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July 26, 2011

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:

In their letter of July 19, 2011, the Resellers informed the Commission that on June 22, 2011, administrative law judge Michelle Finnegan submitted her Proposed Recommendation in the Consolidated Phase proceedings pending before the Louisiana Commission. Attachment A to this letter is a copy of Judge Finnegan's Proposed Recommendation, which adopts in full AT&T's Louisiana's positions on each of the three issues in those proceedings.

The Resellers also submitted a copy of the Louisiana Staff's Exceptions to Judge Finnegan's Proposed Recommendation. Attachment B to this letter is a copy of AT&T Louisiana's response to those exceptions, which explains that Judge Finnegan's Proposed Recommendation is well-reasoned, fully supported by controlling law and the evidence of record, and consistent with:

the FCC's *Local Competition Order*;

*BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007) (a copy of which is Attachment C to this letter);

the Louisiana Staff's letter of September 30, 2009 (a copy of which is Attachment D to this letter);

Adminstrative Law Judge DeVitis' Proposed Recommendation in *dPi v. AT&T Louisiana* (a copy of which is Attachment E to this letter);

the North Carolina Commission's Order in *dPi v. AT&T North Carolina* (a copy of which is Attachment F to this letter);

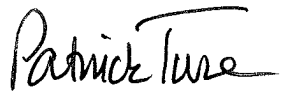
the North Carolina Commission's Appellate Brief – submitted by the Office of the North Carolina Attorney General – supporting that Order (a copy of which is Attachment G to this letter);

the South Carolina Office of Regulatory Staff's recommendation in these consolidated dockets (a copy of which is Attachment H to this letter); and

the North Carolina Public Staff's Proposed Order in the the companion Consolidated Phase proceedings before the North Carolina Commission (a copy of which is Attachment I to this letter).

AT&T South Carolina respectfully requests that the Commission consider this recent development in resolving the issues presented in these consolidated dockets.

Sincerely,



Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
926803

| | | |
|---|---|---|
| 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 South Carolina ("AT&T") and that she has caused AT&T South Carolina's Letter dated July 26, 2011 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 July 26, 2011:

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)**

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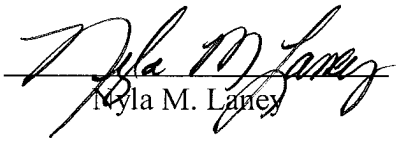

Nyla M. Laney

800715

# ATTACHMENT A

# LOUISIANA PUBLIC SERVICE COMMISSION

## ADMINISTRATIVE HEARINGS DIVISION

**DOCKET NO. U-31364**

**BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTHEAST D/B/A AT&T LOUISIANA**
**V.**
**IMAGE ACCESS, INC. D/B/A NEW PHONE;**

**BUDGET PREPAY, INC. D/B/A BUDGET PHONE D/B/A BUDGET PHONE, INC.;**

**BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATIONS SOLUTIONS D/B/A MEXICALL COMMUNICATIONS;**

**DPI TELECONNECT, LLC;**
**AND**
**TENNESSEE TELEPHONE SERVICE, INC. D/B/A FREEDOM COMMUNICATIONS USA, LLC**

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***In re: Consolidated Proceeding to Address Certain Issues Common to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.***

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## PROPOSED RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

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

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

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

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

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

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

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

Copies of the Rules of Practice and Procedure of the Louisiana Public Service Commission are available from the Administrative Hearings Division.

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

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

Baton Rouge, Louisiana, this 22nd day of June.

Michelle Finnegan
Administrative Law Judge

cc: Official Service List
via Fax, E-mail & Regular Mail

***Louisiana Public Service Commission***
***Administrative Hearings Division***
***602 N. Fifth Street***
***Galvez Building, 11th Floor***
***Post Office Box 91154***
***Baton Rouge, Louisiana 70821-9154***
***Telephone (225) 219-9417***
***Fax (225) 342-5611***

# Service List for U-31364
as of 6/22/2011

**Commissioner(s)**

Lambert C. Boissiere, Commissioner
Eric Skrmetta, Commissioner
James "Jimmy" Field, Commissioner
Clyde C. Holloway, Commissioner
Foster L. Campbell, Commissioner

**LPSC Staff Counsel**

Brandon Frey, LPSC Staff Attorney

**Petitioner: AT&T Louisiana**

Michael D. Karno, Attorney
365 Canal Street
Suite 3060
New Orleans, LA 70130
Email: michael.karno@att.com; Telephone 1:(504)528-2003; Fax:(504)528-2948; Telephone 1:(504)528-2003;

**Respondent: BLC Management LLC of Tennessee D/B/A Angles Communication Solutions d/b/a Medicall Communications and Tennessee Telephone Service, Inc. D/B/A Freedom Telecommunications USA, LLC**

Henry Walker,
1600 Division Street
Suite 700
Nashville, TN 37203
Fax:(615)252-6363; Telephone 1:(615)252-2363;

**Respondent: BLC Management, LLC**

11121 Highway 70
Suite 202
Arlington, TN 38002

**Respondent: Budget PrePay, Inc. D/B/A N/A**

Lauren M. Walker,
P.O. BOX 3513
Baton Rouge, LA 70821
Email: Lauren.Walker@keanmiller.com; Fax:(225)388-9133; Telephone 1:(225)382-3436;

Katherine W. King,
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**Respondent: dPi Teleconnect, LLC D/B/A N/A**

Christopher Malish,
1403 West Sixth Street
Austin, TX 78703
Fax:(512)477-8657; Telephone 1:(512)476-8591;

**Respondent: Image Access, Inc.**

555 Hilton Avenue
Suite 606
Baton Rouge, LA 70808

**Respondent: Image Access, Inc. D/B/A NewPhone**

Paul F. Guarisco,
PO BOX 4421
400 CONVENTION STREET, SUITE 1100
Baton Rouge, LA 70821-4412
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# LOUISIANA PUBLIC SERVICE COMMISSION

## ADMINISTRATIVE HEARINGS DIVISION

**DOCKET NO. U-31364**

**BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTHEAST D/B/A AT&T LOUISIANA**
**V.**
**IMAGE ACCESS, INC. D/B/A NEW PHONE;**

**BUDGET PREPAY, INC. D/B/A BUDGET PHONE D/B/A BUDGET PHONE, INC.;**

**BLC MANAGEMENT, LLC D/B/A ANGLES COMMUNICATIONS SOLUTIONS D/B/A MEXICALL COMMUNICATIONS;**

**DPI TELECONNECT, LLC;**
**AND**
**TENNESSEE TELEPHONE SERVICE, INC. D/B/A FREEDOM COMMUNICATIONS USA, LLC**

---

***In re: Consolidated Proceeding to Address Certain Issues Common to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.***

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**PROPOSED RECOMMENDATION**
**OF THE ADMINISTRATIVE LAW JUDGE**

**DRAFT ORDER**

***Background***

BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana ("AT&T Louisiana") has filed complaints with the Louisiana Public Service Commission ("the Commission" or "LPSC") against Image Access, Inc. d/b/a New Phone, Budget Prepay, Inc. d/b/a Budget Phone d/b/a Budget Phone, Inc., BLC Management, LLC d/b/a/ Angles Communications Solutions d/b/a Mexicall Communications, and dPi Teleconnect, LLC (collectively known as the "Resellers").

AT&T Louisiana has also filed a complaint against Tennessee Telephone Service, Inc. d/b/a Freedom Communications USA, LLC ("Tennessee Telephone"). On November 1, 2010, a

Stipulation Regarding Participation in Consolidated Proceeding on Procedural Issues was filed into this consolidated docket. The stipulation outlines the Tennessee Telephone petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Tennessee, Nashville Division. On September 24, 2010, the Bankruptcy Court entered an Agreed Order on Motion to Determine Automatic Stay Inapplicable or, Alternatively, For Relief from the Automatic Stay which, among other things, terminated, modified and annulled the automatic stay with respect to the Consolidated Proceedings in order to allow them to proceed notwithstanding the bankruptcy filing. Accordingly, AT&T Louisiana and Tennessee Telephone entered into the following stipulations:

1. As set forth in the Relief From Stay Order, Tennessee Telephone will be bound by all rulings and determinations made in the Consolidated Phase of the proceedings.
2. Tennessee Telephone has decided not to participate as a party to the Consolidated Phase of the proceedings.
3. AT&T Louisiana will not oppose any motion by Tennessee Telephone Service, Inc. d/b/a Freedom Communications USA, LLC to be removed as a party to the Consolidated Phase of the proceeding.

On February 10, 2011, AT&T and Budget Prepay, Inc. d/b/a Budget Phone f/k/a Budget Phone, Inc. ("Budget Phone") filed a Motion to Dismiss in this proceeding, jointly moving that all claims, demands and counter-claims asserted by either of them be dismissed with prejudice, on the grounds that the parties have amicably resolved their disputes. The Commission issued Order No. U-31364 dismissing Budget Phone as a party to consolidated docket number U-31364, with prejudice, on February 15, 2011.

On May 13, 2010, the parties in all five complaint proceedings brought by AT&T Louisiana in LPSC Dockets U-31256, U-31257, U-31258, U-31259, and U-31260, requested that the Commission convene a consolidated proceeding for the purpose of resolving certain issues common to the five complaints and common to cases pending before the regulatory commissions of eight other states (the states of the former BellSouth region). A ruling granting the Joint Motion on Procedural Issues was issued by Chief Administrative Law Judge Valerie Seal Meiners, Judge Carolyn DeVitis and Judge Michelle Finnegan on May 19, 2010.

This consolidated proceeding was instituted for the limited purpose of addressing and resolving three issues identified in the joint motion, as well as any other common issues subsequently identified and approved for consolidation. The Parties also requested that all other pending motions in the proceedings be held in abeyance while the common issues were addressed. It was determined that further proceedings in the five dockets should be stayed pending a resolution of issues in the consolidated proceeding, unless a subsequent Ruling or Order directed otherwise. The Parties, as outlined in the stipulations submitted at the time of the hearing, request a ruling on three basic issues that are to be decided in this consolidated docket, which are: Cashback Offerings, the Line Connection Charge Waiver ("LCCW") and Referral Marketing ("Word-of-Mouth"). A hearing was held on the consolidated issues on November 4 and 5, 2010.

***Jurisdiction and Applicable Law***

The Commission holds broad power, pursuant to the Louisiana Constitution and statutes, to regulate telephone utilities and adopt reasonable and just rules, regulations, and orders affecting telecommunications services. *South Central Bell Tel. Co. v. Louisiana Public Service Commission,* 352 So.2d 999 (La.1997).

Article IV, Section 21 of the Louisiana Constitution of 1974, provides, in pertinent part, that

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

Louisiana Revised Statutes 45:1163, et seq., similarly provide that the Commission shall exercise all necessary power and authority over telephone utilities and shall adopt all reasonable and just rules, regulations and orders affecting or connected with the service and operation of such business.

Pursuant to its authority, the Commission has issued Orders addressing specific aspects of telecommunications services. Section 1101.B5 of the Commission's Local Competition Regulations provides:

> Short-term promotions, which are those offered for 90 days or less, are not subject to mandatory resale. Promotions that are offered for more than ninety (90) days must be made available for resale, at the commission established discount, with the express restriction that TSPs shall only offer a promotional rate obtained from the ILEC for resale to those customers who would qualify for the promotion if they received it directly from the ILEC.

Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 USC section 251 et seq.) regulates local telephone markets and imposes obligations on Incumbent Local Exchange Carriers ("ILECs") to foster competition, including requirements for ILECS to share their networks with competitors. Pursuant to 47 USC § 251(c)(4)(A), ILECS have a duty,

> to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.

The wholesale price at which these services are to be provided is the retail rate less avoided costs, pursuant to 47 USC § 252(d)(3). This duty applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term. This excludes rates that are in effect for no more than 90 days and that are not used to evade the wholesale rate obligation. 47 CFR § 51.613(a)(2). The Commission has established that avoided cost (or wholesale discount) at 20.72% in Order U-22020 and it has been continuously applied.

## *STIPULATIONS FOR CONSOLIDATED PHASE*

In accordance with the Joint Motion on Procedural Schedule submitted in these Dockets on June 16, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana ("AT&T Louisiana") and each of the Respondents in the above-referenced Dockets (collectively the "Parties") respectfully submit the following Stipulations for use in resolving the issues presented in the Consolidated Phase of these Dockets.[1]

## I. Introduction

The Parties agree that in the Consolidated Phase of these dockets, it is neither practical nor necessary to identify the terms and conditions of each and every retail promotional offering that may be implicated by the various pleadings in these Dockets, and the Parties have not attempted to do so in these Stipulations. Instead, the Parties submit the stipulations in Section II below to give the Commission a general description of the representative types of promotions that are addressed in the three issues in the Consolidated Phase – *i.e.*, Cashback Offerings, Referral Marketing ("Word-of-Mouth"), and Line Connection Charge Waiver ("LCCW") – and a general description of the representative types of AT&T retail offerings that are subject to such

[1] *See* Joint Motion on Procedural Issues submitted May 13, 2010.

promotions. In Sections III and IV, the Parties provide a general description of a representative process for AT&T's retail customers and its wholesale customers to request a promotional offering. The Parties respectfully ask the Commission to address the issues in the Consolidated Phase based on these stipulations and the representative types of promotions and processes included herein.

In addressing the specific offerings in the Consolidated Phase, the Parties agree to the following:

a. Cashback and LCCW (described at page 2, paragraphs 2(a) and 2(c), respectively, of the Joint Motion on Procedural Issues). As to these offerings, the Parties ask the Commission **in this Consolidated Phase** to assume that the Parties agree that a Respondent is entitled to receive a promotional credit and **that the only dispute is the amount of the credit** to which the Respondents are entitled.[2]

b. Word-of-Mouth (described at page 2, paragraph 2(b) of the Joint Motion on Procedural Issues). As to this offering, the Parties ask that the Commission make an initial determination as to whether the word-of-mouth referral reward program described herein is subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law. **If the Commission determines that the referral award program described herein is subject to such resale obligations,** the Parties ask that the Commission further assume that the Parties agree that a Respondent is entitled to receive a promotional credit and **that the only dispute is the amount of the credit** to which the Respondents are entitled.

[2] Some of AT&T's cashback promotional offerings are associated with long distance services, and AT&T has denied promotional credit requests associated with such offerings. These stipulations do not address such offerings, and each Party reserves all rights to argue, in subsequent phases of these proceedings and in other forums, that such promotional offerings are or are not subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law.

In reaching the Stipulations below in the Consolidated Phase, no Party waives any of its rights to, after the Commission has issued an order resolving the issues in the Consolidated Phase, present evidence and arguments regarding each and every retail promotional offering that may be implicated by the various pleadings in these Dockets, including how and whether credit requests have been processed and credits issued by AT&T to any Respondent and whether a given Respondent is entitled to receive a given amount of promotional credits.

Similarly, the Parties agree that in the Consolidated Phase, it is neither practical nor necessary to address the facts specific to any Respondents' requested promotional credits, or AT&T's processing of those credits. In order to provide context for the Commission to decide the issues presented in the Consolidated Phase, however, the parties submit the stipulations in Sections III and IV below. In reaching these Stipulations in the Consolidated Phase, no Party waives any of its rights, after the Commission has issued an order resolving the issues in the Consolidated Phase, to present additional evidence and arguments as to retail and wholesale requests for any offerings that are being or have been processed.

## II. Representative Description of Promotions

### *a. Cashback Offerings*

1. Attachment A to these Stipulations are representative descriptions of various Cashback Offerings. Attachment B to these Stipulations are representative descriptions of retail services and prices that are the subject of these representative Cashback Offerings, and the parties stipulate that additional representative descriptions of retail services and prices that are the subject of these representative Cashback Offerings are available at:

http://cpr.bellsouth.com/pdf/la/a996.pdf

http://cpr.bellsouth.com/pdf/la/g996.pdf#page=1

*b. Word-of-Mouth Offerings*

2. Attachment C to these Stipulations is a representative description of a "Word-of-Mouth" Referral Offering.

*c. LCCW Offerings*

3. Attachment D to these Stipulations are representative descriptions of various LCCW Offerings. Attachment B to these Stipulations are representative descriptions of the retail services and prices that are the subject of these representative LCCW Offerings, and the parties stipulate that additional representative descriptions of retail services and prices that are the subject of these representative LCCW Offerings are available at:

http://cpr.bellsouth.com/pdf/la/a996.pdf

http://cpr.bellsouth.com/pdf/la/g996.pdf#page=1

## III. AT&T's Procedure for Processing a Retail Request for a Promotional Offering

4. An AT&T retail customer is billed the standard retail price for the telecommunications services subject to a "cashback" promotional offering. The AT&T retail customer then requests the benefits of the cashback promotion either on-line or by mailing in a form within the allowable time period as described in the terms and conditions of the particular promotion. If the retail customer meets the qualifications of the promotional offering, AT&T mails a check, gift card, or other item (as described in the promotional offering) to the retail customer's billing address. This process is further described by AT&T in "frequently asked questions"

found at https://rewardcenter.att.com/FAQ.aspx. Attachment E to these Stipulations is a copy of this description.

5. At the time an AT&T retail customer requests a "LCCW" promotional offering, an AT&T retail representative determines whether the retail customer meets all qualifications of the offering. If the retail customer meets those qualifications, the line connection charge is waived.

6. If an existing AT&T retail customer refers a potential customer to AT&T and the potential customer orders service(s) that qualify for the "Word-of-Mouth" Referral Offering, the AT&T customer referring the new customer to AT&T may be entitled [to] a referral benefit. In order to process the request for the benefit, the referring AT&T retail customer requests the benefits of the promotion on-line by: (1) registering in the program; (2) nominating a potential customer before that customer orders qualifying service(s) from AT&T; and (3) after the potential customer orders qualifying service(s) from AT&T, providing that customer's account information to AT&T online. If the referring retail customer meets the qualifications of the promotional offering, AT&T mails a gift card or other item (as described in the promotional offering) to that retail customer's billing address. The AT&T retail customer that refers a potential customer as set forth above is billed the standard retail price for the telecommunications services he or she purchases from AT&T.

## IV. AT&T's Procedure for Processing a Wholesale Request for a Promotional Offering

7. When a Respondent purchases for resale the telecommunications services that are subject to any of the offerings described herein, AT&T bills the Respondent the

wholesale rate (the retail rate less the 20.72% residential resale discount established by this Commission) for those telecommunications services.

8. After being billed by AT&T, the Respondent submits promotional credit requests seeking any credits to which it believes it is entitled pursuant to the offering.[3]

9. Upon receipt of these requests, AT&T reviews them to determine whether it believes the Respondent is entitled to the credits it requests. To the extent AT&T determines that the Respondent is entitled to the requested credits, AT&T applies the credits that it believes are due on a subsequent bill to the Respondent.[4]

10. For purposes of this Consolidated Phase, the Parties agree that AT&T did not seek prior approval from the Commission regarding the methodology it used to calculate the amount of promotional credits to Respondents that are the subject of the Consolidated Phase.

***Witnesses***

***Dr. William Taylor,*** an employee of National Economic Research Associates, Inc., testifying on behalf of AT&T.

***Joseph Gillan,*** an economist with a consulting practice specializing in telecommunications, testifying on behalf of the Resellers.

***Christopher Klein,*** an Associate Professor in the Economics and Finance Department of Middle Tennessee State University, testifying on behalf of Resellers.

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[3] Those stipulations address only the process for the 9-state former BellSouth region and not the process for the other 13 states in which an AT&T entity operates as an ILEC.

[4] As mentioned above, neither Respondents nor AT&T stipulate that AT&T has or has not processed or applied all credits that AT&T has deemed are due, and neither Respondents nor AT&T stipulate that AT&T has or has not processed all credits that are actually due.

*Overview of Party Positions*

### *AT&T Louisiana's Positions*

AT&T Louisiana uses a two-step process to resell a telecommunications service that is subject to a retail cashback promotion: (1) a reseller orders the requested telecommunications service and is billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the 20.72% resale discount rate established by the Commission); and (2) the reseller requests a cashback promotional credit which, if verified as valid by AT&T Louisiana, results in the reseller receiving a bill credit in the amount of the face value of the retail cashback benefit discounted by the 20.72% resale discount rate established by the Commission. The issue becomes whether the 20.72% resale discount rate is to be applied to the standard retail price of the affected service and not to the cashback benefit or to the retail promotional price of the service. AT&T Louisiana avers it is correctly applying the 20.72% resale discount rate to the promotional price of the service.

AT&T Louisiana argues that the Resellers position concerning LCCW is incorrect because discounting the $0 retail price by 20.72% produces a wholesale price of $0. It avers it is not only the mathematically accurate result, but also the result envisioned by the 1996 Act. The controlling statute provides that wholesale prices shall be set "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to [costs avoided by the ILEC]."

Concerning the word-of-mouth program, AT&T Louisiana argues that these referrals are marketing promotions and are not subject to resale. Resale obligations apply only to "telecommunications services" AT&T Louisiana provides at retail, and a marketing referral

program like "word-of-mouth" is not even arguably a telecommunications service. Rather it is a marketing activity that AT&T induces from its customers.

