSION

CGM seeks declaratory judgment construing the dictates of the 1996 Act and Sanford, yet Plaintiff is not a CLEC or an ILEC, has not cited to any breached ICA or failure to negotiate an IAC, nor has Plaintiff cited any law supporting a third-party non-ILEC/CLEC bringing an action in federal court pursuant to the 1996 Act. Furthermore, all the pertinent caselaw seems to involve the review by federal courts of state commission rulings filed by either an ILEC or CLEC. The underlying controversy is based on the rights of CLECs that are not parties to this litigation, and the Court should hesitate before adjudicating those rights unnecessarily. Plaintiff has not sufficiently established a case or controversy between itself and Defendants that does not rest on the legal rights or interests of third parties. The undersigned will respectfully recommend that the motions to dismiss be granted for failure to state a claim upon which relief may be granted to this Plaintiff in this lawsuit.

VI. RECOMMENDATION

FOR THE FOREGOING REASONS, the undersigned respectfully recommends that: BellSouth's "Motion to Dismiss" (Document No. 25), and the AT&T Defendants' "Motion to Dismiss" (Document No. 27), should be **GRANTED**.

VII. NOTICE OF APPEAL RIGHTS

The parties are hereby advised that, pursuant to 28 U.S.C. § 636(b)(1)(C), and Rule 72 of the Federal Rules of Civil Procedure, written objections to the proposed findings of fact and conclusions law and the recommendations contained herein must be filed within fourteen (14) days after service of same. Responses to objections must be filed within fourteen (14) days after service of the objections. Failure to file objections to this Memorandum and Recommendation with the District Court will preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

The Clerk is directed to send copies of this Memorandum and Recommendation to counsel for the parties and the Honorable Robert J. Conrad, Jr.

Signed: March 16, 2010

David C. Keesler
United States Magistrate Judge

EXHIBIT D

No. 09-11188
consolidated with 09-11099

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BUDGET PREPAY, INC., et al.,
plaintiffs - appellees,

V.

AT&T INC. f/k/a SBC COMMUNICATIONS, INC., et al.
defendants - appellants

On Appeal from the United States District Court
for the Northern District of Texas

PLAINTIFFS'/APPELLEES' BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Budget Prepay, Inc.
Global Connection Inc. of America
Mextel Corporation, LLC d/b/a Lifetel
Nexus Communications, Inc.
Terracom, Inc.
AT&T Inc.
AT&T Operations, Inc.
Illinois Bell Telephone Company d/b/a SBC Illinois
Indiana Bell Telephone Company Incorporated d/b/a SBC Indiana
Michigan Bell Telephone Company d/b/a SBC Michigan
Southwestern Bell Telephone L.P. d/b/a SBC Arkansas
SBC Kansas
SBC Missouri
SBC Oklahoma
SBC Texas
Wisconsin Bell, Inc. d/b/a SBC Wisconsin
AT&T Southeast Inc. f/k/a BellSouth Telecommunications, Inc.
AT&T California
AT&T Nevada
AT&T Connecticut
AT&T Ohio

/s/ Chris Malish
Attorney of record for
plaintiffs/ appellees

d. Resale Attachment's General Provision sections 3.1: p. 3: "...Subject to effective and applicable FCC and Commission rules and orders, *BellSouth shall make available to Global Connection for resale those telecommunications services BellSouth makes available...to customers* who are not telecommunications carriers." (R. 91)

33. Other the contractual provisions provide:

-- The parties acknowledge that the respective rights and obligations ... set forth in this Agreement are based on ... the [Federal Telecommunications] Act, the applicable rules, regulations, Orders promulgated under the Act by the FCC...

GTC 3.1, DEFApp 13 (R. 302)

-- The parties agree that by executing this agreement, neither Party waives any ... rights, remedies, or arguments with respect to any ...rules, regulations, Orders, or laws upon which it is based, including the right to seek legal review....

GTC 3.2, DEFApp 14 (R. 303)

34. AT& T has over the past months and years sold its retail services at a discount to its end users under various promotions that have lasted for more than 90 days. (R. 91) Of concern in this particular case is the Win-back Cash Back Promotion. AT&T deploys this promotion in various states with essentially the same basic terms. Generally, this promotional offering is (1) available to customers who are with another wireline or wireless service provider and convert their service to AT&T's; and (2) results in the waiver of connection fees and a credit of $50. (R. 91) Copies of excerpts from AT&T tariffs from Florida, Texas, and Ohio are attached as Exhibit 1 as representative examples of the terms and conditions under which AT&T makes

this offer available to its prospective retail customers.

