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February 21, 2012

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

Re: Complaint and Petition for Relief of BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Affordable Phone Services, Inc. d/b/a High Tech Communications, Dialtone & More, Inc., Tennessee Telephone Service, LLC d/b/a Freedom Communications USA, LLC, OneTone Telecom, Inc., dPi Teleconnect, LLC and Image Access, Inc., d/b/a New Phone
Docket No. 2010-14-C, Docket No. 2010-15-C, Docket No. 2010-16-C, Docket No. 2010-17-C, Docket No. 2010-18-C, & Docket No. 2010-19-C

Dear Ms. Boyd:

Enclosed for filing is AT&T South Carolina's Notice of Subsequent Development in the above-referenced matters.

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

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
enclsoure
cc: All Parties of Record
1025173

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 NOTICE OF SUBSEQUENT DEVELOPMENT

AT&T South Carolina respectfully submits for the Commission's consideration Attachment A to this Notice, which is a recent Order of the United States District Court for the Eastern District of North Carolina. As explained below, this federal court Order rejects the position that where the rebate exceeds the first month's cost of service, the resale discount should not be applied to the rebate, finding that this position is contrary to the 1996 Act and binding Fourth Circuit precedent. AT&T South Carolina respectfully requests that the Commission take this federal court Order into consideration in drafting the Commission's Order in these

proceedings and that the Commission take any action necessary to ensure that its Order complies with federal law as set forth in this federal court Order.

In a complaint proceeding, the North Carolina Commission ruled that when dPi (one of the Resellers in these Consolidated Phase proceedings) qualifies for a cashback promotional offering, AT&T North Carolina is entitled to apply the commission-established resale discount rate to both the monthly price of the service and to the retail value of the cashback benefit (as AT&T South Carolina advocates in these proceedings). dPi appealed that decision, raising exactly the same arguments that the Resellers raised in these proceedings before this Commission. Specifically, dPi strenuously presented the same "negative price" and "wholesale must always be less than retail" arguments that the Resellers presented to this Commission. As explained below, the federal district court soundly rejected these arguments as being contrary to controlling federal law.

The Court first found that the North Carolina Commission's decision was ***not*** predominately a factual issue entitled to "substantial evidence" review. Instead, the Court found that "[d]etermining the proper method of calculation [of the cashback amount owed to dPi] ***requires interpretation of the Act and of Fourth Circuit precedent***, and as such requires the application of law to fact." *See* Attachment A at 3. The Court, therefore, applied the more demanding "*de novo* review with appropriate *Skidmore* deference to the [North Carolina Commission's] special role in the regulatory scheme." *Id.* The Court then found that "AT&T North Carolina's method properly makes wholesale discount adjustments to both relevant rates [the monthly price and the cashback amount] ***as dictated by the statute***." *Id. at* 6.

The Court expressly addressed dPi's "suggest[ion] that this method produces anomalous results because, in the case where the cashback amount exceeds the monthly retail price, the 'price' to the retail customer in a given month is a negative number." *Id.* at 6. The Court noted that "dPi argues that this cannot be the correct result because the Act dictates that the wholesale price must always be less than the retail price." *Id.* Significantly, this is the same argument the Resellers presented to the Commission and upon which the Commission apparently relied in its Directive.[1] The Court expressly found that this argument is wrong as a matter of law.

The Court plainly stated that "dPi misapprehends the Act's mandate." *Id.* at 6. The Court explained that short-term promotional rates

> are exempted from the ILEC's resale obligation so long as the rate is 'in effect for no more than 90 days.' 47 C.F.R. 51.613(a)(2). Even if dPi's anomaly should occur, ***the effect of a cashback amount greater than the monthly retail price is appropriate and permitted for a period of 90 days or less***, after which any continuing distortion could be remedied by additional promotional credits.[2]

See Attachment A at 7 (emphasis added). The Court, therefore, entered judgment in favor of the North Carolina Commission and AT&T North Carolina and against dPi.

In conclusion, AT&T South Carolina respectfully requests that the Commission take this federal court Order into consideration in drafting the Commission's Order in these proceedings and that the Commission take any action necessary to ensure that its Order complies with federal law as set forth in this federal court Order.

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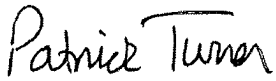
[1] *See* Directive at 2 ("In the case whether the rebate is greater than the first month's charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended.").

[2] This ruling is consistent with the compromise position advocated by the Office of Regulatory Staff. *See* ORS' Letter dated April 6, 2011.

Respectfully submitted on this the 21st day of February, 2012.



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ATTACHMENT A

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

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

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

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

BACKGROUND

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

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

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

DISCUSSION

Standard of Review

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

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

I. The Telecommunications Act of 1996

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

2. Calculating the Value of Promotional Credits

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

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

service to dPi and other resellers for $78.50.

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Terrence W. Boyle

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

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, LLC d/b/a AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Notice of Subsequent Development 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 February 21, 2012:

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(Tennessee Telephone Service, LLC d/b/a Freedom Communications)
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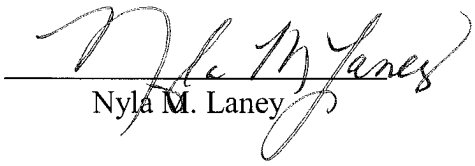

Nyla M. Laney

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