### *The Resellers Positions*

The Resellers state this docket is about preserving the viability of wholesale competition and the efficacy of federal pricing rules. They espouse in their post-hearing brief at page 2:

> At issue is whether retail should be less than wholesale – that is, whether AT&T's retail price for telecommunication services should ever be less than the wholesale price at which AT&T resells those services to competitive local exchange carriers (CLEC") such as the Resellers. Obviously, it should not: the whole concept behind requiring Incumbent Local exchange Carriers ("ILECs") like AT&T to resell their services at wholesale rates hinges on retail rates being greater than wholesale rates. Nevertheless, the Louisiana Public Service Commission ("Commission") is here confronted with the problem that AT&T's use of "cashback" promotions, combined with its failure to extend the full value of those promotions to the Resellers, results in retail prices less than wholesale. AT&T's promotional pricing practices are unreasonable, discriminatory, and contrary to the requirements and purposes of the Federal Telecommunications Act of 1996 ("FTA") and the FCC's rules on resale.

The Resellers state the question before the Commission is how to calculate the amount the Resellers are entitled to when reselling services subject to cash back, LCCW and referral (or word of mouth) promotions for the month in which the promotion is earned. They argue that no other months are in dispute. The FTA and federal regulations set the resale rate for telecommunications services that an ILEC may charge as "the rate for the telecommunications service, less avoided retail costs, as described in section 51.609. Thus, the "wholesale discount" must by law be calculated as the avoided cost. The Resellers argue that the appropriate method for determining the wholesale price is to first calculate the amount of the avoided cost, then subtract the avoided cost from the actual sales price.

Resellers state that to properly determine the avoided cost, one multiplies the resale discount factor times the standard/tariffed price. This gives one the base amount of the

avoided cost, and thus the amount by which the wholesale amount should be less than the retail price. They argue this is because the costs associated with the service remain the same, even if the price is temporarily changed for a particular customer pursuant to a special sale or promotion. They state that it also makes sense to measure the avoided costs based on the standard/tariffed retail rate because that is how the model was originally designed, years prior to the introduction of cashback and other promotions. The resellers state the three steps to finding the wholesale price are:

STEP 1: Find the pre-promotion standard/tariffed retail price.

STEP 2: Find the avoided cost: multiply the standard/tariffed retail price by the wholesale discount factor.

STEP 3: Subtract the avoided cost from the retail sales price, which is the standard/tariffed price, or, if a promotion applies, the price after applying the promotion. By applying this method, they state, the wholesale price is always the same amount less than the retail price which, as AT&T's witness acknowledged, is what the FCC intended.

The Resellers further state that they are entitled to the full value of AT&T's cash back promotions because according to the FTA and pertinent FCC regulations, AT&T is required to offer its services for resale "subject to the same conditions" that AT&T offers its own end-users and at "the rate for the telecommunications service less avoided retail costs." There are scenarios where this would result in AT&T giving credit balances to the Resellers.

### *The LPSC Staff's Position*

Staff concludes that:

1) the proper wholesale rate applicable when a "cashback" promotion is offered is the "effective retail price" of the telecommunications service multiplied by the LPSC's 20.72% avoided cost. Staff uses the following equation: Wholesale Rate = (Retail Rate) – (Cash-back) x (Discount).

2) credits to resellers for the WLCC promotion should be equal to the amount the reseller was charged for the service; and

3) word-of-mouth promotions should not be available for resale.

### *Issues and Analysis*

All parties to this proceeding are to be complimented for their work in narrowing down the issues to be addressed by the Commission. The Joint Stipulation specifically requests that three issues be decided. Since there is no need to review any individual promotions or offers, the Commission, upon a review of pre-filed testimony, exhibits, testimony elicited at the hearing and briefs on the issues, answers the questions presented to it by the Parties as succinctly as possible.

### Cashback Offerings

Resale services must be sold at wholesale prices established by state commissions based on the retail rate less avoided costs. 47 U.S.C. § 252(d)(3). The duty to sell services to resellers at wholesale prices applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term (i.e., rates that are in effect for no more than 90 days and that are not used to evade the wholesale rate obligation).

47 C.F.R. § 51.613(a)(2); See *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007) ("Sanford").

The Parties have requested for the Commission to assume that the Parties agree that Resellers are entitled to receive a promotional credit for cashback offerings. The Parties state the only dispute is the amount of the credit to which the Resellers are entitled. Cashback offerings are used to entice customers to purchase service. In the instance of AT&T, it is hoped that using such enticements will result in customers who will not only purchase the service, but keep it long term. "It would be irrational for AT&T to offer cashback promotions to woo customers who will stay with the company for only one month; . . . a proper understanding of the economics of a cashback promotion necessarily looks at a longer term."[5] If these cashback offerings are offered for more than 90 days, the promotional rates shall be available for resale at the wholesale discount.

AT&T contends that Staff's formula is flawed because it adds the avoided cost estimate rather than subtracting it, causing AT&T to give resellers a high credit, which therefore increases the expense of the promotion to AT&T. AT&T postulates that "by making it more expensive for AT&T to offer these promotions, Staff's proposed new formula would discourage these pro-competitive promotions that are beneficial to consumers in Louisiana.[6] AT&T claims that the formula Staff proposed was an approach that was not addressed at the hearing. The Resellers aver that the Staff's proposal was not novel. The Resellers urge that the formula is the same as "Taylor's formula corrected for reality" proposed during the hearing by Reseller Witness Mr. Joseph Gillan and illustrated on Reseller Exhibit #4. AT&T contends that the formula it uses is the long standing fundamental formula Staff supports in all other circumstances.

[5] Reply brief of AT&T page 14.
[6] Reply brief of AT&T page 14

A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the 20.72% resale discount rate established by this Commission). When the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the 20.72% resale discount rate established by the Commission. A cashback promotion is a reduction in the price of a service and does not result in a change to tariffed rates. Although this theory does not embrace the calculation methods proposed by the Resellers or Staff, this result is consistent with the FCC's Local Competition Order and the orders of this Commission.

**Waiver of Line Connection Charge**

The Parties have stipulated that the Resellers are entitled to receive a promotional credit for the LCCW and that the only dispute is the amount of the credit to which the Resellers are entitled. An AT&T retail customer normally incurs a charge for the line connection. As a result of the LCCW, the retail customer is charged nothing. The Resellers are charged the line connection charge at the applicable wholesale discount. If the Resellers qualify for the LCCW, they are then credited back the amount initially charged. For example, if the line connection charge is $50, the retail customer is charged $50. However, if the LCCW is granted the retail customer pays nothing. The amount that the Resellers are entitled to is the line connection charge, less the applicable wholesale discount. Using 20% (for ease of calculation) as the applicable wholesale discount, the Resellers will pay $40. The Resellers are entitled to a credit of the amount paid, namely $40. Under the Reseller's proposal, the LCCW would amount to a rebate and thus the full amount, prior to the application of the wholesale discount, must be credited to the Reseller. We agree with Staff's conclusion that the application espoused by the

Resellers can result in a situation where AT&T pays the Resellers to connect its customers. Accordingly, the proper method for applying the waiver of the line connection charge is to provide a credit to Resellers equal to the amount previously charged to the Resellers.

## Word of Mouth Promotion

The Parties ask that the Commission make an initial determination as to whether the word-of-mouth referral reward program described herein is subject to the resale obligations of the federal Telecommunications Act of 1996 and other applicable law. They propose that if the Commission determines that the referral award program is subject to such resale obligations, that the Commission assume the Parties agree a Reseller is entitled to receive a promotional credit and determine the amount of the credit to which the Resellers are entitled.

The Commission agrees with the positions of Staff and AT&T Louisiana that word-of-mouth is a promotion that is not subject to resale. Retail customers of AT&T can receive promotional benefits such as cash or gift cards under word-of-mouth promotions. The retail customers, who choose to participate in said program, convince friends and family members who are not currently retail customers of AT&T to purchase particular services. The retail customers who convinced friends and family members to sign up for AT&T's offerings must then apply to receive the cash or near-cash offerings. This word-of-mouth referral is not a "telecommunications service" AT&T provides at retail. It is the result of AT&T's marketing referral program and should not be subject to resale.

In accordance with the conclusions reached in this consolidated docket;

**IT IS HEREBY ORDERED** that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the

Resellers at the wholesale discount. A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service. This equals the standard retail price of the service discounted by the resale discount rate established by this Commission. The Commission has previously established the resale discount rate as 20.72%. When the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%.

**IT IS FURTHER ORDERED** that if the Resellers are entitled to receive a promotional credit for the LCCW, the Resellers are entitled to a credit of the LCCW, less the applicable resale discount rate.

**IT IS FURTHER ORDERED** that word-of-mouth promotions are not a 'telecommunications service'. The word-of-mouth promotion is the result of AT&T's marketing referral program and is not subject to resale.

**BY ORDER OF THE COMMISSION**
**BATON ROUGE, LOUISIANA**

**DISTRICT II**
**CHAIRMAN JAMES M. FIELD**

**DISTRICT IV**
**VICE CHAIRMAN CLYDE C. HOLLOWAY**

**DISTRICT V**
**COMMISSIONER FOSTER L. CAMPBELL**

**DISTRICT III**
**COMMISSIONER LAMBERT C. BOISSIERE, III**

**EVE KAHAO GONZALEZ**
**SECRETARY**

**DISTRICT I**
**COMMISSIONER ERIC F. SKRMETTA**

# ATTACHMENT B

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July 22, 2011

Ms. Terri Lemoine
Louisiana Public Service Commission
The Galvez Building, 12th Floor
602 North 5th Street
Baton Rouge, LA 70125

Re: U-31364 Consolidated Proceeding of dockets:
U-31256: BST v. Image Access
U-31257: BST v. Budget Prepay
U-31258: BST v. BLC Management
U-31259: BST v. dPi Teleconnect
U-31260: BST v. Tennessee Telephone

Dear Ms. Lemoine:

In accordance with Rule 3 of the LPSC Rules regarding filing via facsimile, enclosed are the original and two (2) copies of AT&T Louisiana's Opposition Memorandum to Exceptions of Resellers and Staff supporting our filing today via facsimile. The facsimile transmission fee of $25.00 is also included. I am enclosing an additional copy of this filing which I request that you please date stamp and return to me in the envelope provided.

Thank you for your assistance in this matter.

Sincerely,

Michael D. Karno

MDK/tbd
Enclosures
cc: Official Service List (w/enclosure) (via email and U.S. Mail)

925027v2

# LOUISIANA PUBLIC SERVICE COMMISSION
## ADMINISTRATIVE HEARINGS DIVISION

| | | |
|---|---|---|
| BellSouth Telecommunications, Inc. D/B/A AT&T Southeast D/B/A AT&T Louisiana versus Image Access, Inc. D/B/A New Phone Docket No. U-31256 | ) | |
| BellSouth Telecommunications, Inc. D/B/A AT&T Southeast D/B/A AT&T Louisiana versus Budget Prepay, Inc. D/B/A Budget Phone D/B/A Budget Phone, Inc. Docket No. U-31257 | ) | |
| BellSouth Telecommunications, Inc. D/B/A AT&T Southeast D/B/A AT&T Louisiana versus BLC Management, LLC D/B/A Angles Communications Solutions D/B/A Mexicall Communications Docket No. U-31258 | ) | CONSOLIDATED DOCKET NO. U-31364 |
| BellSouth Telecommunications, Inc. D/B/A AT&T Southeast D/B/A AT&T Louisiana versus dPi Teleconnect, LLC Docket No. U-31259 | ) | |
| BellSouth Telecommunications, Inc. D/B/A AT&T Southeast D/B/A AT&T Louisiana versus Tennessee Telephone Service, Inc. D/B/A Freedom Communications USA, LLC Docket No. U-31260 | ) | |

## AT&T LOUISIANA'S OPPOSITION MEMORANDUM TO EXCEPTIONS OF RESELLERS AND STAFF

In accordance with Rule 56 of the Rules of Practice and Procedure of the Louisiana Public Service Commission ("the Commission") and the Proposed Recommendation of the Administrative Law Judge ("Proposed Recommendation") entered in this docket on June 22,

2011, BellSouth Telecommunications, LLC[1] d/b/a AT&T Louisiana ("AT&T Louisiana") respectfully submits its Opposition Memorandum to the Exceptions to the ALJ's Proposed Recommendation filed by the Resellers on July 12, 2011 ("Resellers Exceptions") and to the Staff's Exceptions to Proposed Recommendation/Draft Order filed on July 12, 2011 ("Staff's Exceptions").[2]

Contrary to these Exceptions, the Proposed Recommendation is well-reasoned, fully supported by controlling law and the evidence of record, and consistent with:

the FCC's *Local Competition Order*;

*BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007) ("*Sanford*");

the Staff's letter of September 30, 2009;

Judge DeVitis' Proposed Recommendation in Commission Docket No. U-30976;

the North Carolina Commission's Order in *dPi v. AT&T North Carolina*;

the North Carolina Commission's Appellate Brief (submitted by the Office of the North Carolina Attorney General) supporting that Order;

the South Carolina Office of Regulatory Staff's recommendation in the companion Consolidated Phase proceedings before the South Carolina Commission; and

the North Carolina Public Staff's Proposed Order in the the companion Consolidated Phase proceedings before the North Carolina Commission.

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[1] Effective July 1, 2011, BellSouth Telecommunications, Inc. was converted to BellSouth Telecommunications, LLC by operation of Georgia law (the law of the state in which the former BellSouth Telecommunications, Inc. was incorporated).

[2] While the Staff's Exceptions address only the cashback issue, the Resellers' Exceptions address all three issues in this docket. Moreover, the Resellers' Exceptions present many of the same "cashback" arguments as Staff presents in its Exceptions. AT&T Louisiana's Objection, therefore, focuses on the Resellers' Exceptions and addresses any additional arguments the Staff presents as necessary.

In sharp contrast, AT&T Louisiana is not aware of any decisions, recommendations, or briefs that adopt the Resellers' position on any of the three issues in this docket, and the Resellers do not cite to any in their Exceptions. Accordingly, AT&T Louisiana respectfully requests that the Administrative Law Judge issue a Final Recommendation that is consistent in every respect with the Proposed Recommendation.

## EXCEPTION NO. 1 (CASHBACK)

The Resellers argue that "[t]he Proposed Recommendation fails to apply the avoided cost discount to the 'effective retail rate'" and that it improperly "appl[ies] the Commission's discount twice."[3] The evidence squarely refutes both of these arguments. The parties stipulated that under AT&T Louisiana's method that is endorsed by the Proposed Recommendation: (1) a reseller orders the requested telecommunications service and is billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the Commission-approved 20.72% resale discount rate); and (2) the reseller requests a cashback promotional credit which, if verified as valid by AT&T Louisiana, results in the reseller receiving a bill credit in the amount of the face value of the retail cashback benefit discounted by the the Commission-approved 20.72% resale discount rate.[4] Dr. Taylor correctly testified that applying the Commission-approved resale discount to both the retail price and to the cashback amount in this manner is "algebraically identical" to applying the discount "***precisely once***" to the retail promotional price (which often was referred to during the hearing as the effective retail

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[3] *See* Resellers' Exceptions at 2. Similarly, the Staff argues that the Proposed Recommendation "fails to first calculate the 'effective retail rate' created by the 'cash-back offering' prior to applying the wholesale discount . . . ."*See* Staff's Exceptions at 2.

[4] *See* Stipulations for Consolidated Phase at ¶¶7-9; Taylor Direct at 14).

price).[5] This evidence fully supports the Proposed Recommendation's conclusion that AT&T Louisiana's method is appropriate, and that conclusion is consistent with: the FCC's *Local Competition Order;*[6] *Sanford*; the Staff's letter of September 30, 2009;[7] Judge DeVitis' Proposed Recommendation in Commission Docket No. U-30976;[8] the North Carolina Commission's Order in *dPi v. AT&T North Carolina*;[9] the North Carolina Commission's appellate brief (submitted by the Office of the North Carolina Attorney General) supporting that Order;[10] the South Carolina Office of Regulatory Staff's Recommendation in the companion Consolidated Phase proceedings before the South Carolina Commission;[11] and the North Carolina Public Staff's Proposed Order in the the companion Consolidated Phase proceedings before the North Carolina Commission.[12] AT&T Louisiana is not aware of any decisions, recommendations, or briefs that adopt the Resellers' position on any of the three issues in this docket, and the Resellers do not cite to any in their Exceptions.

The Resellers' contend that the Proposed Recommendation "is at odds with . . . ALJ DeVitis' proposed recommendation in Commission Docket No. U-30976," *see* Resellers' Exceptions at 2, but that contention cannot be taken seriously. As explained in Judge DeVitis' Proposed Recommendation in that docket, dPi (a Reseller) ordered telecommunications services that were subject to retail cashback promotions from AT&T Louisiana, and AT&T Louisiana

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[5] *See* Tr. Vol. I at 36, 59 (emphasis added). *See also* AT&T Louisiana's Post-Hearing Brief at 2-4.

[6] *See* AT&T Louisiana's Post-Hearing Brief at 4-8.

[7] *See Id.* at 11.

[8] *See Id.* The Resellers contention that the Proposed Recommendation in this docket is "at odds with" Judge DeVitis' Proposed Recommendation (*see* Resellers' Exceptions at 2) is refuted below.

[9] *See* AT&T Louisiana's Post-Hearing Brief at 13.

[10] *See* AT&T Louisiana's Notice of Subsequent Developments at 3 (filed in Docket No. 31364 on April 27, 2011).

[11] *Id.* at 2.

[12] *See* AT&T Louisiana's Letter filed June 21, 2011.

charged dPi the retail rate for those services less the Commission-approved 20.72% resale discount.[13] dPi requested cashback promotional credits associated with the services it ordered,[14] and AT&T Louisiana denied those requests on the grounds that the cashback promotion was not subject to resale.[15] Judge DeVitis ruled that these promotions were subject to resale.[16] The issue, therefore, became the amount of credit AT&T Louisiana owed dPi: "dPi argu[ed] that it should receive the full amount of the cash back premium offered to AT&T's retail customers, not the premium amount reduced by the wholesale discount factor as claimed by AT&T";[17] and AT&T Louisiana "argu[ed] that any award should also be reduced by the 20.72% residential discount established by the Louisiana Commission . . . ."[18] This is the same issue as the "cashback" issue that is addressed in the Proposed Recommendation in this docket – what is the appropriate amount of credit owed. Consistent with the Proposed Recommendation in this docket, Judge DeVitis' Proposed Recommendation notes that "dPi argues ***unconvincingly*** that it should receive the enter amount of the cash back promotion, unreduced by any wholesale discount"[19] and finds instead that **"[a]ll cash back promotions are to be reduced by the wholesale residential discount which in Louisiana has been established to be 20.72%."**[20]

Finally, the Resellers and Staff are mistaken when they argue that the Proposed Recommendation is inconsistent with *BellSouth Telecom. Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007).[21] Their primary argument is that *Sanford* requires the resale discount to be applied to the

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13 *See* Proposed Recommendation in Docket No. U-30976 at 9, ¶7.
14 *Id.* at 10, ¶12.
15 *Id.* at 10, ¶¶13, 17.
16 *Id.* at 15.
17 *Id.* at 6.
18 *Id.* at 8.
19 *Id.* at 25 (emphasis added).
20 *Id.* at 26 (emphasis in original).
21 Resellers' Exceptions at 2-3; Staff's Exceptions at 3-4.

"promotional" or "effective" retail price of the service."[22] As explained above, however, that is exactly what the method endorsed by the Proposed Recommendation does. This is evident when the method endorsed by the Proposed Recommendation is applied to the example set out in the *Sanford* decision itself. In that example, a service priced at $120 per month is subject to a monthly rebate check for $100. The *Sanford* court found that the appropriate wholesale price for this service is $16, and the method endorsed by the Recommended Order produces this identical $16 wholesale price.[23] In contrast, the methods endorsed by the Resellers and the Staff do not.[24] Clearly, the Proposed Recommendation is consistent with *Sanford*, and any suggestion to the contrary is refuted by the unequivocal statement of the North Carolina Commission – the very Commission whose orders were affirmed by the *Sanford* decision – that "***the method of calculating the promotional credits advocated by AT&T is consistent with the method approved in Sanford.***"[25]

## EXCEPTION NO. 2 (CASHBACK)

The Resellers argue that the Proposed Recommendation "fails to consider that its method for calculating cash back credits creates a wholesale price which is greater than retail."[26] As explained at pages 16 to 17 of AT&T Louisiana's Post-Hearing Brief, however, what the Resellers really mean is that they would receive less money from AT&T Louisiana for keeping

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[22] Resellers' Exceptions at 2, Staff's Exceptions at 3. The Resellers proffer a second argument that *Sanford* somehow supports their position (which AT&T Louisiana squarely refutes below) that "resellers must be subject to a lower, wholesale charge as compared to retail customers." Resellers' Exceptions at 3. The Resellers, however, cite no language in the *Sanford* decision to support this argument, and for good reason – no such language appears in the decision.

[23] *See, e.g.,* AT&T Louisiana's Post-Hearing Brief at 8-9.

[24] *Id.*

[25] *See* North Carolina Commission's Brief (attached to AT&T Louisiana's Notice of Subsequent Developments) at 17 (emphasis added).

[26] *See* Resellers' Exceptions at 5.

service for only one month than a retail customer would receive from AT&T Louisiana for keeping service for only one month. After all, their witness Mr. Gillan acknowledged that if a Reseller retains service for more than a single month, the Reseller pays a net amount that is not only ***less*** than what the retail customer pays, but that is ***less by the 20.72% resale discount rate*** established by the Commission.[27] The Proposed Recommendation declines the Resellers' invitation to consider a single month in isolation and, instead, appropriately endorses a method that produces wholesale prices that are less than retail prices when viewed over any reasonable period of time.[28] This is consistent not only with the testimony of AT&T Louisiana witness Dr. Taylor,[29] but also with the testimony of Reseller witness Dr. Klein, who acknowledged that in considering pricing questions like the ones in this docket, "you would have to look at more than one month."[30] It also is consistent with the South Carolina ORS Recommendation in the companion Consolidated Phase docket before the South Carolina Commission,[31] the North Carolina Commission's Appellate Brief,[32] and the North Carolina Public Staff's Proposed Order in the companion Consolidated Phase docket before the North Carolina Commission.[33]

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27 *See* Tr. Vol. II at 36, AT&T Cross-Examination Exhibit No. 7.