35. Plaintiffs are entitled to purchase and resell those same services at the promotional rate, less the wholesale discount. For months and years, AT&T (as SBC Communications) has honored such promotions and made them equally available to CLECs like plaintiffs as required by law.[11] (R. 92) Thus, to use the Win-back Cash Back Promotion as an example, when a CLEC attracted a new customer away from another carrier or wireless provider, the CLEC reselling AT&T's services would also qualify to have its cost for that line credited by $50 (less the wholesale discount in situations where the wholesale discount had already been applied to the inital retail price) and have the installation charges waived. *See*, for example, the CLEC Accessible Letters[12] from February 2009, acknowledging that CLECs qualify for these reduced prices for service (Exhibit 2).

36. This dispute arises because on or about July 1, 2009, AT&T alerted CLECs through a series of CLEC Accessible Letters that on September 1,

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[11] BellSouth has, however, paid the credits requested for service rendered only after June 2007. The timing appears to coincide with the 4th Circuit's decision in *BellSouth Telecommunications Inc. v. Sanford et al.*, 494 F3d 439 (4th Cir. 2007), in which the 4th Circuit upheld the North Carolina Commission's decision that promotions that tend to reduce the retail price paid by retail customers must be made available to CLECs.

[12] A CLEC Accessible Letter is simply a communication that AT&T posts on its website or mails to CLECs informing them of issues related to the provision of service by AT&T.

2009, AT&T in effect planned to:

> (1) cease compliance with AT&T's obligations under the Federal Telecommunications Act; Federal Communications Commission regulations; and contracts to resell AT&T's services to plaintiffs CLECs at wholesale, and
>
> (2) instead implement a program of predatory pricing, in which AT&T will drastically discount its pricing for its retail customers, but deny corresponding discounts to its resale/wholesale customers, such as plaintiffs.

A copy of representative samples of the relevant CLEC Accessible Letters are attached as Exhibit 3. For example, instead of making a cash back payment or credit of $50 (less the standard wholesale discount), AT&T has stated that it will provide plaintiffs with reduced credits calculated by some bizarre formula that AT&T came up with on its own. *See* Exhibit 4.

37. In effect, what has happened here is that despite AT&T's clear obligation under 47 C.F.R. § 51.605 (a) to "***offer*** **to any requesting telecommunications carrier any telecommunications service that the incumbent LEC** ***offers*** **on a retail basis,"** AT&T has declared that it will no longer make available for resale the same offer it makes available for its retail customers as described in its retail tariffs or other retail offerings. Instead, AT&T will make available a highly modified offer, with completely ***different*** terms, for wholesale – one in which the amount of the cash back promotion is not a fixed $50, but an amount drastically reduced by bizarre "retention" and

EXHIBIT E

ESCROW AND DEPOSIT AGREEMENT

THIS ESCROW AND DEPOSIT AGREEMENT ("Escrow Agreement") is made and entered into this [____] day of [_____], 2010, by and between [_____] ("CLEC"), BellSouth Telecommunications, Inc d/b/a AT&T [State] ("AT&T"), and [_____](the "Escrow Agent").

WHEREAS, AT&T and CLEC are parties to [identify docket]; and

WHEREAS, in [identify Order] the [State commission] has required CLEC to deposit [$] into an appropriate escrow arrangement;

NOW, THEREFORE, for and in consideration of the payment by CLEC to Escrow Agent of Ten Dollars ($10.00) and other valuable consideration, receipt whereof is hereby acknowledged, and the mutual promises hereinafter set out, the parties hereto agree as follows:

Section One: Position of Agent

[_____], as Escrow Agent, acts hereunder as a depository only and undertakes no responsibility or liability other than as herein specifically set forth.

Section Two: Liability

Escrow Agent shall not be liable for any errors of judgment or for any act done or omitted by it in good faith, or for anything that it may in good faith do or refrain from doing in connection herewith. No liability will be incurred by Escrow Agent if, in the event of any dispute or question as to the construction of this Escrow Agreement, it acts in accordance with the opinion of its general counsel.

Section Three: Notices

All notices to any party shall be in writing directed to the parties at the addresses appearing following their signatures hereon or at other addresses as each may furnish, from time to time, to the other parties hereto.

Section Four: Documents

Escrow Agent is authorized to act on any correspondence or other document directed to it which it believes in good faith to be genuine and signed by the proper party or parties, and will incur no liability in so acting.

Section Five: Adverse Claims

In the event of any disagreement or the presentation of adverse claims or demands in connection with this Escrow Agreement and funds escrowed pursuant hereto, Escrow Agent shall refuse to comply with any such claims or demands until all the rights of the adverse claimants have been finally adjudicated by the [State commission] or a court having jurisdiction of the parties and subject matter.