28 *See* AT&T Louisiana's Post-Hearing Brief at 16-20; AT&T Louisiana's Reply Brief at 14-18.

29 *See, e.g.,* AT&T Louisiana's Post-Hearing Brief at 17-20.

30 *See* Tr. Vol. II at 71; Joint Exhibit 4 at 58.

31 *See* South Carolina ORS Recommendation (attached to AT&T Louisiana's Notice of Subsequent Developments) at 3 ("While we believe that it is not appropriate to consider only the month in which the cash-back is received, ORS believes that these types of promotion should be evaluated over a reasonable period of time.").

32 *See* North Carolina Commission's Appellate Brief (attached to AT&T Louisiana's Notice of Subsequent Developments) at 19 ("the argument is not compelling that the difference between the retail price and wholesale price in a particular month is problematic . . . .").

33 *See* North Carolina Public Staff's Proposed Order (attached to AT&T Louisiana's Letter filed June 21, 2011) at 7. ("Thus, while in a single month the wholesale rate may exceed the retail price, it is appropriate to compare the wholesale and effective retail rates over a longer period than a single month.").

Even if it were appropriate to consider a single month in isolation as proposed by the Resellers (and it is not), the Resellers are simply wrong when they argue that FCC regulations "require that wholesale prices should ***always*** be less than retail prices."[34] The FCC's *Local Competition Order* clearly contemplates – and even encourages – short-term situations in which the wholesale price is greater than the retail price, recognizing that the pro-competitive effects of such short-term situations outweigh any anticompetitive effects.[35]

This provision of the *Local Competition Order*, the evidence of record, and AT&T Louisiana's submissions also refute the argument that the Proposed Recommendation places Resellers "at a competitive disadvantage to AT&T."[36] If a Reseller gives its end user the same cashback benefit as AT&T Louisiana gives its retail customer, and if the Reseller prices its service only slightly higher than AT&T Louisiana's retail prices for similar services, AT&T Louisiana's method allows the Reseller to use the same cashback offering AT&T Louisiana uses to attract a customer for a mere fraction of the out-of-pocket amount AT&T Louisiana incurs.[37] This clearly does not put the Reseller at a competitive disadvantage. The evidence of record, of course, demonstrates that Resellers' prices typically are significantly higher than AT&T Louisiana's retail prices for similar services,[38] and the Resellers presented no evidence that they actually give their customers the same cashback benefit that AT&T Louisiana gives its qualifying retail customers (or any cashback benefit at all, for that matter). Even in situations in which the Resellers contend the retail price is "negative" in the first month, therefore, the

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34 *See* Resellers' Exceptions at 5 (emphasis added).

35 *See* AT&T Louisiana's Reply Brief at 15-16. *See also* North Carolina Commission's Brief at 17 (citing this provision of the *Local Competition Order*, among other things, in support of its conclusion that the "wholesale must always be lower than retail" argument is "flawed for several reasons").

36 *See* Staff's Exceptions at 2.

37 *See* AT&T Louisiana's Post-Hearing Brief at 17-18; Attachment B.

38 *See* AT&T Louisiana's Post-Hearing Brief at 20 n.49.

Resellers typically receive positive revenue in the first month of a cashback promotional offering, while AT&T Louisiana is out-of-pocket in the first month.[39] This cannot realistically be viewed as putting a Reseller at a competitive disadvantage to AT&T.

The Resellers further argue that the Proposed Recommendation errs in not adopting the modified formula proposed by Staff in its Brief.[40] This argument is without merit for all of the reasons set forth above and others, including without limitation: the proposed modified formula distorts the Commission-approved avoided cost discount by overstating the estimated avoided costs;[41] it impermissibly establishes nonuniform wholesale discount rates without a supporting avoided cost study;[42] and it would have a chilling effect on promotional offerings to the detriment of Louisiana consumers.[43] Accordingly, the North Carolina Commission's Appellate Brief correctly notes that this modified formula (which dPi proposed in that proceeding) is "incorrect mathematically" and "ignores the formula that is inherent in the FCC regulation . . . ."[44]

**EXCEPTION NO. 3 (LINE CONNECTION CHARGE WAIVER ("LCCW"))**

The Resellers acknowledge that AT&T Louisiana "offers [the LCCW] promotion to retail and wholesale customers at the same price: $0.00."[45] They contend, however, that AT&T Louisiana is required to actually pay the Resellers when AT&T Louisiana connects the lines the Resellers use to provide service to (and collect revenue from) their end user customers, relying

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39 *See* AT&T Louisiana's Post-Hearing Brief at 17-18; Attachment B.

40 *See* Resellers' Exceptions at 6-8. *See also* Staff's Exceptions at 3-4;.

41 *See* AT&T Louisiana's Reply Brief at 11-22.

42 *See Id.* at 22-23. *See also* North Carolina Commission Brief at 20 (rejecting this modified formula as proposed by dPi because "without performing a cost study, it is not appropriate for the [North Carolina Commission] to abandon the 21.5% percentage discount established for AT&T.").

43 *See Id.* at 5-8.

44 *See* North Carolina Commission Brief at 10.

45 Resellers' Exceptions at 9.

again on their erroneous assertion that "the wholesale price of a service should always be less than retail."[46] The Proposed Recommendations' rejection of this absurd position is appropriate for all of the reasons set forth at pages 26 through 29 of AT&T Louisiana's Post-Hearing Brief. It is also consistent with the Staff's Post-Hearing Brief in this docket,[47] as well as the South Carolina ORS Recommendation[48] and the North Carolina Public Staff's Proposed Order[49] in the companion Consolidated Phase proceedings in those states.

**EXCEPTION NO. 4 (WORD-OF-MOUTH)**

The Resellers argue that AT&T Louisiana must make the "word-of-mouth" promotion available for resale because it "reduces the customer's 'effective retail rate' just as much as the cash back promotion . . . ."[50] This argument is refuted by the testimony of Reseller witness Dr. Klein, who conceded that if a retail customer does nothing more than purchase a telecommunications service from AT&T Louisiana, that customer does not receive any benefit under the word-of-mouth promotion.[51] Instead, to receive a word-of-mouth benefit, a retail customer must take the additional action of contacting and convincing a person who is not an

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46 *Id.*

47 *See* Staff's Post-Hearing Brief at 8 ("Staff agrees with AT&T's position, and for the reasons provided by AT&T, believes that the proper method for applying the waiver of the line connection charge is to provide a credit to the previously charged amount to the Reseller.").

48 *See* South Carolina ORS Recommendation (attached to AT&T Louisiana's Notice of Subsequent Developments) at 4. ("ORS's position is that the waiver should be in the amount of a credit to zero out the amount previously charged to the Reseller. In this manner, the Reseller is not paid for the Line Connection Charge. Thus, ORS recommends that the Commission adopt AT&T's position on this issue.")

49 *See* North Carolina Public Staff's Proposed Order (attached to AT&T Louisiana's Letter filed June 21, 2011) at 8. ("In regard to the LCCW, the effective retail rate is zero, so the effect of the promotion is that neither retail nor wholesale customers are charged the line connection charge. This hardly seems inequitable.").

50 Resellers' Exceptions at 10.

51 Klein Cross, Tr. Vol. II at 93-94.

AT&T retail customer to buy a qualifying AT&T service.[52] And as Dr. Taylor further explained, a retail customer can receive one, two, or more payments under the word-of-mouth promotion without changing the telecommunications services she buys.[53] Clearly, the "word-of-mouth" benefits do not impact the price a retail customer pays for retail services, and the Proposed Recommendation appropriately rejects the Resellers' contentions to the contrary. The Proposed Recommendation's adoption of AT&T Louisiana's position on this issue is consistent with the Staff's Post-Hearing Brief in this docket,[54] as well as the South Carolina ORS Recommendation[55] and the North Carolina Public Staff's Proposed Order[56] in the companion Consolidated Phase proceedings in those states.

## CONCLUSION

For the reasons set forth above, AT&T Louisiana respectfully requests that the Administrative Law Judge issue a Final Recommendation that is consistent in every respect with the Proposed Recommendation.

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52 *Id.*

53 Taylor Direct at 35.

54 *See* Staff's Post-Hearing Brief at 8 ("Staff agrees with AT&T that the word-of-mouth promotions should not be subject to resale.").

55 *See* South Carolina ORS Recommendation (attached to AT&T Louisiana's Notice of Subsequent Developments) at 3. ("ORS submits that resale obligations apply only to 'telecommunications services' the ILEC provides at retail, and a marketing referral program like 'word-of-mouth' should not be subject to resale. Therefore, ORS recommends that the Commission adopt AT&T's position on this issue.")

56 *See* North Carolina Public Staff's Proposed Order (attached to AT&T Louisiana's Letter filed June 21, 2011) at 9. ("The Commission believes that the Word-of-Mouth referral program is analogous to the sales efforts described in the cross-examination of Dr. Klein and is essentially a marketing program for AT&T's services. The Commission is aware of nothing in the *Local Competition Order* requiring a program that markets retail services to be made available for resale by a competitor. The Commission, therefore, finds and concludes that the Word-of-Mouth referral program should likewise not be required to be made available for resale.").

BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T SOUTHEAST D/B/A AT&T LOUISIANA

By: _____

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## CERTIFICATE OF SERVICE

This is to certify that, this 22nd day of July, 2011, a copy of the above and foregoing has been served upon all parties on the Official Service List, by U.S. Mail and electronic mail.

_____
Michael D. Karno

926555

# ATTACHMENT C

United States Court of Appeals,
Fourth Circuit.
BELLSOUTH TELECOMMUNICATIONS, INCORPORATED, Plaintiff-Appellee,
v.
Jo Anne SANFORD, Chairman; Robert V. Owens, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; Howard N. Lee; William Thomas Culpepper, II; James Y. Kerr, II, Commissioners, in their official capacities as Commissioners of the North Carolina Utilities Commission, Defendants-Appellants,
and
North Carolina Utilities Commission; Robert K. Kroger, Commissioner, Defendants,
Image Access, Incorporated, Intervenor/Defendant.

No. 06-1678.
Argued: March 14, 2007.
Decided: July 25, 2007.

**Background:** Incumbent telecommunications provider brought action against commissioners of North Carolina Utilities Commission, challenging orders in which Commission determined, pursuant to Telecommunications Act, that value of incumbent provider's incentive offers, when extended to subscribers for more than 90 days, created promotional rate that had to be offered to competing providers in form of reduced wholesale price. The United States District Court for the Western District of North Carolina, Graham C. Mullen, Senior District Judge, 2006 WL 1367379, granted summary judgment for incumbent provider. Commissioners appealed.

**Holding:** The Court of Appeals, Niemeyer, Circuit Judge, held that value of incentives that are offered to subscribers by incumbent telecommunications providers and extend for more than 90 days must be reflected in retail rate used for computing wholesale rate that is to be charged to competing providers under Act.

Reversed and remanded with instructions.

Williams, Chief Judge, filed a separate opinion concurring in part and in the judgment.

West Headnotes

**[1] Telecommunications 372 644**

372 Telecommunications
372I In General
372k633 Judicial Review or Intervention in General
372k644 k. Standard and Scope of Review. Most Cited Cases

Actions of state commissions taken under Telecommunications Act are reviewed in federal court de novo to determine whether they conform with statutory requirements. Telecommunications Act of 1996, § 101, 47 U.S.C.A. §§ 251, 252.

**[2] Telecommunications 372 644**

372 Telecommunications
372I In General
372k633 Judicial Review or Intervention in General
372k644 k. Standard and Scope of Review. Most Cited Cases

Although actions of state commissions taken under Telecommunications Act are reviewed in federal court de novo, order of state commission may deserve measure of respect in view of commission's experience, expertise, and the role that Congress has given it in Act. Telecommunications Act of 1996, § 101, 47 U.S.C.A. §§ 251, 252.

**[3] Statutes 361 219(6.1)**

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(6) Particular Federal Statutes
361k219(6.1) k. In General. Most

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Cited Cases

Although orders of state commissions construing Telecommunications Act fall outside domain of *Chevron* and its mandate of deference to reasonable agency interpretations of ambiguous statutes, given that Act delegated interpretive authority to Federal Communications Commission (FCC), not state commissions, views of state commissions may nevertheless deserve *Skidmore* respect, which flows from principle that well-reasoned views of agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. Telecommunications Act of 1996, §§ 101, 101(d)(1), 101, 47 U.S.C.A. §§ 251, 251(d)(1), 252.

**[4] Telecommunications 372 910**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k910 k. Standard and Scope of Review. Most Cited Cases

Respect was due to orders of North Carolina Utilities Commission on judicial review of those orders under Telecommunications Act, given that orders, which provided that value of incentive offers made by incumbent telecommunications provider, when extended to subscribers for more than 90 days, created promotional rate that had to be offered to competing providers in form of reduced wholesale price, resulted from deliberative notice and comment process, demonstrated valid and thorough reasoning, including careful reading and harmonizing of relevant authorities and policies, and aligned with decisions of other state commissions. Telecommunications Act of 1996, § 101(c)(4)(A), 47 U.S.C.A. § 251(c)(4)(A); 47 C.F.R. § 51.613(a)(2).

**[5] States 360 4.19**

360 States
360I Political Status and Relations
360I(A) In General
360k4.19 k. Cooperation Between State and United States. Most Cited Cases

In a scheme involving cooperative federalism, federal courts should recognize the considered role of state agencies that have accepted Congress's invitation to become crucial partners in administering federal regulatory schemes.

**[6] Telecommunications 372 865**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k865 k. Resale. Most Cited Cases

Promotions and incentives offered to subscribers by incumbent telecommunications provider, in the form of gift cards, coupons, and gifts, were not themselves "telecommunications" for purposes of provision of Telecommunications Act requiring incumbent local exchange carriers (LECs) to offer telecommunications services at wholesale rates for resale by competing providers. Telecommunications Act of 1996, §§ 3(a, c), 101(c)(4), 47 U.S.C.A. §§ 153(43, 46), 251(c)(4).

**[7] Telecommunications 372 865**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k865 k. Resale. Most Cited Cases

As used in provision of Telecommunications Act requiring incumbent local exchange carriers (LECs) to offer telecommunications services at wholesale rates for resale by competing providers, term "telecommunications service" describes both sides of the service contract between an incumbent LEC and consumer: (1) the telecommunications offered by LEC and (2) the fee paid by consumer. Telecommunications Act of 1996, § 101(c)(4), 47 U.S.C.A. § 251(c)(4).

**[8] Telecommunications 372 866**

372 Telecommunications
372III Telephones
372III(F) Telephone Service

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372k854 Competition, Agreements and Connections Between Companies
372k866 k. Pricing, Rates and Access Charges. Most Cited Cases

Although incentives offered to subscribers by incumbent local exchange carriers (LECs), such as rebates or gift cards, are not telecommunications, as defined by Telecommunications Act, they do reduce the retail price or fee for telecommunications, and therefore incentives are part of "the offering of telecommunications" which incumbent LECs must make to would-be competitors under Act. Telecommunications Act of 1996, § 101(c)(4), 47 U.S.C.A. § 251(c)(4).

**[9] Telecommunications 372 ⚷866**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k866 k. Pricing, Rates and Access Charges. Most Cited Cases

Salient question in determining whether incentive offered to subscribers by incumbent local exchange carrier (LEC) is part of "the offering of telecommunications" that incumbent LECs must make to would-be competitors under Telecommunications Act is whether the incentive affects the "fee" for telecommunications. Telecommunications Act of 1996, § 101(c)(4), 47 U.S.C.A. § 251(c)(4).

**[10] Telecommunications 372 ⚷866**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k866 k. Pricing, Rates and Access Charges. Most Cited Cases

Value of incentives, such as gift cards, checks, coupons for checks, or similar types of marketing incentives that are offered to subscribers by incumbent telecommunications providers and extend for more than 90 days must be reflected in retail rate used for computing wholesale rate that is to be charged to competing providers under Telecommunications Act. Telecommunications Act of 1996, §§ 101(c)(4), 101(d)(3), 47 U.S.C.A. §§ 251(c)(4), 252(d)(3); 47 C.F.R. § 51.613(a)(2).

***441 ARGUED:** Margaret A. Force, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants. Matthew Patrick McGuire, Nelson, Mullins, Riley & Scarborough, L.L.P., Raleigh, North Carolina, for Appellee. **ON BRIEF:** Roy Cooper, North Carolina Attorney General, Raleigh, North Carolina, for Appellants. Frank A. Hirsch, Jr., Nelson, Mullins, Riley & Scarborough, L.L.P., Raleigh, North Carolina, for Appellee.

Before WILLIAMS, Chief Judge, NIEMEYER, Circuit Judge, and T.S. ELLIS, III, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Senior Judge ELLIS joined. Chief Judge WILLIAMS wrote a separate opinion concurring in part and in the judgment.

**OPINION**

NIEMEYER, Circuit Judge:

With the purpose of creating competition in the provision of local telecommunications services, the Telecommunications Act of 1996 imposed new duties on incumbent providers, who had previously enjoyed monopolies in local markets for those services. Among the new duties was the duty to sell their services at wholesale to would-be competitors for resale to consumers. *See* 47 U.S.C. § 251(c)(4). The wholesale rate for such services was prescribed to be the incumbent provider's retail rate less a wholesale discount determined by the relevant state utility commission. *Id.* § 252(d)(3).

By two orders dated December 22, 2004, and June 3, 2005, the North Carolina Utilities***442** Commission ("NC Commission") determined, under the authority of 47 U.S.C. § 252(d)(3), that the value of an incumbent provider's incentive offers to subscribers, such as gift cards and cash rebates, when extended to subscribers for more than 90 days, created a promotional retail rate that must be offered to would-be competitors, less a wholesale discount.

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Challenging the NC Commission's orders, BellSouth Telecommunications, Inc., an incumbent provider of telecommunications services, commenced this action in the district court under 47 U.S.C. § 252(e)(6). The district court declared the NC Commission's orders invalid, holding that an incumbent provider's incentives to retail subscribers, other than direct reductions in price, need not be taken into account in calculating the wholesale rate to be charged would-be competitors.

In this appeal, we conclude that the NC Commission correctly ruled that "long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied." *See* 47 U.S.C. § 251(c)(4); 47 C.F.R. § 51.613(a), (b). Accordingly, we reverse the judgment of the district court and remand with instructions to enter summary judgment in favor of the Commissioners of the NC Commission.

I

In the spring of 2004, BellSouth Telecommunications, Inc., an incumbent provider of telecommunications services to retail subscribers in North Carolina, made a filing with the NC Commission to introduce an incentive for subscribers which offers "a coupon for a check for $100 as an incentive to subscribe to one or more regular residence lines and two or more features." This "1FR + 2 Cash Back" offer, as it was called, required subscribers to return the coupon to BellSouth within 90 days to receive their checks. The offer was to run for nine months-from June 29, 2004, through March 31, 2005. In its filing, BellSouth indicated that it would not provide the benefit of this special offer to competing providers of telecommunications services under 47 U.S.C. § 251(c)(4).

Concerned that such incentive offers could be used to circumvent the resale requirements of the Telecommunications Act, the Public Staff of the NC Commission [FN1] filed a motion with the NC Commission for a ruling that gift offers, such as BellSouth's "1FR + 2 Cash Back" offer, are "special promotions of telecommunications services under federal law which must be offered to resellers if the special offer runs for more than 90 days."

FN1. The Public Staff of the NC Commission is an independent arm of the Commission responsible for representing consumers in matters before the Commission. The Public Staff is not supervised by the Commission, but rather by an executive director appointed by the Governor. *See* N.C. Gen.Stat. § 62-15.

After giving public notice and receiving comments, the NC Commission issued an "Order Ruling on Motion Regarding Promotions," dated December 22, 2004.[FN2] In its order, the Commission determined that incentives such as those proposed by BellSouth decreased the retail rate for the purpose of calculating the wholesale rate, because retail customers effectively paid less for their telephone service in the amount of the incentives. As a result, it ***443** concluded that BellSouth was required to pass on the value of such incentives as a price reduction when selling its services to resellers, unless it could show that such restrictions on resale were "reasonable and nondiscriminatory." The NC Commission explained:

FN2. *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 (Dec. 22, 2004) (Order Ruling on Motion Regarding Promotions).

> While these promotional offerings are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings, they do result in a savings to the customers who subscribe to the regulated service.... The promotion reduces the subscriber's cost for the service by the value received in the form of a gift card or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e. the promotional rate, would become the "real" retail rate. Thus, the [incumbent provider] could use the promotion as a *de facto* rate change without changing its tariff pricing.

The Commission concluded that because the incentives reduced the retail rate for consumers, BellSouth had to pass on the value of the incentives to resellers.

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With respect to the "1FR + 2 Cash Back" offer that prompted the order, however, the Commission observed generally that some promotions, even if they extended for more than 90 days, might be proven to be reasonable and nondiscriminatory and therefore would not have to be offered to resellers. As a result, it "would be inclined to find that [the 1FR + 2 Cash Back promotion] is reasonable and nondiscriminatory.... [T]he anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the pro-competitive effects." The Commission was quick to point out, however, that resellers had not complained to the Commission nor asked it to find BellSouth's refusal to resell the promotion unreasonable or harmful to competition and that therefore it was not specifically ruling on that matter.

On BellSouth's motion for reconsideration, the NC Commission issued an order dated June 3, 2005, clarifying its December 22 order.[FN3] It noted 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. The NC Commission stated:

> The [December 22] *Order* does not require that non-telecommunications services, such as gift cards, check coupons, or merchandise, be resold. Such items do, however, have economic value. In recognition of this fact, the *Order* requires that telecommunications services subject to the resale obligation of Section 251(c)(4) be resold at rates that give resellers the benefit of the change in rate brought about by offering one-time incentives for more than 90 days. The *Order* does not require [incumbent providers] to provide [would-be competitors] with toasters, phones, knife sets, hotel accommodations, gift cards, *etc.* that they might provide to their customers as an incentive to purchase services. The *Order* does require 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 ***444** of such a reduction be passed on to resellers by applying the wholesale discount to the lower actual retail price.
>
> The NC Commission thus clarified that incentives function as retail price reductions which must be passed on to resellers. The June 3 order also clarified that even though incentives resulted in a reduced retail rate for purposes of calculating the wholesale price, BellSouth could still attempt, on a promotion-by-promotion basis, to justify any given restriction on resale as reasonable and nondiscriminatory and thereby avoid having to pass the incentive along to a would-be competitor.

FN3. *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).

BellSouth commenced this action against the NC Commission and the individual Commissioners (generally collectively, the "NC Commission") under 47 U.S.C. § 252(e)(6), requesting the district court to enter declaratory and injunctive relief against the NC Commission's orders.[FN4] Specifically, BellSouth challenged, as violating federal law, the NC Commission's determination that the value of one-time marketing incentives lasting more than 90 days must be accounted for as a reduction of the retail rate.

FN4. While BellSouth originally named the North Carolina Utilities Commission as a defendant, along with the Commissioners, it subsequently dismissed the Commission and elected to proceed only against the Commissioners under the theory of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

On cross-motions for summary judgment, the district court declared the NC Commission's orders invalid and granted summary judgment for BellSouth. It held that because incentives such as gift cards were not "telecommunications services" under 47 U.S.C. § 251(c)(4), they were not the subject of an incumbent provider's resale duty. It also concluded that the incentives were not "price discounts" under the regulations requiring incumbent providers to pass on discounts and promotions to competing providers. Thus, the court concluded that BellSouth had no obligation to give the value of the incentives to competing providers when selling them telecommunications services.

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From the district court's judgment, the NC Commission filed this appeal.

II

In enacting the Telecommunications Act of 1996, Congress intended to create competition in local telecommunications markets. Specifically, the Telecommunications Act was intended to force incumbent providers of local telecommunications services-"incumbent local exchange carriers" or "incumbent LECs"-which had regional monopolies over the local telephone infrastructure, to open their markets to competition. *See* Peter W. Huber et al., *Federal Telecommunications Law* § 1.9, at 54 (2d ed.1999). Because the local telephone monopolies controlled the physical networks necessary to provide telecommunications service, the Telecommunications Act created a series of compulsory licenses from the incumbent LECs to would-be competitors or "competitive LECs." Among other duties imposed by the Telecommunications Act, the incumbent LEC must "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)(A). This provision allows a competitive LEC to establish a market presence by reselling the incumbent's telecommunications services without building its own physical infrastructure. In selling telecommunications services to a competitive LEC, an incumbent LEC has a duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or ***445** limitations on, the resale of such telecommunications service." *Id.* § 251(c)(4)(B). The incumbent LEC must charge the competitive LEC a *wholesale rate* for the telecommunications service. "For purposes of section 251(c)(4), a *State commission* shall determine whole-sale 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." [FN5] *Id.* § 252(d)(3) (emphasis added). Thus, the wholesale rate consists of the retail rate, less whatever costs the incumbent LEC will save by selling the services in bulk to the competitive LEC. Because the wholesale rate is calculated on the basis of the retail rate, a proper determination of the retail rate is essential to creating competition through the Telecommunication Act's resale provisions.

FN5. For purposes of calculating the wholesale rate for BellSouth to charge, the NC Commission has adopted a uniform discount rate of 21.5% from BellSouth's retail price for residential services, and 17.6% from its retail price for business services.

The Federal Communications Commission ("FCC") has promulgated regulations refining the resale obligations imposed by the Telecommunications Act. Thus, when an incumbent LEC offers telecommunications services to a competitive LEC at a wholesale rate, *see* 47 C.F.R. § 51.605(a), it does so subject to *id.* § 51.605(e), which provides that the "incumbent LEC shall not impose *restrictions* on the resale by [a competitive LEC] of telecommunication services offered by the incumbent LEC" (emphasis added). Section 51.613, however, provides three exceptions to the rule prohibiting restrictions. *First,* the incumbent LEC can prohibit cross-class selling-i.e. it can prevent the competitive LEC from buying *business* services and reselling them to *residential* customers. 47 C.F.R. § 51.613(a)(1). *Second,* the incumbent LEC can restrict the resale of services offered at promotional rates, but only if those rates are in effect for less than 90 days. *Id.* § 51.613(a)(2)(i) ("An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if such promotions involve rates that will be in effect for no more than 90 days"). If promotions are offered for longer than 90 days, the incumbent LEC must offer the promotional rates to its competitors. *Third,* the incumbent LEC can impose any restrictions that it can "prove[e] to the state commission" are "reasonable and nondiscriminatory." *Id.* § 51.613(b).

Finally, the FCC adopted rules to implement the resale requirements of the Telecommunications Act and the regulations promulgated under it, issuing a "First Report and Order" in August 1996. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15,499 (1996) (First Report and Order) (hereinafter "Local Competition Order"). In its Local Competition Order, the FCC stated that "[t]he rules that [it] establishes in this Report and Order are minimum requirements upon which the states may build." *Id.* ¶ 24.

Before adopting the Local Competition Order, the FCC considered numerous comments from interested

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parties, including contentions by incumbent LECs that "promotions and discounts are only devices for marketing underlying 'telecommunication services' " and that the promotions were not themselves telecommunications services required to be resold under 47 U.S.C. § 251(c)(4). *See* Local Competition Order ¶ 941. These incumbent providers ***446** argued also that promotions and discounts were simply means "by which incumbent LECs differentiate their services from resellers' offerings." *Id.* ¶ 942. After considering these and other similar comments, the FCC concluded:

> Section 251(c)(4) provides that incumbent LECs must offer for resale at wholesale rates "any telecommunications service" that the carrier provides at retail to noncarrier subscribers. This language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.

*Id.* ¶ 948. Nonetheless, the FCC observed that *short term* promotions serve "pro-competitive ends through enhanced marketing." Thus, it tempered its Order to exclude short-term promotions:

> There remains, however, the question of whether all short-term promotional prices are "retail rates" for purposes of calculating wholesale rates pursuant to section 252(d)(3). The 1996 Act does not define "retail rate;" nor is there any indication that Congress considered the issue. In view of this ambiguity, we conclude that "retail rate" should be interpreted in light of the pro-competitive policies underlying the 1996 Act. We recognize that promotions that are limited in length may serve pro-competitive ends through enhancing marketing and sales-based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their pro-competitive effects will outweigh any potential anti-competitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

Local Competition Order ¶ 949. In addition to its ruling that promotional and discount prices generally were to be treated as "retail rates" which incumbent LECs must offer to their would-be competitors, the FCC observed that short-term promotions can be pro-competitive marketing tools. It therefore "establish[ed] a *presumption* that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to section 251(c)(4)(A)." Local Competition Order ¶ 950; *see also* 47 C.F.R. § 51.613(a)(2).

Applying these provisions of the Telecommunications Act, the regulations under it, and the FCC's Local Competition Order to the question of whether gift card type promotions must be taken into account in calculating the retail rate, the NC Commission concluded in its order of December 22, 2004:

> Despite the [incumbent LECs'] argument that gift card type promotions are incentives and/or marketing tools used to distinguish their services in the marketplace, these promotions are in fact promotional offerings subject to the FCC's rules on promotions. While these promotional offerings are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings, they do result in a savings to the customers who subscribe to the regulated***447** service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the "real" retail rate available in the marketplace.

The NC Commission therefore ruled that incumbent providers' offers of incentives to subscribers in the form of "gift cards, checks, coupons for checks or similar types of benefits," offered for more than 90 days, must be made available to resellers in the form of a reduced wholesale price.

In declaring the NC Commission's orders invalid, the district court advanced two reasons why the orders were inconsistent with the Telecommunications Act. *First,* the district court relied on the following syllogism: (1) 47 U.S.C. § 251(c)(4) requires an incumbent LEC to resell "any telecommunications service"

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that it provides; (2) gift cards, checks, coupons and similar types of incentives are not "telecommunications services"; therefore (3) the incumbent LEC does not have to provide the benefit of gift cards, checks, coupons and similar types of incentives to competitive LECs. *Second,* the district court recognized that the FCC "has determined [in its Local Competition Order] that the Act's resale obligations extend to *promotional price discounts* offered in retail on retail communications services." Reading a *price discount* not to include "marketing incentives," the court held that marketing incentives "such as Walmart [sic] gift cards" are therefore excluded from the FCC's Local Competition Order requiring that incumbent LECs pass on price discounts to competitive LECs. The court explained:

> A customer receiving a Walmart [sic] gift card in exchange for signing up to receive certain services, for example, will pay the same full tariff price for the service each month as customers who subscribed to the service without the benefit of the gift card. Moreover, a customer cannot use a Walmart gift card or coupon to pay her bill.

The question presented on appeal, then, is whether the district court erred as a matter of law in concluding that the NC Commission's Order was inconsistent with the Telecommunications Act, the regulations promulgated under it, and the FCC's Local Competition Order.

III

[1] Actions of state commissions taken under 47 U.S.C. §§ 251 and 252 are reviewed in federal court *de novo* to determine whether they conform with the requirements of those sections. *See GTE South, Inc. v. Morrison,* 199 F.3d 733, 745 (4th Cir.1999); *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania,* 271 F.3d 491, 515-17 (3d Cir.2001).

[2][3] But even with our *de novo* standard of review, an order of a state commission may deserve a measure of respect in view of the commission's experience, expertise, and the role that Congress has given it in the Telecommunications Act. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 139-40, 65 S.Ct. 161, 89 L.Ed. 124 (1944). To be sure, state commissions' orders construing the Telecommunications Act fall outside *Chevron*'s domain and its mandate of deference to reasonable interpretations of ambiguous statutes, because the Telecommunications Act, 47 U.S.C. § 251(d)(1), delegated interpretive authority to the FCC, not to the state commissions.[FN6] *See United States v. Mead,* 533 U.S. 218, 226-27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); ***448** *MCI Telecomm.,* 271 F.3d at 516. Yet the views of state commissions may nevertheless deserve respect under *Skidmore*-the respect that flows from the long-standing principle that "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Mead,* 533 U.S. at 227, 121 S.Ct. 2164 (*quoting Skidmore,* 323 U.S. at 139-40, 65 S.Ct. 161). In any given case, the amount of respect afforded to a state commission will vary in accordance with "the degree of the agency's care, its consistency, formality, and relative expertness," as well as "the persuasiveness of the agency's position." *Mead,* 533 U.S. at 228, 121 S.Ct. 2164.

> FN6. Of course, the Telecommunications Act did delegate other responsibilities to the state commissions, such as, for example, certain rate-setting authority. *See* 47 U.S.C. § 252(d).

The NC Commission's expertise and experience in applying communications law are considerable and even predate the enactment of the Telecommunications Act of 1996, as the Commission functioned under the Communications Act of 1934, and the Telecommunications Act of 1996 called upon this expertise and experience. *See* Local Competition Order ¶ 2 ("The 1996 Act forges a new partnership between state and federal regulators.... As this Order demonstrates, we have benefited enormously from the expertise and experience that the state commissioners and their staffs have contributed to these discussions"). Given the NC Commission's accumulation of knowledge and experience in telecommunications law and policy, its orders should not be taken lightly. *See* Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform,* 52 Vand. L.Rev. 1, 24-30 (1999) (arguing for considerable deference to state commission decisions under the Telecommunications Act).

[4] Additionally, respect is due the orders of the NC Commission because the NC Commission has applied its expertise and experience in formulating them. The NC Commission's orders resulted from a

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deliberative notice and comment process; they demonstrate valid and thorough reasoning, including careful reading and harmonizing of relevant authorities and policies; and they align with the decisions of other state commissions.[FN7] *See Skidmore,* 323 U.S. at 139-40, 65 S.Ct. 161; *Mead,* 533 U.S. at 227-28, 121 S.Ct. 2164.

FN7. In addition to the North Carolina Utilities Commission, other state commissions have read the Telecommunications Act and regulations in this fashion. *See, e.g., In re Tariff Filing of U.S. West Communications, Inc. to "Winback" Residential Customers Who Have Changed Their Telephone Service to Another Provider,* Wyo. Pub. Serv. Comm'n, No. 70,000-TT-98-379, Rcd. No. 3992, at 29-30 (Jan. 8, 1999); *In re Petitions by AT & T Communications of the Southern States, Inc.,* Fla. Pub. Serv. Comm'n, No. PSC-96-1579-FOF-TP, at 69-71 (Dec. 31, 1996).

[5] Additionally, 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. *See Verizon Md., Inc. v. Global Naps, Inc.,* 377 F.3d 355, 371 (4th Cir.2004) (Niemeyer, J., concurring in part and dissenting in part) ("even while pursuing these federal purposes, Congress left in place many of the traditional functions of State public utility commissions"); *see, e.g.,* 47 U.S.C. § 252(d) (giving state commissions rate-setting authority); *id.* § 252(e)(3) (leaving States authority to establish and enforce state law relating to ***449** agreements between carriers, so long as consistent with the Act); *id.* § 252(f)(2) (permitting States to apply state law to incumbent LEC agreements); *id.* § 253(b) (preserving state authority to protect and advance universal service); *id.* § 254(f) (similar); *id.* § 261(b) (preserving state regulations not inconsistent with the Act); *id.* § 261(c) (residual authority for States to pass regulations not inconsistent with the Act).

Thus, States' continuing exercise of authority over telecommunications issues forms part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment and have the freedom to do so. *See generally* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act,* 76 N.Y.U. L.Rev. 1692, 1732 (2001) ("where the FCC does not mandate a national approach to interpreting and applying the Telecom Act, state agencies are left with considerable flexibility to do so, albeit subject to federal court review").

Thus, even though we review the NC Commission's orders for compliance with 47 U.S.C. §§ 251 and 252 *de novo,* we nonetheless approach the task with a respect for the Commission's special role in the regulatory scheme, its freedom to maneuver in that role, its expertise and experience, and the care it has taken in the particular task of forming its orders.

IV

[6] Addressing the district court's first reason for reversing the NC Commission, we note that the district court assumed that the NC Commission concluded that gift cards, checks, coupons for checks, and similar types of incentives are *themselves* "telecommunications services" that incumbent LECs were required to offer competitive LECs for resale. It relied on that assumption to conclude that "there can be no argument that [such incentives] are 'telecommunication services,' " and accordingly found the NC Commission in error.

[7][8] We agree with the district court's observations that promotions and incentives in the form of gift cards, coupons, and even gifts are not themselves "telecommunications" as addressed in 47 U.S.C. § 251(c)(4). The term "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." *Id.* § 153(43). But this observation fails to address accurately the scope of the resale duty imposed by § 251(c)(4). That section requires an incumbent LEC to resell its "telecommunications service" at wholesale to competing LECs, and "telecommunications service" is defined to be "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications service"

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thus describes *both* sides of the service contract between an incumbent LEC and a consumer: (1) the "telecommunications" offered by the provider; *and* (2) the "fee" paid by the consumer. While an incentive, such as a rebate or a gift card, is obviously not "telecommunications," it does reduce the retail price or "fee" for telecommunications. As such, an incentive is part of "the offering of telecommunications" which incumbent LECs must make to would-be competitors.

[9] The district court pursued a red herring in focusing on the fact that a gift card, check, coupon for a check, or other similar type of incentive is not a telecommunication. The salient question is whether the incentive affects the "fee" for telecommunications.***450** The NC Commission never held that the marketing incentives under discussion were "telecommunications." It noted, to the contrary, that "gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunication services [were] not themselves services (regulated or nonregulated) offered by a public utility." Its order "does not require that non-telecommunications services, such as gift cards, check coupons, or merchandise, be resold." Rather, the NC Commission held that the incentives had "economic value" which effectively reduced the relevant "*fee,*" *see* 47 U.S.C. § 153(46)-the retail rate charged for telecommunications. Accordingly, the NC Commission concluded that telecommunications (the underlying telephony) must be resold to competing LECs "*at rates* that give resellers the benefit of the *change in rate* brought about by offering one-time incentives for more than 90 days." (Emphasis added).

Even 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 LECs' resale duty.

V

[10] This brings us to the core issue-whether the NC Commission correctly determined that the value of incentives such as gift cards, checks, coupons for checks, or similar types of marketing incentives extending for more than 90 days must be reflected in the retail rate used for computing the wholesale rate that is to be charged to competitive LECs under 47 U.S.C. § 252(d)(3).

The NC Commission concluded that when such incentives are offered, the nominal tariff (the charge that appears on the subscriber's bill) is not the "retail rate charged to subscribers" under § 252(d)(3) because the nominal tariff does not reflect the value of the incentives. Retail subscribers are, in fact, charged *less* than the tariff rate because they receive the added value of the incentives. BellSouth insists, however, that "a give-away such as a gift card is not a price reduction, promotional or otherwise," but rather a marketing expense incurred by it to compete in the marketplace for subscribers.

The parties agree, as we also observe, that because the term "retail rate" is not defined in the Telecommunications Act, nor in the regulations promulgated under it, the question of whether incentives implicate the retail rate must be resolved in light of the pro-competition policies of the Act. *See* Local Competition Order ¶ 949. The following hypothetical demonstrates how the NC Commission viewed the question in light of these policies.

Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, *see* Local Competition Order ¶¶ 931-33, BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to compete with BellSouth's $20 retail fee. Now suppose that BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100. According to the NC Commission's orders, the appropriate wholesale rate is still $16, because that is the *net* price paid by the retail customer ($20), less the wholesale discount (20%). According to BellSouth's position, however, the appropriate wholesale rate would be $96 (the nominal retail rate of $120, less the 20% discount for ***451** avoided costs). Because its position would not account for the promotional rebate check, BellSouth's position would obviously impede competition. The competitive LEC would have to pay BellSouth a wholesale rate of $96 for the telephone service for which BellSouth's retail customers would pay only $20. Thus, as the NC Commission observed, by structuring its offerings with incentives, BellSouth would be able to price its

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competitors out of the market. Indeed, competitive LECs have alleged just such a price squeeze in proceedings currently before the FCC. *See In re Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale,* Joint Comments of ABC Telecom, et al., FCC Docket No. 06-129 (filed July 31, 2006), at 5-10.

While the anticompetitive effect of a smaller incentive would not be as severe as in the hypothetical-indeed at some point an incentive undoubtedly promotes competition-the line between an incentive that is anticompetitive and one that serves as a pro-competitive marketing tool is just the type of line that the FCC is authorized and qualified to draw. Incumbent LECs have strong, indeed natural, incentives to win in the marketplace, and the FCC recognized in its Local Competition Order the real possibility that promotional offerings could be used to circumvent the pro-competitive resale requirements of the Telecommunications Act. Local Competition Order ¶ 948 ("no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs"). As the FCC ruled in its Local Competition Order, "We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a reseller. Given the probability that restrictions and conditions may have anticompetitive results, we ... *presume* resale restrictions and conditions to be ... in violation of section 251(c)(4)." Local Competition Order ¶ 939 (emphasis added).

That the FCC may have drawn the line-between an anticompetitive incentive and a pro-competitive promotion-at the right place is, to some degree, indicated by the fact that both incumbent and competitive LECs have complained about its location. As one commentator has observed, "The [incumbent LECs] regard the pricing scheme as confiscatory and the arguments made on the scheme's behalf as an elaborate procedural smokescreen. The [competitive LECs] regard the question of price as settled, and treat non-cooperation as a deviation from the required legislative standard." Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired,* 22 Yale J. on Reg. 315, 339-40 (2005) (discussing unbundling requirements).

BellSouth contends that the "core issue before this Court" is the "meaning of the term 'promotion' in the context of the Act and the FCC's First Report and Order." It argues at some length that when the FCC stated that it was "only referring to ... temporary price discounts," the FCC was referring to tariff rate discounts (discounts appearing on the subscriber's bill for services). BellSouth asserts that the Local Competition Order does not address promotional offerings that do not result in a change in the tariff rate.

The NC Commission, however, exercising its statutory authority under 47 U.S.C. § 252(d)(3), determined what comprised a "retail rate" within the general parameters given by the FCC in its Local Competition Order. The NC Commission concluded in its December 22, 2004 order that while gift card type promotions were

> ***452** not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings, they do result in a savings to the customers who subscribe to the regulated service. The longer such promotion is offered, the more likely the savings will undercut the tariffed retail rate and the promotional rate becomes the 'real' retail rate available in the marketplace.

The question is not, as BellSouth seems to suggest, whether the NC Commission's determination was compelled by the Local Competition Order, but rather whether it was authorized by it. Given the latitude afforded state commissions on this issue, we conclude that the NC Commission properly read the FCC's Local Competition Order to require incumbent LECs to do more than pass on to resellers only monetary discounts from the tariff rate. This is based on the Local Competition Order's contextual language; on the comments that the FCC had received in the course of crafting the order-comments which addressed not only discounts from the tariff rate, but also incentive-based promotions; and above all, on the Telecommunications Act's overarching pro-competition purpose.