Section Six: Compensation

Escrow Agent shall receive no compensation for acting as such pursuant to this Escrow Agreement excepting such as it derives from all customer money market accounts at its banking house. CLEC shall pay to Escrow Agent the [$_____] inception fee and the [$_____] annual fee for the maintenance of the account pursuant to this Escrow Agreement.

Section Seven: Instructions

Escrow Agent hereby acknowledges the following instructions:

1. It shall handle all transactions herein via Automatic Clearing House (ACH) transfers;

2. It shall accept an initial deposit from CLEC in the amount of [_____] and any further amounts submitted by CLEC, and shall place same into a money market account entitled "[CLEC] — AT&T: Dispute Account";

3. Any and all interest earned on said account shall likewise be deposited into same;

4. None of the funds deposited into the escrow account or the interest earned thereon may be subjected to Escrow Agent's charges for serving as Escrow Agent;

5. All interest earned on deposits to the escrow account shall be disbursed to CLEC and/or AT&T in the same proportion as the principal;

6. Disbursements from the escrow account shall be limited to those authorized by written order of the [State commission];

7. CLEC and AT&T shall direct to the Escrow Agent appropriate documentation regarding proper disbursement of applicable funds held in the escrow account based on the ultimate disposition of the issues as described above;

8. After appropriate disbursement of funds, any funds remaining in said escrow account shall be disbursed consistent with Paragraph 6 in this Section 7; and

9. Escrow Agent may resign from its duties pursuant to this Escrow Agreement at any time, but shall give sixty (60) days written notice of its intent to resign to CLEC and AT&T prior to the effective date of such resignation. In such case, no later than five (5) business days following said notice, CLEC and AT&T shall promptly notify the [State commission] of the Escrow Agent's written notice and work in good faith to

identify a successor escrow agent who will assume the duties and responsibilities of the Escrow Agent pursuant to this Escrow Agreement. CLEC and AT&T shall then negotiate in good faith and execute a Successor Escrow and Deposit Agreement with the successor escrow agent identified. Said Successor Escrow and Deposit Agreement shall bear identical substantive terms and conditions as this Agreement and shall be filed with the [State commission].

Section Eight: Expenses

Any and all reasonable expenses associated with the work of Escrow Agent and incurred by it pursuant to this Escrow Agreement, including attorney fees and costs, shall be borne by CLEC and shall be promptly remitted upon request.

Section Nine: Irrevocable Instructions

This Escrow Agreement shall create irrevocable instructions to the Escrow Agent from the date hereof until the Escrow Agreement shall expire according to its terms or be terminated, and all funds placed in the account provided for herein shall be held for the use and benefit of CLEC and AT&T, as herein provided, and shall not until the expiration or termination of this Escrow Agreement be considered the property of either party, but funds held in trust for the uses and purposes herein set out.

Section Ten: Audit

CLEC and AT&T shall have the individual right to annually audit the escrow account, and each of them shall receive a monthly statement from the Escrow Agent showing funds held, deposited, and disbursed.

Section Eleven: Miscellaneous

Escrow Agent shall notify CLEC and AT&T at least ten (10) days prior to any distribution of funds in escrow.

Section Twelve: Severability

If any of the provisions of this Escrow Agreement shall be unenforceable or invalid under the laws of the jurisdiction applicable to the entire agreement, such invalidity or unenforceability shall not render the entire agreement invalid but rather the Escrow Agreement shall be construed as if not containing the particular unenforceable or invalid provision(s) and the rights of the parties shall be construed accordingly.

Section Thirteen: Termination

This Escrow Agreement and any obligations herein shall terminate upon any of the following acts:

1) authorization in writing by both CLEC and AT&T (that is, a signature from a representative of one party is not sufficient to properly terminate this Escrow Agreement); or

2) disbursement of all funds in the escrow account consistent with the terms herein;

3) execution of a Successor Escrow and Deposit Agreement; or

4) pursuant to an order issued by the [State] Commission.

Section Fourteen: Governing Law

This Escrow Agreement shall be construed, enforced, and administered in accordance with the laws of the State of [_____].

Section Fifteen: Counterparts

This Agreement may be executed in three counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The exchange of copies of this Agreement and of signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original Agreement for all purposes. Signatures of the parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.

Section Sixteen: Entire Agreement

This Agreement contains the entire agreement between the parties with respect to the subject matter hereof. The terms and provisions hereof shall govern the rights, obligations and liabilities of the Escrow Agent.

IN WITNESS WHEREOF, the parties have here set their hands the day first above written.