It is true that the FCC did not state explicitly what it was referring to when it discussed "promotions and discounts" in its 1996 Local Competition Order. But it made amply clear that it was referring to any promotion or discount by which incumbent LECs could

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"avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." Local Competition Order ¶ 948. Recognizing that promotions and discounts could amount to "retail rates" and noting that Congress did not define "retail rate," the FCC concluded that " 'retail rate' should be interpreted in light of the pro-competitive policies underlying the 1996 Act." *Id.* ¶ 949. Thus, it presumed that a promotion or discount offered a subscriber for 90 days or less was pro-competitive, whereas a promotion or discount offered for more than 90 days became part of a retail rate that had to be offered to competing LECs. *Id.* ¶ 950; *see also* 47 C.F.R. § 51.613(a)(2).

Both the FCC and the NC Commission thus understood that incentives can sometimes be more than "marketing expenses"; they can be devices used to create an uneven playing field. The NC Commission's orders addressed that concern well within the parameters set out by the FCC in its Local Competition Order.

BellSouth argues that the NC Commission's orders stack the deck against it, denying it the opportunity to compete by using marketing incentives unless it pays for those incentives twice-once in paying for the incentives and again in reducing its retail rate for its competitors. The competing LECs would respond in a like manner that, without the orders, they would have to pay for the incentives twice in order to compete-once when they pay for the service at a wholesale rate that was not adjusted for the incentives and again when they pay for similar marketing incentives to offer their own customers.

The NC Commission reached a sensible middle ground, in harmony with the FCC's judgment. The NC Commission observed, "[i]f a promotion is offered for an indefinite extended period of time, *at some point* it starts to become or look more like a standard retail offering that should be subject to the duty to resell at the wholesale rate." (Emphasis added). The NC Commission then concluded that that point would be 90 days, the same period specified by the FCC in its regulations and in ***453** its Local Competition Order. *See* 47 C.F.R. § 51.613(a)(2); Local Competition Order ¶ 950 ("We therefore establish a presumption that promotional prices offered for a period of 90 days or less need not be offered at a discount to resellers. Promotional offerings greater than 90 days in duration must be offered for resale at wholesale rates pursuant to § 251(c)(4)(A)"). In so ruling, the NC Commission did not decide how to treat any particular incentive or promotion. Rather, it established guidelines similar to those given by the FCC in its Local Competition Order. Indeed, with respect to the only specific promotion discussed, the "1FR + 2 Cash Back" offer, the NC Commission indicated that it was inclined to allow the incentive, even though it amounted to a restriction on resale and lasted more than 90 days, because it was pro-competitive. *See* 47 C.F.R. § 51.613(b) (the incumbent LEC can impose any restrictions that it can "prove[ ] to the State commission" are "reasonable and nondiscriminatory").

We therefore conclude that the district court erred in concluding that the NC Commission's orders violated the Telecommunications Act, the regulations promulgated under it, and the FCC's Local Competition Order. In reversing the district court and restoring the NC Commission's orders, we emphasize that the NC Commission has invited BellSouth to show that any particular restriction on resale is pro-competitive, reasonable, and not discriminatory.[FN8]

FN8. The tenor of the NC Commission's orders suggests, for instance, that the benefit of de minimus incentives such as merchandise or low-value gift cards need not be passed on to resellers.

BellSouth argues further that as an accounting matter, the NC Commission's orders would unreasonably double-count its costs of incentives. It claims that it accounts for incentives as "marketing expenses" under the mandatory government accounting scheme. Such marketing expenses are presumptively subtracted from the retail rate as "avoided costs." *See* 47 U.S.C. § 252(d)(3) ("excluding ... costs that will be avoided by the local exchange carrier"); 47 C.F.R. § 51.609. And with the NC Commission's order, BellSouth must again account for the expense as a discount to the retail rate when selling its services to competing LECs.

BellSouth's argument, however, suggests a greater problem than actually exists. If the costs of incentives were accounted as avoided costs at the time the uniform wholesale discount was set, BellSouth could seek approval to reduce the wholesale discount by an appropriate amount. *See* 47 C.F.R. §§

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51.609-51.611. Moreover, the fact that BellSouth currently chooses to put the cost of incentives in the marketing account does not necessarily mean that it will do so in the future. Conceivably, BellSouth could account for its incentive costs as reductions in revenue in its revenue accounts, as the placement of items in accounts is more art than science. *See* 47 C.F.R. § 32.5000 *et seq.* Indeed, BellSouth demonstrates its own understanding of this flexibility by adopting a litigating position that appears to be inconsistent with its tax position on these expenses. BellSouth has stated in public filings that "marketing incentives, including cash coupons, packaging discounts and free service are recognized as *revenue reduction* and are accrued in the period the service is provided." Bell-South Corp., Annual Report (Form 10-K), at 61 (Feb. 24, 2004) (emphasis added). This flexibility that BellSouth has shown regarding these expenses will surely help it find the ***454** optimal accounting treatment in light of the NC Commission's orders.

BellSouth also argues that it would not be able to establish a value for some of the incentives for purposes of determining an effective retail rate. It points out that the value to a customer of a rebate check is less than the face value of the check because of the effort required to redeem it. Similarly, a $100 gift card is also worth less than $100 cash, because a customer can only use the gift card for certain purposes and must exert time and effort in spending it. Moreover, when a promotion is given on a one-time basis in connection with an initial offering of service, its value must be distributed over the customer's expected future tenure with the carrier and discounted to present value. The 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.

BellSouth's arguments are essentially arguments of impracticality or difficulty, not arguments about what the law commands. Such impracticalities and difficulties cannot, at least at the level identified by BellSouth, determine its obligations under the Telecommunications Act, which often requires Herculean efforts on the part of incumbent LECs to accommodate their competitors. We conclude that the NC Commission's ruling on BellSouth's obligations under the Telecommunications Act is supported by applicable law.

Accordingly, we reverse the judgment of the district court and remand this case to that court with instructions to enter summary judgment in favor of the Commissioners of the NC Commission.

*REVERSED AND REMANDED*

WILLIAMS, Chief Judge, concurring in part and in the judgment:

The majority interprets the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (the "Telecommunications Act")'s definition of "telecommunications service" to mean that special offers featuring gift incentives form part of the "offering of telecommunications" that incumbent local exchange carriers (LECs) must make available for resale to would-be competitors. I agree. For the reasons that follow, however, I respectfully disagree with the portion of the majority opinion suggesting that the NCUC did not resolve whether the special offers at issue in this case are "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2) (2006) but rather independently "established guidelines similar to those given by the FCC in its Local Competition Order," *ante* at 453.

I.

A.

Like the majority, I believe that although we review de novo the NCUC's interpretations of the Telecommunications Act and the regulations and rulings of the FCC, the orders of the state commissions nevertheless reflect "a body of experience and informed judgment to which courts ... may properly resort for guidance." *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944). It is important to note, however, that this is an area in which the FCC has previously disagreed with the state commissions, including the NCUC. *See In the Matter of Am. Commc'ns Servs., Inc.,* 14 F.C.C.R. 21579, 21605 n. 124 (1999) (citing favorably to *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.,* 7 F.Supp.2d 674 (E.D.N.C.1998), which invalidated a section of an ***455** NCUC order setting out the terms of an interconnection agreement providing that "[s]hort-term promotions shall not be available for resale"); *MCI Telecomm. Corp. v. BellSouth Telecomm., Inc.,* 40 F.Supp.2d 416, 426 n. 9 (E.D.Ky.1999) (noting that BellSouth had withdrawn its argument that it was not required to resell contract service arrangements

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(CSAs) at the wholesale rate after "the FCC made clear that it disagreed with the PSC and other state commissions on th[e] issue" and "informed BellSouth that it would not grant Bell-South the authority to provide long distance service originating in any state in which it provides local service if such CSA restrictions exist in that state"); *In the Matter of Application of BellSouth Corp.,* 13 F.C.C.R. 539 (1997) (FCC order requiring BellSouth to offer CSAs for resale at the wholesale rate).

B.

FCC regulations require incumbent LECs to offer their telecommunications services for resale to competing local providers (CLPs) "subject to the same conditions" on which retail subscribers receive them. 47 C.F.R. § 51.603 (2006). An incumbent LEC seeking to impose a restriction on resale ordinarily must prove to the state commission that the restriction is reasonable and nondiscriminatory. 47 C.F.R. § 51.613(b) (2003). There exist two exceptions, however, to this requirement. Pursuant to 47 C.F.R. § 51.613(a), incumbent LECs may prohibit resellers from engaging in "cross-class selling" and may offer "short-term promotions" without applying the wholesale discount to the promotional rate. 47 C.F.R. § 51.613(a)(1), (2). This case requires us to resolve whether the NCUC correctly concluded that special offers featuring gift benefits are "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2).[FN1]

FN1. I agree with the majority that the NCUC's orders did not conclusively determine how to treat BellSouth's "1FR + 2Cashback" offer or any other specific offer. Rather, the NCUC sought to provide guidance on how these types of special offers should be treated under the Telecommunications Act and its implementing regulations. I do not believe, however, that the NCUC sought to independently establish guidelines similar to the FCC's. The NCUC's orders sought to provide guidance on whether gift offers are subject to the resale requirements set forth in the Telecommunications Act and the FCC regulations by determining whether such offers (1) form part of an offering of telecommunications, and (2) constitute "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2). In its initial order, the NCUC agreed with commenters and the Public Staff that "gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunication services ... are promotional discounts." (J.A. at 25.) The NCUC's Clarifying Order emphasizes that the initial order "should not be read as a change of law or policy," and that "[i]f the Commission is called upon to determine whether a promotion offered for more than 90 days must be offered to resellers at the promotional rate minus the wholesale discount, the Commission will follow the law as stated in 47 U.S.C. 251(c)(4) and 47 C.F.R. 51.613(a)(2) and (b)." (J.A. at 43.) Thus, this case requires us to resolve whether the NCUC's interpretation of "the law as stated in ... 47 C.F.R. 51.613(a)(2)," (J.A. at 43),-that special offers featuring gift benefits are "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2)-was correct. I therefore disagree with the majority opinion to the extent that it suggests that the NCUC's orders sought to independently "establish [ ] guidelines similar to those given by the FCC in its Local Competition Order." *Ante* at 453.

I agree with the district court that the FCC's Local Competition Order [FN2] limits ***456** the scope of the term "promotions" and therefore forecloses the interpretation adopted by NCUC. In its Local Competition Order, the FCC stated that, in discussing promotions, it was "only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.,* temporary price discounts." Local Competition Order, para. 948. This statement makes clear that the FCC intended the term "promotion" to refer only to temporary price discounts. This interpretation is bolstered by the language of the regulation itself, which provides that,

FN2. *In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Report and Order,* 11 F.C.C.R. 15499 (1996), *aff'd in relevant part and remanded on other grounds, Iowa Utils. Bd. v. FCC,* 120 F.3d 753, 819 (8th Cir.1997), *aff'd in part and remanded on other grounds, AT & T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

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An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a *special promotional rate* only if:

(I) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

47 C.F.R. § 51.613(a)(2) (emphasis added). Thus, the regulation specifically contemplates a "special promotional rate" brought about by the "temporary price discount" referenced in the Local Competition Order.

The NCUC conceded that special offers featuring gift benefits are not "discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings," but reasoned that they "do provide a savings and therefore a type of discount to subscribers for the regulated services provided." (J.A. at 33, 34.) [FN3] The NCUC thus reasoned that because anything of economic value given to a customer represents a benefit to the customer that may offset the cost of service, "anything of economic value paid, given, or offered to a customer to promote or induce purchase of a ... service offering ... is a promotional discount." (J.A. at 25.) Section 51.613(a)(2) and the Local Competition Order, however, do not broadly encompass "anything of economic value," (J.A. at 25), but instead contemplate only "temporary price discounts" giving rise to "special promotional rates," 47 C.F.R. § 51.613(a)(2); Local Competition Order, para. 948. Both legal and non-legal dictionaries define a "discount" as "[a] reduction from the full amount or value of something, esp [ecially] a price." *Black's Law Dictionary* 498 (8th ed.2004); *see also Merriam-Webster's Collegiate Dictionary* 357 (11th ed.2004) (defining "discount" as "a reduction made from the gross amount or value of something: as a(1): a reduction made from a regular or list price....").

FN3. Citations to the "J.A." refer to the contents of the joint appendix filed by the parties to this appeal.

In addition to recognizing that gift offers are not discount service offerings *per se,* the NCUC recognized that gift offers have different anti-competitive effects than do direct price discounts. It determined that gift offers "do not have the same degree of anti-competitive effect that a direct discounting of the retail price would have on a reseller market." (J.A. at 34.) The conclusion that gift offers do not have the same degree of anti-competitive effect as price discounts undermines the NCUC's finding that gift offers are "promotional discounts."

***457** The FCC's determination that promotional rates "cease to be 'short-term' and must therefore be treated as a retail rate for an underlying service" if they are greater than 90 days in duration was the result of a careful balancing of the pro- and anti-competitive effects promotional prices. Local Competition Order, paras. 946-50; *see also* 47 C.F.R. § 51.613(a)(2). Accordingly, I believe we should not expand 47 C.F.R. § 51.613(a)(2)'s exemption for short-term promotions to one-time gift offers, which have a lesser anti-competitive effect than do direct price discounts and to which the FCC did not anticipate that the exemption would apply.[FN4]

FN4. Notably, in arguing for a broad construction of the term "promotions," the NCUC commissioners stress that "[t]he statement in ¶ 948 was written in 1996, long before the type of promotional offering at issue in this case began to appear." (J.A. at 30.)

C.

The majority opinion does not address the NCUC's belief that gift offers have lesser anti-competitive effects than price discounts. Instead, it emphasizes that incentives to subscription may be "used to create an uneven playing field," *ante* at 452, and seeks to demonstrate potential anti-competitive effects by way of a hypothetical. The hypothetical involves an incumbent LEC that sends its customers a *monthly* rebate check. *See Ante* at 450-51. The NCUC's orders, however, focused on *one-time* gifts offered as an inducement to subscription. The NCUC issued its first order in response to the Public Staff's request for guidance on the applicability of the Telecommunications Act's resale obligations to such offers. The Public Staff argued that "bill credits, gift cards, checks or coupons offered to customers by a company's regulated business ... to encourage sub-

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scription to a regulated service are promotions featuring price discounts." (J.A. at 24.) In its first order, the NCUC agreed with the Public Staff that "gift cards, checks, check coupons and similar benefits offered as an inducement to purchase telecommunications services ... are promotional discounts." (J.A. at 25.) In its Clarifying Order, the NCUC described its initial order as an "Order regarding resale obligations applicable to *one-time* gift promotions." (J.A. at 47 (emphasis added).) The Clarifying Order explains that the NCUC's Order of December 22, 2004 "requires that telecommunications services subject to the resale obligation of Section 251(c)(4) be resold at rates that give resellers the benefit of the change in rate brought about by offering *one-time* incentives for more than 90 days." (J.A. at 46 (emphasis added).)

Consideration of the one-time gift offers addressed by the NCUC's orders reveals an important distinction between such offers and price discounts. A customer must continue to subscribe to an incumbent LEC's services to receive a discounted rate for those services. Customers receiving one-time gifts with no corresponding obligation to commit to a particular term of service, in contrast, may attempt to take advantage of the special offer by signing up for the gift benefit and cancelling their service soon or shortly thereafter. Moreover, the time period during which the incumbent LEC makes a one-time gift offer available does not affect the value of the gift. With a direct price discount (or a recurring gift benefit), the longer the discount is offered, the more savings a customer receives. With a one-time gift offer, in contrast, the customer receives the same gift regardless of the duration of the offer. Thus, whether the offer extends for more than 90 days would have a minimal impact***458** on the anti-competitive effects of the special offer.

Concluding that the gift offers at issue are not "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2) would not prevent the NCUC from exercising oversight over gift offers or allow incumbent LECs to use this type of special offer to create an uneven playing field. To the contrary, it would impose a greater burden on incumbent LECs. Section 51.613(a)(2) allows restrictions on the resale of short-term promotions as a narrow exemption to the general rule that incumbent LECs "may impose a restriction [on resale] only if it proves to the state commission that the restriction is reasonable and non-discriminatory." 47 C.F.R. § 51.613(b). Accordingly, concluding that gift-offers are not "promotions" would require incumbent LECs to prove to the state commission that restrictions on the resale of *all* offers including gift incentives (and not merely those lasting for more than 90 days) were reasonable and nondiscriminatory. Such a case-by-case analysis would allow the NCUC to apply its expertise in assessing the pro- and anti-competitive effects of this particular type of special offer. This assessment by the NCUC would better serve the goals of the statute and the FCC regulations than applying an ill-fitting exemption designed to address a different type of special offer with admittedly different anti-competitive effects.

II.

In sum, I concur in the majority's interpretation of the Telecommunications Act and ultimate conclusion that special offers featuring gift benefits offered for more than 90 days must be made available to resellers in the form of a reduced wholesale price. I believe, however, that one-time gift offers are not price discounts within the meaning of the FCC's Local Competition Order and therefore do not constitute "promotions" within the meaning of 47 C.F.R. § 51.613(a)(2).

C.A.4 (N.C.),2007.
BellSouth Telecommunications, Inc. v. Sanford
494 F.3d 439

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# ATTACHMENT D

*Louisiana Public Service Commission*

*POST OFFICE BOX 91154*
*BATON ROUGE, LOUISIANA 70821-9154*

COMMISSIONERS

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District III

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District IV

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EVE KAHAO GONZALEZ
Secretary
and
Executive Counsel

(MRS.) VON M. MEADOR
Deputy Undersecretary

September 30, 2009

Ms. Debbie V. Canale
Executive Directory- Regulatory
AT&T Louisiana
Suite 3000, 365 Canal Street
New Orleans, LA 70130

**Re: AT&T Accessible Letters dated July 1, 2009-Resale of Cash-Back Promotions**

Dear Ms. Canale:

The Louisiana Public Service Commission ("LPSC") has reviewed AT&T's July 1, 2009, Accessible Letter[1] that provided notice that AT&T "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 Accessible Letter further states that 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," by using formulae to calculate what credits are available.

In a separate Accessible Letter also dated July 1, 2009,[2] AT&T states that "[e]ffective September 1, 2009, Competitive Acquisition Customers who purchase Complete Choice® Basic or Enhanced will receive a one-time cashback amount of $3.74 using the methodology announced in CLECSE09-100, dated July 1, 2009." This second Accessible Letter appears to apply only to Louisiana. While under AT&T's proposed

[1] Accessible Letter CLECSE09-100
[2] Accessible Letter CLECSE09-108

new methodology a reseller would be entitled to a one-time cashback amount of only $3.74, it is the Commission's understanding that an AT&T customer qualifying for the same promotion would receive a one-time cashback amount of $50.

Pursuant to 47 C.F.R. § 51.605(a), AT&T is required to offer to a requesting telecommunications carrier, at a wholesale discount, any telecommunications service it offers to its subscribers on a retail basis. This offering is to be made without restriction, except as allowed by 47 C.F.R. §51.613. A review of section 51.613 leads to the conclusion that the only restrictions that may be placed on resale involve cross-class selling, short term promotions (90 days or less) and restrictions that a state commission finds to be reasonable and nondiscriminatory. Staff has also reviewed the U.S. 4th Circuit Court of Appeals' ruling in *BellSouth v. Sanford*, 494 F.3d 439, which addressed the issue of whether incentive offers to retail customers must also be offered to competitors at a resale price. The court found that "long-term promotional offerings offered to AT&T's customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied." *Id* at 442. While Sanford dealt with promotional offerings in the form of gift cards, the holding can no doubt be applied to cashback promotions such as the one at issue. The court did recognize, however, that "the degree of difficulty in valuing incentives might, in some circumstances, support a claim that resale restrictions are reasonable and nondiscriminatory", but concluded that those issues should be negotiated or, failing success in negotiations, resolved by State Commissions.

As AT&T's methodology as announced in its Accessible Letters dated July 1, 2009, CLECSE09-100 and CLECSE09-108, on its face, fails to provide a reseller with the same promotional discount as offered to AT&T's retail customer, the Commission Staff initially concludes that the Accessible Letters are placing a restriction on resale. As the restriction imposed by AT&T is not related to cross-class selling or short term promotions, it is invalid unless found by the LPSC to be reasonable and nondiscriminatory. While AT&T has discussed this matter with Staff, the Company has not sought such a ruling from the LPSC, and the Commission has made no such finding. Thus, it is the Commission Staff's belief that, absent such a ruling, the appropriate cashback amount would be approximately $39.65.[3] Accordingly, the Commission Staff hereby suspends the effectiveness of AT&T's Accessible Letters CLECSE09-100 and CLECSE09-108, dated July 1, 2009, until such time as AT&T requests the Commission make a finding that the new methodology as set forth therein is reasonable and non-discriminatory, and complies with applicable law.

Sincerely yours,

Eve Kahao Gonzalez
Executive Secretary

EKG:bmf

[3] This represents the amount of the promotion, minus the 20.72% wholesale discount established by the LPSC.

# ATTACHMENT E

# LOUISIANA PUBLIC SERVICE COMMISSION
## ADMINISTRATIVE HEARINGS DIVISION

**DOCKET NUMBER U-30976**

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

---

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

---

**PROPOSED RECOMMENDATION OF**
**THE ADMINISTRATIVE LAW JUDGE**

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

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

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

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

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

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

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

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

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

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

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

Carolyn L. DeVitis
Administrative Law Judge

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


***Louisiana Public Service Commission***
***Administrative Hearings Division***
***11th Floor, Galvez Building***
***602 North Fifth Street***
***Post Office Box 91154***
***Baton Rouge, Louisiana 70821-9154***
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Service List
Docket No. U-30976

All Commissioners
Brandon Frey - LPSC Supervising Attorney

PA- Christopher Malish, Malish & Cowan, PLLC, 1403 West Sixth Street, Austin TX 78703 P: (512) 476-8591 F: (512) 477-8657 email: cmalish@malishcowan.com

DA- Victoria McHenry, BellSouth Telecommunications, Inc., 365 Canal St., Suite 3060, New Orleans, LA 70130 P: (504) 528-2050 F: (504) 528-2948 on behalf of BellSouth

Carmen S. Ditta, 365 Canal Street – Suite 3060, New Orleans, LA 70130 P: (504) 528-2003 F: (504) 528-2948 email: Carmen.ditta@att.com on behalf of AT&T Louisiana

# LOUISIANA PUBLIC SERVICE COMMISSION
## ADMINISTRATIVE HEARINGS DIVISION

**DOCKET NUMBER U-30976**

**DPI TELECONNECT, L.L.C.**
**VS.**
**BELLSOUTH TELECOMMUNICATIONS, INC. DBA AT&T LOUISIANA**

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

**PROPOSED RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**

*Nature of the Case*

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

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

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

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

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

***Jurisdiction***

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

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

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

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

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

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

***Procedural History***

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

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

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

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

***Summaries of the Parties' Positions***

dPi's Position

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

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

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

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

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

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

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

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

AT&T's Position

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

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

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

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

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

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

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

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

***Fact Stipulations***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Analysis*

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

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

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

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

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

> (a) An incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunication carriers for resale at wholesale rates. 47 C.F.R. sec 51.605

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The FCC First Report, VIII Resale section 863 informs that Section 251(c)(4) imposes a duty on incumbent LECs "**to offer for resale at wholesale rates** any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Section 864 directs that State commission shall determine wholesale rates on the basis of retail rates charged to the subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

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

********** -COMM. JOURNAL- ********** DATE SEP-03-2010 ***** TIME 19:08 *********

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| Carmen Ditta | |
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# ATTACHMENT F

**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. P-55, SUB 1744

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

| | | |
|---|---|---|
| In the Matter of | | |
| dPi Teleconnect, LLC, | ) | |
| Complainant | ) | |
| | ) | |
| v. | ) | RECOMMENDED ORDER |
| | ) | |
| BellSouth Telecommunications, Inc., | ) | |
| d/b/a AT&T North Carolina, | ) | |
| Respondent | ) | |

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina on Thursday, November 12, 2009, at 10:00 a.m.

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

APPEARANCES:

For dPi Teleconnect, LLC:

Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh, North Carolina 27602-1351

Christopher Malish, Foster, Malish & Blair, PLLC, 1403 West Sixth Street, Austin, Texas 78703

For BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina:

Edward L. Rankin, III, Post Office Box 30188, Charlotte, North Carolina 28230

Patrick W. Turner, 1600 Williams Street, Suite 5200, Columbia, South Carolina 29201

For the Using and Consuming Public:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: On April 11, 2008, dPi Teleconnect, LLC (dPi or Complainant) filed a complaint against BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina (AT&T or Respondent)[1] seeking to recover cashback promotional credits allegedly owed pursuant to the parties' interconnection agreements. On May 2, 2008, Respondent filed its answer in which it denies that Complainant is entitled to the promotional credits sought in the complaint. On May 23, 2008, Complainant filed a response indicating that Respondent's answer is not satisfactory and requesting an evidentiary hearing.

On September 10, 2008, the Commission issued an Order Scheduling Docket for Hearing and Prefiling of Testimony. Pursuant to this Order, this docket was originally scheduled for hearing on December 9, 2008.

On November 5, 2008, Respondent prefiled the direct testimony and exhibits of Nicole Bracy, Kristy Seagle, and P.L. (Scot) Ferguson. On this same date Complainant prefiled the direct testimony and exhibits of Brian Bolinger.

On November 12, 2008, Respondent filed its Motion to Compel and Motion to Suspend Procedural Schedule. On November 19, 2008, Complainant filed its Response to Respondent's Motion to Compel and the rebuttal testimony of Brian Bolinger. On November 20, 2008, Respondent filed the rebuttal testimony of Nicole Bracy and P.L. (Scot) Ferguson.

On November 21, 2008, the Commission issued its Order Canceling Hearing, Suspending Procedural Schedule, and Ruling on Data Requests. Pursuant to this Order, the procedural schedule that had previously been set in this docket was suspended pending further Order and Complainant was directed to answer certain discovery requests previously made upon it by Respondent.

On August 27, 2009, the Commission issued its Order Scheduling Hearing. By separate Order issued October 28, 2009, the starting time for the hearing was changed to 10:00 a.m.

On November 6, 2009, Respondent filed a Motion to Compel requesting the Commission to enter an Order compelling Complainant to respond to certain

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[1] The Commission takes judicial notice that the merger of AT&T Inc. and BellSouth Corporation became effective on December 29, 2006. Generally, within this Order, AT&T Inc. will be designated as "pre-merger AT&T," BellSouth Corporation and BellSouth Telecommunications, Inc. prior to the merger will be designated as "BellSouth", and the post-merger entity BellSouth Telecommunications, Inc. d/b/a/ AT&T North Carolina will be designated as "AT&T".

interrogatories. On November 12, 2009, Complainant filed a Response to this Motion to Compel.

An evidentiary hearing was held on November 12, 2009 in Raleigh. Tom O'Roark adopted the prefiled direct and rebuttal testimony and exhibits of Brian Bolinger. For AT&T, Kristy Seagle presented direct testimony and exhibits, and Nicole Bracy and P.L. (Scot) Ferguson presented direct and rebuttal testimony and exhibits.

On December 7, 2009, AT&T filed a Reply to Complainant's Response to the Motion to Compel. On December 15, 2009, the Commission entered an Order Requiring Answers to Interrogatories.

On January 5, 2010, the Commission issued an Order Requesting Proposed Orders. On February 3, 2010, the Public Staff requested an extension of the deadline for proposed orders, and the Commission granted such request on the same date.

On February 19, 2010, dPi, AT&T and the Public Staff, respectively, filed Proposed Orders and/or Post-hearing Briefs.

On March 15, 2010, dPi filed a Motion for Leave to File Reply Comments. In its Motion, dPi requested that the Commission allow dPi to comment further on issues that were raised but not fully addressed during the hearing, i.e., the billing dispute limitation period, the application of the wholesale discount to promotional amounts and verification of amounts in dispute. On April 1, 2010, AT&T responded to dPi's Motion by filing its Reply in Opposition to dPi's Motion. By Order dated April 9, 2010, the Commission granted dPi's Motion to File Reply Comments.

On March 23, 2010, Affordable Phone Services, Inc., and LBC Management, LLC d/b/a Angles Communications Solution (Amici) filed a Motion for Leave to File Amicus Curiae Brief. On April 1, 2010, AT&T responded to the Amici's Motion by filing its Reply in Opposition. The Commission Denied Amici's Motion on April 9, 2010.

Based on the foregoing, the evidence presented at the hearing, and the entire record in this matter, the Commission now makes the following

## FINDINGS OF FACT

1. AT&T is duly certified as an incumbent local exchange carrier (ILEC) providing retail and wholesale telecommunications service in its North Carolina service area. Pursuant to federal law, AT&T has a duty to offer any telecommunications service that it offers to its retail customers to competing local providers (CLPs) at wholesale rates. 47 USC 251(c)(4). Pursuant to this obligation, AT&T permits CLPs to resell discount promotional plans that AT&T offers to its retail customers.

2. dPi is duly certified as a CLP and purchases telephone service from AT&T for resale to its end user customers in North Carolina on a prepaid basis.

3. During the period from late-2003 through July 2007, BellSouth and then post-merger, AT&T, offered three cashback promotions under which an end user who subscribed to a particular service or bundle of services for a particular term would apply to the ILEC for a coupon which could be redeemed for cash.

4. BellSouth did not make these cashback promotions available to CLPs for resale through mid-June of 2007. Pre-merger AT&T allowed CLPs to resell such cashback promotions. In July 2007, AT&T standardized the conflicting practices of BellSouth and pre-merger AT&T and adopted pre-merger AT&T's policy of allowing CLPs to resell cashback promotions.

5. During the period at issue in the complaint, two interconnection agreements between the parties were in effect, the first effective April 19, 2003 (ICA1), and the second effective May 12, 2007 (ICA2).

6. Section 2.1 of Attachment 7 to ICA1 required each party to notify the other party in writing upon the discovery of a billing dispute. dPi was required to report all billing disputes to BellSouth using a specified form provided by BellSouth. If a billing dispute arose, the parties agreed to try to resolve such dispute in 60 days, after which they could pursue dispute resolution under other provisions of ICA1.

7. Section 2.2 of Attachment 7 to ICA1 defined a "billing dispute" as a reported dispute of a specific amount of money actually billed by either party. The dispute was required to be clearly explained by the disputing party and supported by written documentation.

8. Although ICA1 does not specify a time in which a party must discover and notify the other of a billing dispute, Section 18 of its Terms and Conditions specifies that the Agreement will be governed by federal and state substantive telecommunications law, but in all other respects the "Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles."

9. In Georgia, the limitations period for a breach of contract is six years. O.C.G.A. 9-3-24.

10. In August 2004, AT&T witness Seagle, then a BellSouth employee, met with a representative for Lost Key Telecom, Inc. (Lost Key), which acted in an agency capacity for dPi. Witness Seagle informed the Lost Key representative that BellSouth did not make available for resale cashback promotional offers.

11. On July 21, 2005, dPi submitted a request for promotional credits for a cashback promotion. On August 2, 2005, witness Seagle informed the dPi representative that the cashback promotion was not available for resale.

12. dPi first disputed AT&T's denial of the requested credits in January 2007.

13. The table attached as Appendix A sets out the various claims at issue in this complaint and the pertinent dates and periods relating to such claims. [2]

14. ICA2 became effective on May 12, 2007.

15. Section 30.1 of the General Terms and Conditions (GTC) of ICA2 indicates that ICA2 supersedes ICA1 and that any orders placed under ICA1 will be governed by the terms of ICA2. In ICA2, dPi acknowledges and agrees that all amounts and obligations owed for services provisioned or orders placed under ICA1 shall, as of May 12, 2007, be due and owing under ICA2 and be governed by ICA2's terms and conditions as if such services or orders were provisioned or placed under ICA2.

16. Pursuant to Section 2.1 of Attachment 7 of ICA2, after a denial of a billing dispute or the passage of 60 days after submission of a billing dispute to AT&T, dPi is required to pursue a specific escalation process or the billing dispute is considered denied and closed. Only after completion of the escalation process is dPi permitted to invoke the dispute resolution process provided under the General Terms and Conditions.

17. Section 2.1 of Attachment 7 of ICA2 also provides that dPi agrees not to submit billing disputes for amounts billed more than twelve months prior to submission of a billing dispute filed for amounts billed.

18. BellSouth and post-merger AT&T were aware that dPi disputed AT&T's denial of its claim for promotional credits within 60 days of the effective date of ICA2.

19. On May 12, 2007, the effective date of ICA2, AT&T's official position was that the cashback promotion was not available for resale. Consistent with this policy, AT&T denied dPi's cashback requests associated with service orders submitted from September 2003 to June 2007.

20. AT&T changed its position and made the cashback promotion available for resale prospectively in July 2007.

21. All claims were pending and subject to dispute on the date that ICA2 became effective and on the date when the Complaint in this proceeding was filed.

22. All claims were disputed within the 12 month limitation period established in ICA2.

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[2] For identification purposes, the Commission will refer to a particular Claim No. by the row on which it appears as set out in Appendix A. Thus, Claim No. C2-NC-704-20031108 will be referred to in this Order as Claim 1.

23. dPi has reasonably complied with the terms of Sections 2.1 and 2.2 of Attachment 7 of ICA2 in regard to each claim, and AT&T's contention that these sections of ICA2 bar these claims is without justification.

24. AT&T has not shown that its and BellSouth's refusal to allow resale of the cashback promotions in question was reasonable and nondiscriminatory.

25. dPi's claims for these amounts are not barred by the equitable doctrine of laches.

26. AT&T should calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion.

27. Subject to validation as provided by this Order, dPi is entitled to receive credit for claims submitted minus the wholesale discount.

## EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 1 AND 2

These findings of fact are essentially informational, procedural, and jurisdictional in nature, and the matters which they involve are uncontroversial. They are supported by information contained in the parties' pleadings and testimony and the Commission files and records regarding this proceeding.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 3

This finding of fact is supported by the pleadings and the testimony of dPi witness O'Roark and AT&T witness Ferguson. It also appears that the finding of fact is essentially informational in nature and uncontroverted by the parties.

According to AT&T witness Ferguson, BellSouth or AT&T, as applicable, offered three promotions under which dPi claims it should have received credits: $100 Cashback for IFR + 2 Custom Calling or TouchStar Features; $100 Cashback for Complete Choice, Area Plus with Complete Choice and Preferred Pack; and $50 Cashback 2-Pack Bundle Plan. The $100 Cashback for IFR + 2 Custom Calling or TouchStar Features promotion was available from August 25, 2003 to January 31, 2005 to new residential subscribers to AT&T's local service who purchased basic residential service plus at least two qualifying Custom Calling or TouchStar features. When an end user qualified for this promotion, AT&T would mail a $100 Cashback coupon. The end user had to redeem the coupon within 90 days of receipt to receive a $100 check.

The $100 Cashback for Complete Choice, Area Plus with Complete Choice and Preferred Pack promotion was available to qualifying AT&T end users from June 1, 2003, and continued through the period involved in the complaint. The promotion was available to returning AT&T end users not currently subscribed to AT&T's local service for at least ten days prior to their service request. In addition, the end user qualified for the promotion by purchasing AT&T's Complete Choice, Area Plus with Complete Choice, or Preferred Pack Plan service offerings. When an end user

qualified for this promotion, AT&T would mail a coupon for $100 Cashback. The end user had to mail in the completed coupon, along with the first month's bill showing the purchase of eligible services, to receive a check for $100.

The $50 Cashback 2-Pack Bundle Plan promotion was available from December 15, 2005 to April 30, 2007. On May 1, 2007, and continuing through the period involved in this Complaint, the cashback reward was reduced to $25. The promotion was offered to reacquisition end users who purchased AT&T's 2-Pack service offering with an affiliate service such as long-distance, DirecTV, DSL, or wireless service. Customers received a cashback coupon and optional voicemail service. When an end user qualified for this promotion, AT&T mailed the customer a coupon that the customer would redeem to receive a $50 check, or after April 30, 2007, a $25 check.

The description of the promotions in question in this matter by AT&T witness Ferguson was uncontroverted by dPi.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 4

This finding of fact is supported by the pleadings, the testimony of dPi witness O'Roark, the testimony of AT&T witness Seagle and her Exhibit KAS-1, and the testimony of AT&T witnesses Bracy and Ferguson.

As AT&T witness Ferguson explained, BellSouth's policy was that 47 USC 251(c)(4) did not require the cashback portion of a promotion to be made available for resale, but only the telecommunications service associated with such promotion. As of July 2007, AT&T began making available the cashback portion of a promotion to CLPs, whose end users met the eligibility requirements, which was the policy of the pre-merger AT&T and post-merger AT&T except in the former BellSouth region. According to witness Ferguson, this reversal in policy was not coincidental with the issuance of the Fourth Circuit Court of Appeals' decision in *BellSouth Telecom, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007), where BellSouth failed to prevail in its appeal of two decisions of this Commission regarding promotions. Instead, witness Ferguson testified that the change in policy was based on a business decision to standardize post-merger AT&T's policies on the issue across its 22-state region.

## EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 5, 6, 7 AND 8

These findings of fact are based on portions of the parties' interconnection agreements contained in Exhibits PLF-1 and PLF-2 and attached to the testimony of AT&T witness Ferguson. They are informational in nature.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 9

This finding of fact is supported by the stipulation of counsel and Georgia state law, O.C.G.A. 9-3-24.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 10

This finding of fact is supported by the testimony of dPi witness O'Roark and the testimony and Exhibit of AT&T witness Seagle.

The record indicates that BellSouth informed dPi of its policy that cashback promotions were not available for resale in August 2004. According to AT&T witness Seagle, she met with a representative from Lost Key, dPi's billing and collections agent for promotional credits and in the course of the conversation informed him of the company's position on resale of such promotions. She then followed up her conversation by restating this policy in an August 26, 2004 e-mail contained in Exhibit KAS-1. At the hearing, dPi stipulated that BellSouth specifically told Lost Key that cashback promotions were not available for resale in the August 2004 time frame. Thus, it is clear that BellSouth had given dPi notice of its policy regarding resale of promotions as of August 26, 2004.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 11

This finding of fact is supported by the testimony and exhibits of AT&T witness Seagle.

AT&T witness Seagle testified that on July 21, 2005, the Lost Key representative submitted a request on behalf of dPi for promotional credits for a cashback promotion. On August 2, 2005, witness Seagle responded that the cashback promotion was not available for resale. The representative of Lost Key then acknowledged witness Seagle's response.[3] Witness Seagle's testimony was not controverted. AT&T has shown that it again made dPi aware of its policy regarding resale of cashback promotions in August 2005.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 12

This finding of fact is based on information stipulated to by the Complainant.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 13

This finding of fact is supported by information contained in Exhibit NWB-1, attached to the testimony of AT&T witness Bracy. This information was uncontroverted by any party.

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[3] These claims denied on August 2, 2005 do not appear to be part of the claims included in the complaint as Complainant stipulated that Lost Key did not submit any requests for promotional credits to AT&T on behalf of dPi until December of 2005.

**EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT Nos. 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 AND 25**

These findings of fact are based on the evidence, the transcripts and exhibits and the record proper.

Beginning in 2004, dPi began to make inquiry to BellSouth about the availability of BellSouth's cashback promotion resale. First, in August 2004 and again in August 2005, BellSouth informed dPi that the cashback promotions at issue in this proceeding were not available for resale. dPi continued to submit written requests to BellSouth to be given credit for the cashback promotions. *See* dPi Exhibit I. BellSouth failed to accept or deny dPi's repeated requests for credits. This conduct persisted until July 2007 when post-merger AT&T decided to honor appropriate requests that dPi made for cashback promotion resale credit for orders that were submitted from June 2007 forward. AT&T, however, denied any requests made by dPi for cashback promotion resale credits for orders that were submitted prior to June 2007. dPi filed this Complaint alleging that AT&T violated federal law and the explicit terms of their interconnection agreements in refusing to provide the benefits of these cashback promotions to dPi for orders that originated prior to the July 2007 policy change.

In its answer and defense, AT&T now contends that BellSouth/AT&T was not and is not required by federal law or FCC regulations to offer these particular cashback promotions to dPi for resale because these restricted offerings are reasonable, nondiscriminatory and, thus, not harmful to competition. In the alternative, AT&T contends that dPi is not entitled to the credits that it now seeks because dPi did not dispute and/or escalate in a timely manner as required by its interconnection agreement and is therefore barred from any recovery or, to the extent that dPi did dispute and/or escalate these disputes in a timely manner, the amounts that dPi seeks must be reduced by the applicable residential resale and error rate discounts.

Ordinarily, when resolving complaint proceedings, this Commission would first resolve the issues raised by the Complainant since the Complainant has alleged injury and has the burden of proof. However, in this instance, the Commission, in its discretion, will first resolve AT&T's contention that dPi is not entitled to such pre-policy change credits because, as a matter of federal law, these restricted offerings are reasonable, non-discriminatory and, thus, not harmful to competition. We choose to resolve this issue first because a determination that the cashback offerings are reasonable, nondiscriminatory and, thus, not harmful to competition would obviate the need to inquire further into this case to determine if both parties have complied with contractual obligations which, when applicable, would determine whether dPi is entitled to credits.

At the outset, the Commission notes, as did AT&T, that the federal Act does not absolutely prohibit restrictions on resale. Instead, it imposes on ILECs a duty "not to prohibit, and not to impose *unreasonable or discriminatory* conditions or limitations on, the resale of such telecommunications service . . . ." 47 U.S.C. 251(c)(4)(B) (emphasis

added). In light of this statutory language, the FCC established a presumption that restrictions on resale that are not expressly permitted in its *Local Competition Order* are unreasonable and discriminatory, but it expressly provided that ILECs "can rebut this presumption, but only if the restrictions are narrowly tailored." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶939 (1996)(*Local Competition Order*). In its rules, the FCC further explained that "an incumbent LEC may impose a restriction" on resale if it "proves to the state commission that the restriction is reasonable and nondiscriminatory." 47 CFR 51.613(b).

Consistent with FCC policy, this Commission stated on December 22, 2004 in Docket No. P-100, Sub 72(b), *(Restriction on Resale Order I)*, a decision interpreting federal law and regulations, that the "benefit of a ...promotion offered for more than 90 days must be made available to resellers such that resellers are permitted to purchase the regulated service(s) associated with the promotion at the promotional rate minus the wholesale discount, unless the ILEC proves to the Commission (per 47 C.F.R. 51.613(b)) that not applying the wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." In that same Order, the Commission refused to establish a bright line rule that promotions that exceed 90 days in length must be offered to resellers in addition to the reseller discount in favor of an approach where the ILEC may, on a case-by-case basis, prove that a promotion that is offered for more than 90 days may not be subject to mandatory resale at the additional discounted rate because the restricted offering is reasonable, nondiscriminatory and thus, not harmful to competition. The Commission ruling in this regard was clarified further in our subsequent Order of June 3, 2005 (*Restriction on Resale Order II)* in the same docket and affirmed in *BellSouth v. Sanford et al*, 494 F.3d 439( 4th Cir., 2007).