CLEC

By: _____

Address: _____
_____
_____

ESCROW AGENT

By: _____

Address: _____
_____
_____

AT&T

By: _____

Address: _____
_____
_____

EXHIBIT F

TURNER, PATRICK W (Legal)

From: ROYER, JULIE (ATTOPS)
Sent: Tuesday, April 06, 2010 1:23 PM
To: BERENBAUM, STEVEN L (ATTSI); TURNER, PATRICK W (Legal)
Subject: FW: Affordable Phone Promotion - Word of Mouth Advertisement - Customer Referrals
Attachments: HTC_Referrals_20090124.xls

From: Database Engineers (GHart) [mailto:GHart@DatabaseEngineers.com]
Sent: Friday, May 22, 2009 4:42 PM
To: Resale Disputes
Subject: Affordable Phone Promotion - Word of Mouth Advertisement - Customer Referrals

Resale Disputes Department at AT&T,

When researching the promotional advertising campaign offer entitled "The Customer Referral Program", the following was found as the most recent and current definition for such:

Refer-A-Friend is an online-only program that provides an incentive for referring new AT&T customers.

Both the existing AT&T customer and the person who is referred will each earn a $25 AT&T gift card for making a successful referral. Customers can earn up to $125 per year (rolling calendar) by participating in the program. Customers can register for the program and make referrals on the Refer-A-Friend website, which is located at http://www.wireless.att.com/referral.

Wireless gift cards can be redeemed for great merchandise online at www.wireless.att.com or at any AT&T company owned store. They can also be used towards paying your wireless bill online through myWireless Account, by phone (1-800-844-4930) or at participating AT&T stores.

When one of your referrals signs up, you get a reward worth $25 per eligible service.
If one of your referrals is a new AT&T customer, you'll get another $25 reward.

Referrals who are current AT&T customers can receive AT&T ConnecTechSM $25

While reviewing this publicly accessible presentation, it becomes obvious that its intention is to promote AT&T to new customers who have been using another company as their provider, or whom have never had telephone service in the past. The promotional offer is very appropriate, in that it generates a strong motivating factor for existing AT&T customers to be "champions" to AT&T and generate the most powerful advertising medium possible, Word-of-Mouth. Virtually every study of effective means for advertising demonstrates that the most effective medium of all is Word-of -Mouth. A recent "Cap Gemini Ernst & Young" study showed that, for the majority of consumers, neither TV nor radio advertising is a big influence in their decisions on purchases. At the top of the list of influences was "word of mouth," cited by 71% of respondents to be a strong influential factor when making purchasing decisions. The next closest in effectiveness was "Direct Mail" with only 48% responsiveness. 71% represents not only a statistically significant number, it represents an overwhelming and mandate majority. The opportunities for acquiring new customers through such a powerful medium are tremendous. As such, it is only befitting and within the true intention of the "Telecommunications Act of 1996" that the same ability to benefit by such medium be made available to CLEC providers, in parity with that which is available to the ILEC. The ILEC, namely AT&T, has at their access this most powerful medium to attract new customers, and such a medium could be devastating to the ability of a CLEC to remain competitive with their ILEC.

The underlying goal of the Telecommunications Act of 1996 is to create a fair and competitive environment to allow the CLECs the opportunity to conduct business with the same abilities to make profit as do the ILECs. Because the resources of a CLEC are provisioned through their ILEC, they do not have the same flexibilities, as all activity that is generated by them is subjective to the ILEC charges associated with them. In the true nature of the Telecommunications Act of 1996, Affordable Phone respectfully request that we be provided with the same opportunity to acquire new customers as you have. Namely, Affordable Phone requests that they have the freedom to extend the benefits of "The Customer Referral Program" to their customers and reap the benefits associated with such. In doing so, Affordable Phone requests compensation for the amount relative to the incentive promotion advertised * (see below for an excerpt from the Telecommunications Act of 1996). Affordable Phone finds this request to be in alignment with the true intentions of the Act, and also finds the request to be in alignment with the guidelines governing parity.

Attached please find submission for customers who have been referred to Affordable Phone as new customers, and such referral has come from an existing Affordable Phone customer, a customers of which Affordable Phone is the providers of their service. The submission includes the name, address, and billing telephone number of the person who was referred as the new customer, and also the information relative to the existing customer of ours who was responsible for the referral. All of the customers making referrals have been confirmed to have made 5 or less referrals within a 12 month time-span (thus conforming with the $125 per "rolling calendar" year maximum).

* Under Section 251 of the Telecommunications Act of 1996, subsection (b)(1) Title: RESALE reads as follows: "OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS - Each local exchange carrier has the following duties:" "The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."