During the hearing, dPi argued that FCC regulations require AT&T to obtain a state Commission ruling that its proposed restriction of the resale of these promotions is reasonable and nondiscriminatory before imposing such restrictions on promotions resale that are offered for more than 90 days. The Commission disagrees.

While an ILEC may voluntarily seek pre-approval for promotions containing restrictions on resale that are intended to last more than 90 days, it is not mandated to apply for and receive prior Commission approval before implementing such restrictions. Imposing a mandated pre-approval process would unnecessarily burden the Commission's resources because it would have to convene a proceeding to address *all* such offerings instead of only addressing those to which affected parties actually object. Moreover, such a requirement would also have a chilling effect on the competitive offerings available to consumers, because ILECs would be reluctant to provide their wireline, wireless, cable, and VoIP competitors so much advanced notice of their upcoming offerings.

Given that, the Commission concludes that the post-implementation approval process being employed is permissible and is in accord with our prior orders interpreting

FCC regulations.[4] Under this process, an ILEC may restrict resale of these presumptively unreasonable and discriminatory promotions that are offered in excess of 90 days without securing pre-approval from this Commission to do so. If challenged, however, the ILEC must rebut this presumption and "prov[e] to the state commission that the restrictions on resale are reasonable and nondiscriminatory. *BellSouth v. Sanford et al*, 494 F.3d 439, 453 ( 4th Cir., 2007). If the ILEC does not produce sufficient evidence to overcome the burden, the Commission must, because of the presumption, find that the restrictions on resale are unreasonable and discriminatory and, when appropriate, retroactively provide the party the benefit to which it was entitled but for the unreasonable and discriminatory restriction placed on the resale of the promotion by the ILEC. This is consistent with the North Carolina courts' treatment of presumptions in other contexts.

In the *Restriction on Resale Orders*, the Commission stated that we would consider such key factors as the length of the promotion and resellers' interest in the promotion to determine if the proposed/implemented restrictions were reasonable and nondiscriminatory.[5] Further, in those same Orders, we stated that the listing of key factors was not exhaustive nor dispositive; and, that while promotions that exceed 90 days must be analyzed individually for their anticompetitive effects, "ILECs should be mindful that resale restrictions on unreasonably long, unlimited or permanent promotions that compete with and undercut the tariffed retail price for service would gut the resale obligation of TA96 and will be held unreasonable." *Restriction on Resale Order I*, p. 13. The Commission now examines the cashback promotions with these and other factors in mind.

With regard to the first factor, i.e., the length of the promotion, the Commission finds that the two shortest promotions lasted approximately 16 months and the longest lasted approximately 48 months.[6] The length of those promotions far exceeded the threshold that the FCC presumed to be unreasonable and discriminatory by a minimum order of magnitude of 4 and a maximum of 16. Further, these periods were considerably longer than the nine month promotional period that the Commission, in dicta, indicated

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[4] See also fn 12 in the *Restriction on Resale Order I*. In that footnote the Commission allowed ILECs to implement gift card promotions associated with mixed bundled offerings of regulated and non-regulated services on one day notice without running afoul of the ILECs' right to offer the promotion without obtaining the Commission's approval. In that instance, the Commission noted that, similar to this case, the issue was not so much the approval of the promotion, but rather, determining what the discounted rate should be after the promotion has been placed into effect.

[5] The Commission later clarified that: "The Commission's discussion of factors that an ILEC may present to establish that a restriction is reasonable and nondiscriminatory was not intended to be exhaustive nor meant to suggest that the presence of any one or all of the factors would be sufficient to prove that a given restriction is permissible under FCC rules. Rather, the Commission's opinion stressed that each 90-day-plus promotion, including 1FR + 2 Cash Back promotion, would have to be examined on a promotion-by-promotion basis, and that, in the absence of an objection by a reseller, the stated factors could be considered and could have some persuasive value to the Commission in determining whether a particular restriction on resale is reasonable and nondiscriminatory." *Restriction on Resale Order II*, p. 3.

[6] There is no evidence in the record to suggest that the latter promotion has been discontinued.

that it might find reasonable and non-discriminatory based upon the facts of that particular proceeding.

The length of these promotions are of particular concern to the Commission because, as we noted in the *Restriction on Resale Order I*, on pp. 10-11, "[i]f a promotion is offered for an indefinite extended period of time, at some point it starts to become or look more like a standard retail offering that should be subject to resell at the wholesale rate." Were it not for TA96 and the FCC regulations, the Commission would be hard-pressed not to conclude based on these facts alone that these "resale restrictions [are]...unreasonably long, unlimited [and]...permanent promotions that compete with and undercut the tariffed retail price for service [that] would gut the resale obligation of TA96 and [are, therefore] unreasonable." *Restriction on Resale Order I*, p. 13. The Commission has not succumbed to this temptation. Instead, as we are required to do, we have considered this evidence in conjunction with all other evidence in making the determination required by TA96 and FCC regulations.

With regard to the second key factor, i.e., resellers' interest in the promotion, the evidence is clear that within nine months after dPi began purchasing the telecommunications services that were subject to the retail promotions at issue, and within one month of dPi's hiring of an outside agent to identify and submit promotional credits that dPi was entitled to receive, dPi expressed interest in reselling the promotion. To date, no other reseller, however, has expressed an interest in reselling the promotion. AT&T witness Ferguson contends that since dPi is the only reseller that has brought this matter before the Commission, this indicates disinterest in the promotion by resellers. While the Commission agrees that this fact supports an inference that some resellers are not interested in this promotion, the Commission is reluctant in the current economic climate to conclude that CLPs generally are disinterested in reselling the cashback promotion. Rather, the Commission views this "disinterest" as recognition by CLPs that these promotions would not be made available by BellSouth without CLPs incurring the expense involved in a legal proceeding.[7]

AT&T also attempted to show that its refusal to pay the credits for the cashback promotion did not have an anti-competitive effect based on dPi's number of customers in North Carolina. Witness O'Roark testified that while BellSouth or AT&T was not paying the cashback credits, dPi's number of customers in North Carolina increased, but when AT&T began paying such credits, dPi's number of North Carolina customers declined. Mr. O'Roark explained on redirect that the customer numbers declined substantially due to a program offered by MCI and then rose after dPi acquired another company. AT&T has not demonstrated any causal relationship between its payment of promotional credits and dPi's customer losses. Nor is the Commission convinced that there is a relationship between dPi's number of customers in North Carolina and the change in policy on the payment for resale of cashback promotions.

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[7] As highlighted by this proceeding, BellSouth has consistently maintained the position that promotions were not available for resale to CLPs in proceedings before this Commission and federal courts prior to the prospective policy change in July 2007 which harmonized BellSouth's promotion resale policy with that of post-merger AT&T.

AT&T contends that it would be discriminatory against other CLPs if it paid dPi for the cashback promotions in question. dPi, however, argues that this claim is illogical. The Commission agrees with dPi. First, there is no evidence that any other CLPs in North Carolina are seeking such credits. Finally, if AT&T's denial of such credit is unreasonable in this matter, it would be unreasonable to deny another CLP's claim that was otherwise valid as well.

AT&T also argues that these restrictions on resale do not stifle competition between dPi and AT&T because dPi does not compete directly with AT&T for the same customer. To support its contention, AT&T cites testimony that dPi witness O'Roark gave in a proceeding in Georgia in which he stated that "essentially every one of dPi's new customers is someone who was formerly a customer of BellSouth or another provider and who left after getting into trouble over their phone bill." AT&T Post Hearing Brief, p. 2. In this proceeding, however, when asked if it was fair and accurate to say that "essentially every single one of dPi's new customers is someone who was formerly a customer of AT&T or another provider and who left after getting into trouble over their phone bill," dPi witness O'Roark would only state that the statement "would be true about a large percentage of our customers", "not 100 percent." (Tr. p. 84) Thus, contrary, to AT&T's assertion, dPi and AT&T do compete directly for the same customers in a small percentage of cases. In those cases, limited though they may be, AT&T's restriction on resale provides it with a significant advantage over dPi and stifles competition. [8]

Moreover, even if the Commission assumes that AT&T and dPi do not directly compete for the same customers, we simply are not persuaded that dPi's decision to pursue credit-challenged customers overcomes the presumption that these restrictions on resale are unreasonable, discriminatory and harmful to competition. TA96 encouraged CLPs to distinguish themselves from ILECs by offering consumers different options than those provided by ILECs in the hope that overall competition would be increased. To do so, Congress encouraged and permitted CLPs to exploit these distinctions by mandating that the ILECs provide CLPs with access to the ILEC's network and that the ILEC permit CLPs to resale ILEC services on a reduced basis. Within this framework, dPi identified and exploited a market niche that was not being served by BellSouth. Thus, it is antithetical to suggest that a CLP that distinguished itself in a way that is encouraged by TA96 is not competitively stifled by an ILEC's refusal to resale a promotion that will allow the CLP to be a more financially viable competitor.

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[8] The Commission takes judicial notice that, as of August 28, 2009, there were 185 certified CLPs in North Carolina. *Report of the North Carolina Utilities Commission to the Joint Legislative Utility Review Committee.* p. 7. While we have no way of knowing with any certainty, it is reasonable to presume that one or more of these CLPs would compete with or would like to compete with AT&T for the same core customers that AT&T has identified as its customer of choice. In those instances, AT&T's long-term restricted resale policy discourages rather than encourages entry into the market by conferring an unfair advantage upon AT&T over any CLP that chooses to or might choose to compete directly against AT&T but *cannot* offer a similar cashback bonus. As a result, competition is stifled and these core customers are left with fewer choices for telecommunications services.

Similarly, we are not persuaded that dPi's decision to retain the proceeds of the promotion rather than pass those proceeds directly to the customer overcomes the presumption that these restrictions on resale are unreasonable, discriminatory and harmful to competition. As we noted in *Restriction on Resale Order II*, p. 7, " [t]he resale obligation of TA96 permits a CLP to use the wholesale discount in a way that is beneficial to it without requiring the benefit to be passed directly to the end user..." As we stated before, this was done in the hope that overall competition would be increased and, in our view, it would be antithetical to suggest that dPi is not competitively stifled by AT&T's refusal to provide dPi with the benefits of these long-term promotions because dPi exercised an option permitted by TA96.

Finally, the most telling evidence in the record as to the reasonableness of AT&T's refusal to offer the cashback promotion for resale is its own conduct. The Commission acknowledges AT&T witness Ferguson's explanation that AT&T changed the BellSouth policy of denying resale of these promotions to standardize its policy across its 22-state region. The fact remains, however, that this change in policy reflected a pre-merger AT&T position, a more legally defensible position under the *Sanford* decision and, as witness Ferguson conceded on cross-examination, has resulted in AT&T paying millions of dollars to resellers. Thus, it is difficult to conclude that AT&T changed the BellSouth policy solely for purposes of standardization.

AT&T has the burden of showing that its denial of the resale of the cashback promotion was reasonable and nondiscriminatory. After fully considering the aforementioned arguments, the evidence, the transcript of this proceeding and the record proper, the Commission finds that AT&T has failed to meet its burden of proving that the restrictions that it placed on the resale of the cashback promotions were narrowly tailored, reasonable, nondiscriminatory and, thus, not harmful to competition. Stated more simply, we find that AT&T's restriction on resale of the cashback promotions was unreasonable, discriminatory and harmful to competition.

Having determined that AT&T's resale restrictions were unreasonable and discriminatory, we now must determine what, if any, recompense dPi is entitled to receive because of AT&T's refusal to provide the cashback promotions in question to dPi for resale. In this phase of the determination, both parties agree that dPi, as the Complainant, has the burden of proof and that dPi's right to recompense is governed primarily by the two voluntarily negotiated ICAs.

For the most part, the parties are in agreement as to the facts surrounding this dispute. That is, the parties are in agreement as to when and by what manner dPi expressed its interest in reselling the cashback promotions. Similarly, the parties are in agreement as to when and in what manner BellSouth responded to dPi's interest. The parties' central disagreement in this proceeding is not about the facts; instead, the core disagreement between the parties is about the meaning of the terms and conditions contained in both ICAs and the applicability of the terms and conditions of ICA1 to ICA2 to the undisputed facts of this case. Thus, to resolve this dispute, we begin our analysis

by examining key components of the ICAs and interpreting and applying those provisions in accordance with Georgia contract law.[9]

Although the parties acknowledge the number and the nature of the ICAs in this case, they differ markedly on the effect that the ICAs have on the issues in this proceeding. For instance, although both parties agree that the initial ICA and the second ICA contain different limitation periods for submitting and resolving billing dispute claims, they strongly disagree on which limitation period governs unresolved claims that arose during the period while ICA1 was effective. ICA1 implicitly establishes a six year limitation period in which disputes are to be identified, submitted and either resolved or a complaint proceeding initiated; whereas, in ICA2, dPi agreed "not to submit billing disputes for amounts billed more than twelve (12) months prior to the submission of a billing dispute filed for amounts billed."

AT&T argues that ICA2 bars dPi from collecting on claims that arose while ICA 1 was effective if those claims were submitted more than 12 months after they were billed; or, in the alternative, AT&T argues that dPi is barred from collecting on those same claims because dPi did not escalate or resolve those claims as required by ICA2. dPi argues that the claims were timely under either ICA1 or ICA2. The Public Staff argues that since ICA1 did not explicitly establish a period in which dPi was required to discover and notify AT&T of disputed billings, it is reasonable to infer that dPi was required to discover and notify AT&T of billing disputes within 12 months of the billing period. Because Claim numbers 1, 2, 3, 21, and 23 were not discovered and reported by dPi to AT&T within 12 months of billing, the Public Staff argues that AT&T was reasonable in denying dPi's request and dPi was barred from seeking recovery for the denial. With the exceptions of Claim Numbers 34, 35 and 36 which, as of the date of the Complaint, had not been submitted to AT&T, the Public Staff asserted that dPi was entitled to credit for those claims remaining since they had been discovered and reported to AT&T within 12 months of the billing date. As to Claim Nos. 34, 35 and 36, the Public Staff recommended that the Commission order dPi and AT&T to work together to resolve the status of those claims.

Under Georgia law, an existing contract will be replaced and discharged when the parties enter into a subsequent agreement that covers the subject matter addressed by the original contract.[10] ICA2, Section 30.1 clearly and unambiguously states that the

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[9] Pursuant to Georgia law, the construction of a contract is a question of law for the court to determine, O.C.G.A. 13-2-1 *et seq.*

[10] See, e.g., *Munson v. Strategis Asset Valuation & Mgmt.*, 363 F. Supp. 2d 1377 (N.D. Ga. 2005) (applying the doctrine of novation to find that a contract was superseded by a subsequent agreement). A novation occurs when the parties to a contract substitute a new agreement for the old one. An effective novation has four elements: (1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) a mutual intention by the parties to substitute the new contract for the old one; and (4) a valid new contract. *Munson*, 363 F. Supp. 2d 1377, 1381-82 (holding that the parties' relationship was governed by the latter agreement, rather than the original contract because the terms of the latter agreement indicated that it was intended to supersede the original contract); see also, e.g., *Rentokil, Inc. v. Creative Plantscapes, Inc.*, 1999 U.S. App. LEXIS 31587 (4th Cir. Dec. 3, 1999) (finding

agreement "sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions between them." The evidence is uncontroverted that the subject matter of both agreements is indeed the same. Thus, it is clear from the language in ICA2 and Georgia contract law that billing disputes that existed prior to the effective date of ICA2 are, to the extent possible, to be resolved in accordance with the terms and conditions mutually agreed to in ICA2 instead of the terms and conditions in ICA1.

The plain language of the 2007 interconnection agreement provides that "the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date."[11] Further, in ICA2 dPi expressly agrees that "any orders placed under [the prior agreement]" and "any and all amounts and obligations owed for services provisioned or orders placed under [the prior agreement]" will be "due and owing" and "governed by the terms and conditions" of the 2007 interconnection agreement. dPi further unequivocally "agrees not to submit billing disputes for amounts billed more than twelve (12) months prior to submission of a billing dispute filed for amounts billed." (*Id.*, Section 2.2). Finally, dPi agreed to "pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed." (Exhibit PLF-2, Attachment 7, Section 2.1). Because of the merger clause, these are the key provisions that dPi must comply with in order to pursue a disputed billing claim for promotional credits that arose before and after the effective date of ICA2.

AT&T contends that the evidence in this proceeding conclusively demonstrates that dPi has failed to comply with these contractual provisions and that dPi is therefore not entitled to receive any of the credits that it now seeks. In the alternative, AT&T contends that the evidence suggests that the credit amount that dPi is entitled to receive should be greatly reduced.

After carefully reviewing the evidence, the Commission finds that dPi has substantially complied with the pertinent provisions of ICA2. To reach this conclusion, we find that these disputed bills were "obligations owed for services provisioned or

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sufficient evidence to show the parties' intent in a new employment agreement that included a superseding clause as to all other agreements between the parties to novate and extinguish the old agreement). Under the doctrine of contractual merger, when parties enter into a final contract, all prior negotiations, understandings, and agreements "on the same subject matter" are merged into the final contract and are accordingly extinguished. *Health Svc. Centers v. Boddy*, 257 Ga. 378, 380 (359 S.E. 2d 659) (Ga. 1987) (citing *Holmes v. Worthey*, 159 Ga. App. 262, 267, 282 S.E. 2d 919 (Ga. App. 1981).

[11] Exhibit PLF-2, General Terms and Conditions, Section 30.1.

orders placed under [the prior agreement]" which dPi, by agreement[12], was required to resolve within 12 months of the effective date of ICA2[13] or those claims would be forever extinguished.[14] Attachment 7, Section 2.2.

The evidence is uncontroverted that dPi filed this Complaint on April 11, 2008. The filing was well within the 12 month limitation period in which dPi was required to resolve these matters with AT&T through formal or informal discussions or to file a complaint proceeding if its efforts to do so failed. Moreover, prior to the complaint being filed, it is uncontroverted that dPi provided AT&T with written requests detailing each claim in dispute.[15] At the time the complaint was filed, none of the claims exceeded the six year statute of limitations that governed Georgia contract claims originating during ICA1 or the 12 month limitation period agreed to in ICA2. Further, as a result of the previously discussed submissions, AT&T was aware that dPi disputed each claim within 60 days of the "obligations [being] owed for services provisioned or orders placed under [the prior agreement]." And, finally, none of the claims identified were resolved within 60 days. Thus, each claim identified is viable and can be resolved in these proceedings.

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[12] Controlling Georgia law allows parties to contractually agree to a limitation period shorter than that provided by general statutes. *See Bullington v. Blakely Crop Hail, Inc.*, 294 Ga. App. 147, 668 S.E.2d 732, 735 (2008), *cert. denied* (2009) (Bullington contends that this action is subject to the six-year statute of limitation for actions on simple contracts in writing, set out in OCGA § 9-3-24, and, therefore, that the trial court erred in applying a one-year limitation period. We disagree. The insurance contract plainly established a one-year period of limitation. It is well established that an insurance policy provision that places a one-year limitation upon the right of the insured to sue the insurer is valid and enforceable even though it shortens the period allowed by statute.). This is consistent with North Carolina law. *See Thigpen v. East Carolina Railway,* 184 N.C. 33, 113 S.E. 562, 563 (1922) (holding consistent with "clear weight of authority" that parties could fix given time, shorter than general statute of limitations, within which suit for breach of contract must be brought).

[13] For billing disputes that arose prior to the effective date of ICA2, we expressly reject AT&T's suggestion that the expiration of the limitation or escalation period is determined by reference to the date that the original order was placed under the ICA1, the prior interconnection agreement. The Commission believes that to impose a retroactive requirement that dPi escalate and resolve these claims when the period for such escalation and resolution had long expired would place an impossible condition on dPi and would lead to an absurd result. Moreover, imposition of such a suggestion is inconsistent with Section 2.1 that states that "the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date. ICA2 can only be given prospective effect if the submission date is viewed as being the effective date of the contract.

[14] We also reject the Public Staff's contention that dPi was required to discover and notify AT&T of billing disputes within 12 months of the bill being provided while ICA1 was in effect. Based upon this reading, the Public Staff essentially extinguished a number of claims that arose during ICA1 that dPi submitted which were not submitted within the 12 months. There is no evidence in the record that either party believed that dPi's failure to discover and notify AT&T within 12 months extinguished the claim during the period in which their relations were governed by ICA1. Quite the contrary, the evidence is that the claims submitted by dPi during that period that were more than "12 months old" were denied, to the extent that they were denied, solely because the promotion was not available for resale.

[15] See dPi Exhibit 1 and NWB-1 which indicates the date that dPi submitted each request for credit and the acknowledgement of receipt of the request by AT&T.

In its Brief and Proposed Order, AT&T argued that dPi failed to "pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed." (Exhibit PLF-2, Attachment 7, Section 2.1). AT&T further argued that the failure of dPi to comply with these escalation provisions would bar dPi from pursuing these claims in this Complaint proceeding. We do not agree.

During the hearing, AT&T witness Scot Ferguson testified that to the best of his knowledge, dPi did not follow the escalation process required and defined by the 2007 interconnection agreement. We are not persuaded by this testimony. Rather, we find dPi's witness who offered testimony that Brian Bollinger, dPi's former in-house attorney, "escalated and attempted to resolve this issue" with an AT&T representative more persuasive on this point.