The attached spreadsheet file(s) represent a submission for compensation for the promotional offer which provides $25 for new customers who sign up for service as a result of being referred by an existing customer.

Affordable Phone makes use of data collection resources, which contain information about customer accounts, dates of inception and termination of service, service plan selection, and the resource which exposed them to Affordable Phone as a new customer.

The layout of the spreadsheet conforms to as requested within the document titled "Initial Claims Spreadsheet.xls" as was presented by:
Melissa Harris; Service Representative-Wholesale Billing Centers
AT&T Wholesale Customer Care - Southeast
Email: mh0554@att.com
Phone: (205) 714-0134 Ext. 7748 or (800) 823-2455 +6 + ext.7748

Sincerely,
Gregory Hart, President
Database Engineers, Inc.
(813) 957-7599
GHart@DatabaseEngineers.com

TURNER, PATRICK W (Legal)

From: Royer, Julie A
Sent: Wednesday, September 23, 2009 5:33 PM
To: 'GHart@DatabaseEngineers.com'
Cc: BATES, KAREN C (ATTOPS)
Subject: Word of Mouth Sept 23, 2009

Attachments: WOM Sept 23 2009 GHART Database Engineers.xls

Dear Mr. Hart,

This response addresses the claims of Database Engineers INC for multiple CLEC customers. The dispute details are attached. These claims are related to what have been referred to as Word Of Mouth disputes.

1st, 2nd, 3rd Escalation Response: AT&T's resale obligations only apply to telecommunications offerings. Your claim refers to a marketing plan for non-telecommunications offerings. AT&T has escalated your dispute through the third level of escalation per your ICA, and accordingly, your claim is denied.

Thanks,

Julie Royer
Area Manager - Wholesale Billing Center
AT&T Wholesale Customer Care
Phone ~ 404 532-2086
Fax ~ 770 493-7349
Email JR5949@att.com

WOM Sept 23 2009
GHART Databas...

PARENT_BILL_NAME:string	FILE_ID:long	CLAIM_NUM:string	CUST_AUDIT_NUM:string
AFFORDABLE PHONE SERVICES INC	[redacted]		
AFFORDABLE PHONE SERVICES INC			
AFFORDABLE PHONE SERVICES INC			
AFFORDABLE PHONE SERVICES INC			
AFFORDABLE PHONE SERVICES INC			
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This is a redacted copy of the first of many pages of this spreadsheet.

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Response to Motions to Dismiss and/or Stay and Reply to Responses to Motion to Consolidate in Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, 2010-17-C, 2010-18-C and 2010-19-C to be served upon the following on April 9, 2010:

John J. Pringle, Jr., Esquire
Ellis, Lawhorne & Sims, P.A.
1501 Main Street
5th Floor
Columbia, South Carolina 29202
(Affordable Phone Services, Inc. d/b/a High Tech)
(Dialtone & More, Inc.)
(Tennessee Telephone Service, LLC d/b/a Freedom Communications)
(OneTone Telecom, Inc.)
(dPi Teleconnect, L.L.C.)
(Image Access, Inc. d/b/a NewPhone)
(Electronic Mail)

Christopher Malish, Esquire
Malish & Cowan, P.L.L.C.
1403 West Sixth Street
Austin, Texas 78703
(dPi Teleconnect, LLC)
(Electronic Mail)

Henry M. Walker, Esquire
Bradley Arant Boult Cummings, LLP
1600 Division Street, Suite 700
Nashville, Tennessee 37203
(OneTone Telecom, Inc.)
(Tennessee Telephone Service, LLC d/b/a Freedom Communications)
(DialTone & More, Inc.)
(Affordable Phone Services, Inc., d/b/a High Tech Communications)
(Electronic Mail)

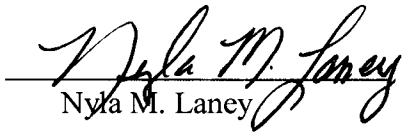
Paul F. Guarisco
W. Bradley Kline
PHELPS DUNBAR LLP
II City Plaza, 400 Convention Street, Suite1100
Post Office Box 4412
Baton Rouge, Louisiana 70821
(Image Access, Inc. d/b/a NewPhone)
(Electronic Mail)

C. Lessie Hammonds, Esquire
Counsel
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, South Carolina 29201
(Electronic Mail)

F. David Butler, Esquire
Senior Counsel
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(Electronic Mail)

Joseph Melchers
Chief Counsel
S.C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(Electronic Mail)

Jocelyn G. Boyd, Esquire
Deputy Clerk
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(Electronic Mail)



Nyla M. Laney

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