Even if we did not find dPi's witness persuasive on this point, dPi's failure to escalate the disputes in compliance with the exact terms of ICA2 would not bar its claims in view of its substantial compliance with the agreement in general. Furthermore, it is black letter law in contract matters that performance of an act required by contract is not necessary where such performance would be an idle, useless or futile act. *Williston on Contracts*, 4th Ed. Section 47.4. This is the law in Georgia.[16]

The uncontroverted facts of this case are that dPi has consistently submitted such claims to AT&T for credit since 2005 only to be "denied" by AT&T's inaction. Until July 2007, AT&T denied these claims because they contended that federal law and regulations did not require that these promotions be made available for resale. AT&T persisted in this denial despite being first told by this Commission in 2004 that promotions of this type that lasted more than 90 days were presumptively unreasonable, discriminatory and should be for resale unless AT&T could prove the promotions were reasonable and nondiscriminatory. BellSouth/AT&T, reluctantly it appears, changed its policy prospectively and began to accept requests to resale such promotions in July 2007 to align itself with pre-merger AT&T. Even then, as evidenced by its stance in this proceeding, AT&T has continued to deny that these promotions are required to be available for resale for bills that originated prior to its July 2007 change in policy.

We believe that the purpose of the escalation provision was to permit the parties, in good faith, to attempt to resolve disputes prior to resorting to a forum such as this Commission. To be effective, each party has to be open to a negotiated resolution of a disputed issue. Here, because of the unyielding position taken by BellSouth, there could be no negotiated resolution. BellSouth's position was that these cashback promotions were not available for resale. No matter how many times dPi asked BellSouth, the answer would always be the same: denial, because "AT&T did not offer cashback promotions for resale." (Tr. p. 165) Thus, any action taken by dPi to comply with the

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[16] See O.C.G.A. 13-4-23 which states: "If the nonperformance of a party to a contract is caused by the conduct of the opposite party, such conduct shall excuse the other party from performance."

escalation process would have been futile. dPi's nonperformance in this regard is therefore deemed to have been excused.

Finally, in this proceeding, AT&T has contended that "[a]s a result of dPi's delay in bringing these claims, AT&T no longer has the records that are needed to determine whether dPi met the qualifications of the underlying promotions with regard to many of the credits", and "that dPi's delay was prejudicial to AT&T..." Further, AT&T contends that dPi is barred from pursuing these claims as a result of the equitable doctrine of laches. Under controlling Georgia law:

> Courts of equity may impose an equitable bar to a complaint when the lapse of time and a claimant's neglect in asserting rights causes prejudice to the adverse party. In determining whether laches should apply, courts consider the length of the delay, the sufficiency of the excuse, the loss of evidence on disputed matters, [and] the opportunity for the claimant to have acted sooner . . . . The defendant must show prejudice from the delay.

*Troup v. Loden*, 469 S.E.2d 664, 665-66 (Ga. 1996).[17]

As we have previously stated, for the most part, the facts of this case are not in dispute. Briefly summarized, they are: dPi stipulated that in 2004, AT&T told dPi's billing agent it would not provide the cashback credits dPi seeks in this docket. (Exhibit KAS-1). Although it seeks cashback credits for billing periods as far back as November 2003 (Exhibit NWB-1), dPi stipulated that it was not until two years later that dPi's billing agent first asked AT&T for cashback promotional credits on behalf of dPi (Exhibit KAS-4). When AT&T denied those requests, dPi stipulated that its billing agent waited another year before informing AT&T that it disagreed with AT&T's denial of these requests. Further, dPi waited another year to file its Complaint with the Commission—although dPi had ample opportunity to file a complaint for its claims earlier.

While it is undoubtedly true that the testimony in this proceeding indicates that AT&T no longer has records that are needed to determine whether dPi met the qualifications of the underlying promotions with regard to approximately $34,000 of the $156,000 in credit amounts that dPi now seeks in this docket, and that these disputed credits arose from bills that were associated with the billing periods between November 2003 through November 2005, it is also true that AT&T did not attempt to validate these requests when they were submitted because "AT&T did not offer cashback promotions for resale" (Tr. p. 162) and AT&T discarded or deleted[18]

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[17] This is consistent with North Carolina law. *See Harris & Gurganus, Inc. v. Williams,* 37 N.C. App. 585, 246 S.E.2d 791, 794 (1978)( the doctrine of laches is "a rule of equity by which equitable relief is denied to one who had been guilty of unconscionable delay, as shown by surrounding facts and circumstances.")

[18] There is no evidence in the record that these records were inadvertently discarded or deleted. From the testimony, one could infer that AT&T discarded or deleted these records in accordance with its record retention policy or its quest to modernize its procedures. If that is so, AT&T's retention and

information necessary to validate these requests. With regard to the latter facts, the Commission notes that AT&T took those actions even though it knew that the Commission had not pre-approved the restrictions; that the restrictions on resale were presumptively unreasonable and discriminatory; and, that the statute of limitations had not expired on the claims covered by the records.

Given those facts and after carefully reviewing the testimony and the record proper in this proceeding, the Commission concludes that the equitable doctrine of laches does not bar dPi from pursuing these claims for promotion resale credits. Further, the Commission concludes that dPi's delay in bringing this action was neither unconscionable nor prejudicial to AT&T.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 26

This finding of fact is supported by the testimony and cross-examination exhibits of dPi witness O'Roark. In its Complaint, during the hearing, in its Brief and Proposed Order and in its Post-Brief and Proposed Order submission, dPi asserted that it was entitled to a credit for the full face value of a promotional offering. AT&T's contention was that the promotional offering should be reduced by the wholesale discount. O'Roark Cross-Examination Exhibit No. 4 demonstrated, however, that dPi would receive the same benefit of a price reduction equal to a promotional credit only if the wholesale discount were applied to the promotional credits. Table 1 below shows a synopsis of this cross-examination exhibit.

**Table 1**

| Telecommunications Service A with Resale Discount Rate of 21.5% | |
|---|---|
| Without $25.00 Reduction in Rate | |
| Retail Rate | $75.00 |
| Wholesale Rate | $58.88 |
| With $25.00 Reduction in Rate | |
| Retail Rate | $50.00 |
| Wholesale Rate | $39.25 |
| Change in Wholesale Rate | $19.63 |

In its Proposed Order, the Public Staff supported AT&T's position that dPi would receive the same benefit of a price reduction equal to a promotional credit only if the wholesale discount were applied to the promotional credit. The Public Staff stated that it

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modernization practices contravene its ICA1 commitment to consider and resolve billing disputes within six years after the bill was submitted. As a result, AT&T may not use the unavailability of these records as an excuse to invalidate claims that predate November 2005.

supported AT&T's position because AT&T calculated the discount in a manner that was consistent with the Fourth Circuit's analysis in the *Sanford* decision.

The Commission agrees with AT&T and the Public Staff. If the Commission were to adopt dPi's position regarding promotional credits, then dPi would receive a greater benefit than it otherwise would be entitled to receive had AT&T merely reduced the telecommunications service's rate. The example in O'Roark Cross-Examination Exhibit No. 4 demonstrated that the only way a CLP could obtain an equal benefit from rate reduction such as a promotional credit was to reduce the promotional credit by the wholesale discount rate.

dPi's calculation would allow it to receive benefits that reflect the promotions' retail or face value. AT&T's calculation takes the promotion's retail value and deducts the wholesale discount. This is the proper way to calculate the amount of credits owed to dPi. Further, this is consistent with the analysis of the Commission's decision in the *Sanford* decision. (*See Sanford* at pp. 450-51)

The Commission is aware that dPi is strongly opposed to the promotion value being calculated in this manner. In dPi's March 15, 2010, Reply to Public Staff's Proposed Findings and Conclusions (Reply), dPi asserts that it is entitled to "the full amount of the promotions" instead of the amount less the discount. Reply p. 9. Stated more simply, dPi contends that for every $100 coupon offered to AT&T's customers, AT&T would have to provide dPi with a $100 cash payment for each of its customers. The Commission considered and rejected this exact promotion valuation method in *Restriction on Resale Order II*. We stated:

> Moreover, BellSouth's argument seems to contemplate that a gift would be provided directly to the CLP, e.g., if a coupon was offered to BellSouth's customers, BellSouth would have to provide resellers with a $100 cash payment for each of its customers. However, as discussed above, the *benefit* (not the gift itself) would be delivered to the reseller through the wholesale price charged to the reseller, thus, further reducing the likelihood of undue windfall as described by BellSouth. (Emphasis in Original)

*Restriction on Resale Order II*, p. 7.

This, as well as other passages in the *Restriction on Resale Orders*, makes clear that the face value of the promotion is not required to be passed through to the CLP. Rather, the Order requires only "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." *Restriction on Resale Order II*, p. 6. The credit calculation formula that we have here adopted accomplishes that purpose.

For the reasons stated above, the Commission concludes that the retail amount of the promotional credits due dPi should be reduced by the wholesale discount rate.

**EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT No. 27**

This finding of fact is supported by the testimony of dPi witness O'Roark and AT&T witness Bracy.

The Commission has determined that dPi's claims are not barred by the billing dispute provisions of ICA2. In Finding of Fact Nos. 21 thru 25, the Commission determined that BellSouth or AT&T, as applicable, unreasonably refused to offer the promotions in question for resale. In Finding of Fact 26, the Commission set out the proper method for calculation of the wholesale rate for these promotions. Before any amounts due can be calculated based on those Findings, there remains one issue outstanding, the validation of the claims.

In its Answer, AT&T demanded that dPi "strictly" prove the amount of the credits that dPi was due. AT&T Answer, ¶9. The law does not require dPi to prove the amount due with absolute certainty. Instead, dPi is only required to introduce evidence to prove the amount due with sufficient completeness and certainty as to permit the finder of fact to arrive at a reasonable conclusion. *Crankshaw v. Stanley Homes, Inc.*, 131 Ga. App. 840, 207 S.E.2d 241(1974). The Commission finds that, in general, dPi has met this burden.

However, it is not clear from the record whether all of dPi's claims are valid. AT&T witness Bracy testified that approximately 33% of dPi's claims had been denied because dPi had either requested the retail value of the promotion or because the end user did not meet the eligibility requirements.[19] Witness Bracy did not break out what portion of the 33% was attributable to incorrect calculation of the value of the promotion and what portion was due to the ineligibility of the end user. Nor did witness Bracy indicate if AT&T denied the claim in total if dPi submitted what the Commission would characterize as a valid claim with an incorrect credit request amount, i.e., dPi requested the retail value of the promotion rather than a credit which reflected the wholesale discount. Similarly, dPi's evidence on this issue was also less than precise. For instance, dPi witness O'Roark admitted that some of dPi's claims may not have reflected the wholesale discount and that "the parties should be able to reach agreement as to the true numbers at issue" in this proceeding. (Tr. p. 56) In any case, the Commission does not believe that the percentage of valid dPi claims since July 2007 should be used as a proxy in this case.

Accordingly, the Commission will order AT&T and dPi to work cooperatively with the Public Staff to determine the "validity" of the claims. Specifically, the parties are to

[19] In ICA1 and ICA2, dPi and AT&T agreed that "[w]here available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by BellSouth directly." See http://cpr.bellsouth.com/clec/docs/all states/800f53.pdf at p. 40 or http://cpr.bellsouth.com/clec/docs/all states/80296813.pdf at p. 38, respectively.

determine which claims are invalid because dPi's end user did not meet the eligibility requirements, to determine which claims submitted meet all eligibility requirements and are per se valid, and finally, to determine which claims are valid but failed to reflect the wholesale discount or some other financial factor that would reduce the amount due dPi. Claims shall not be denied because AT&T no longer has the records to validate such claims. After engaging in this process, the parties shall file a joint report with the Commission within 60 days of this order reporting their progress on validation of these claims. As claims are validated, AT&T should make payment to dPi.

IT IS, THEREFORE, ORDERED as follows:

1. That dPi's Complaint is allowed subject to validation of claims.

2. That AT&T and dPi shall work cooperatively with the Public Staff to determine the validity of the claims.

3. That AT&T and dPi shall file a joint report with the Commission within 60 days of this order reporting their progress on validation of these claims.

4. That as claims are validated, AT&T shall make payment to dPi.

ISSUED BY ORDER OF THE COMMISSION.

This the 7th day of May, 2010.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner William T. Culpepper, III, concurs.
Chairman Edward S. Finley, Jr., dissenting in part.

Lh050710.01

**Appendix A**

| Row | Claim No. | Billing Period | Request for Credit | Days between Billing Period and Request for Credit |
|---|---|---|---|---|
| 1 | C2-NC-704-20031108 | 11/8/2003 | 1/2/2006 | 786 |
| 2 | C2-NC-704-20031208 | 12/8/2003 | 1/2/2006 | 756 |
| 3 | C2-NC-704-20040108 | 1/8/2004 | 1/2/2006 | 725 |
| 4 | C2-NC-704-20050108 | 1/8/2005 | 1/3/2006 | 360 |
| 5 | C2-NC-704-20050208 | 2/8/2005 | 12/9/2005 | 304 |
| 6 | C2-NC-704-20050308 | 3/8/2005 | 12/9/2005 | 276 |
| 7 | C2-NC-704-20050408 | 4/8/2005 | 1/3/2006 | 270 |
| 8 | C3-NC-704-20050408 | 4/8/2005 | 4/20/2006 | 377 |
| 9 | C3-NC-704-20060108 | 1/8/2006 | 12/26/2006 | 352 |
| 10 | C3-NC-704-20060208 | 2/8/2006 | 12/26/2006 | 321 |
| 11 | C3-NC-704-20060308 | 3/8/2006 | 12/26/2006 | 293 |
| 12 | C3-NC-704-20060408 | 4/8/2006 | 12/26/2006 | 262 |
| 13 | C3-NC-704-20060508 | 5/8/2006 | 12/26/2006 | 232 |
| 14 | C3-NC-704-20060608 | 6/8/2006 | 12/26/2006 | 201 |
| 15 | C3-NC-704-20060708 | 7/8/2006 | 8/9/2006 | 32 |
| 16 | C3-NC-704-20060808 | 8/8/2006 | 12/26/2006 | 140 |
| 17 | C3-NC-704-20060908 | 9/8/2006 | 12/26/2006 | 109 |
| 18 | C3-NC-704-20061008 | 10/8/2006 | 12/26/2006 | 79 |
| 19 | C3-NC-704-20061108 | 11/8/2006 | 12/26/2006 | 48 |
| 20 | C3-NC-704-20061208 | 12/8/2006 | 12/26/2006 | 18 |
| 21 | CB-NC-704-20040908 | 9/8/2004 | 12/29/2005 | 477 |
| 22 | CB-NC-704-20041108 | 11/8/2004 | 12/29/2005 | 416 |
| 23 | CB-NC-704-20041208 | 12/8/2004 | 12/29/2005 | 386 |
| 24 | CB-NC-704-20050108 | 1/8/2005 | 12/28/2005 | 354 |
| 25 | CB-NC-704-20050208 | 2/8/2005 | 12/29/2005 | 324 |
| 26 | CB-NC-704-20050408 | 4/8/2005 | 12/26/2005 | 262 |
| 27 | CB-NC-704-20050508 | 5/8/2005 | 12/26/2005 | 232 |
| 28 | CB-NC-704-20050608 | 6/8/2005 | 12/26/2005 | 201 |
| 29 | CB-NC-704-20050708 | 7/8/2005 | 3/30/2006 | 265 |
| 30 | CB-NC-704-20050808 | 8/8/2005 | 12/26/2005 | 140 |
| 31 | CB-NC-704-20050908 | 9/8/2005 | 12/26/2005 | 109 |
| 32 | CB-NC-704-20051008 | 10/8/2005 | 12/24/2005 | 77 |
| 33 | CB-NC-704-20051108 | 11/8/2005 | 12/23/2005 | 45 |
| 34 | CB-NC-704-20070408 | 4/8/2007 | NA | NA |
| 35 | CB-NC-704-20070508 | 5/8/2007 | NA | NA |
| 36 | CB-NC-704-20070608 | 6/8/2007 | NA | NA |

**Commissioner William T. Culpepper, III, concurring:**

Chairman Finley, at page 4 of his dissent, states that "...the cash payments subscribers receive under AT&T's 1 FR + 2 Cash Back program ... are not 'promotions' under the Local Competition Order and FCC rules." Based upon this Commission's prior *Restriction on Resale Orders*, which specifically addressed this issue as to this same offering and which orders were fully affirmed by the majority in *Sanford*,[1] I disagree.

I premise my difference of opinion in this regard on the following *Restriction on Resale Order I* language at pp. 9-10:

> While gift cards, check coupons and other similar promotions or incentives offered for the purchase of a regulated telecommunications service are not themselves services that ILECs offer at retail from their tariffs, they are promotional offerings for telecommunications services. Promotional offerings are subject to the limitations and conditions set forth by the FCC. In ¶ 948 of its Local Competition Order, the FCC stated that Section 251(c)(4)'s requirement that ILECs resell retail telecommunications services
>
> > makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for *all promotional or discount service offerings* made by incumbent LECs. [Emphasis added.] A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. In discussing promotions here, we are only referring to price discounts from standard offerings that will remain available for resale of wholesale rates, *i.e.*, temporary price discounts.

[1] "Accordingly, we reverse the judgment of the district court and remand with instructions to enter summary judgment in favor of the Commissioners of the NC Commission." Sanford at 442.

> The Commission interprets ¶ 948 of the FCC's Local Competition Order to mean that an ILEC's duty to resell telecommunications services it offers at retail does not exclude an ILEC's promotional offerings. The FCC clearly stated that any other conclusion would allow ILECs routinely to create promotions or nonstandard offerings just to avoid their resale obligation. The FCC was concerned that ILEC promotions could become *de facto* standard offerings that would not be made available to resellers and would therefore undercut the duty to resell retail services to resellers at wholesale rates. **The FCC's statement that the subject of its discussion on promotions referred to "price discounts from standard offerings that will remain available for resale at wholesale rates, *i.e.* temporary price discounts," does not define or limit the term "promotion," as used by the FCC in its Order, to a reduction from the retail price of a tariffed service**. Rather, the FCC was speaking to the temporary nature of a promotion. The term "promotion" in the context of a sale or advertising campaign usually refers to an opportunity or offer that is temporary or short-term, rather than one that is more permanent or long-lasting. The FCC distinguished a promotional price discount from a "standard offering" that would remain available for sale at retail and therefore available for resale at the wholesale rate. Contrasted with a promotional offering, a standard offering is one that is of a more permanent, long-lasting nature. **When the reference to a promotion as a price discount is read in context, the Commission believes it is clear that the FCC was not stating that a promotion exists only when there is a reduction or discount of the retail price of a telecommunications service**.

(Emphasis supplied)

\s\ William T. Culpepper, III
Commissioner William T. Culpepper, III

**DOCKET NO. P-55, SUB 1744**

**Chairman Edward S. Finley, Jr., dissenting in part:**

I dissent from Finding of Fact 24 and from the discussion within the Evidence and Conclusions in support thereof set forth on pages 11 through 14.

The issue of whether AT&T or its predecessor BellSouth should make payments under its promotional offerings such as 1FR + 2 Cash Back to CLPs such as dPi has a substantial history in North Carolina. In 2004 the Commission opened a generic docket (P-100, Sub 72) to address issues arising from promotional offerings such as 1FR + 2 Cash Back, give aways such as toasters and gifts such as Wal-Mart gift cards. BellSouth argued that its promotional offerings were not telecommunications services so that under the pertinent federal statutes, orders and rules (47 U.S.C. § 251(c)(4), the FCC's Local Competition Order[1] and 47 C.F.R. § 51.605 et seq.) the Commission lacked the authority to compel BellSouth to make these promotional offerings BellSouth made available to its retail customers to its wholesale customers like dPi. BellSouth argued that the promotional offerings were marketing costs, not reductions in BellSouth's tariffed rate and therefore not the type of promotional rates addressed by § 251(c)(4) and the FCC rules.

In its December 22, 2004, order in the generic docket the Commission determined that it had the authority to compel BellSouth to make the economic value of the promotional offerings available to wholesale resellers unless BellSouth could show that the offerings were reasonable and nondiscriminatory. In response to BellSouth's arguments that the Commission lacked this authority, the Commission reasoned that while the promotional offerings were not reductions in the retail tariff rates per se, they nevertheless had "economic value" that affected de facto the value of service the retail consumer received and therefore the Commission was authorized to require BellSouth to make the promotional offerings available to BellSouth's wholesale customers. Each promotion should be considered on a promotion by promotion basis.

One of the criteria the Commission indicated it would use to determine whether the promotional offering should be given to CLPs was the offering's duration. Relying on ¶¶ 448 and 449 of the Local Competition Order and 47 C.F.R. § 51.613(a)(2)(i), the Commission would look to see whether the promotional offering was or was not limited to 90 days in duration. In its discussion the Commission did not address the issue of whether in applying this durational criterion a distinction should be made between programs that affected the ILEC's tariffed rates each month for fewer or more than 90 days or programs that lasted for 90 days or more but had an economic value that only affected the benefits the retail customer received once, i.e., one time promotions.

The Commission recognized that the promotional offerings could have both pro and anti competitive consequences. Promotional offerings benefit retail consumers and

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[1] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15, 499 (1996).

in that sense are procompetitive.[2] However, if the promotional offering reduces the ILEC's retail rate for a significant period of time, the CLP reselling BellSouth's services receives insufficient margin between the wholesale rate (absent the value of the promotional offering) it pays BellSouth and the retail rate it must charge its subscribers to compete and becomes the victim of a price squeeze. See BellSouth Telecom, Inc. v. Sanford, 494 F.3d 439, 451 (4th Cir. 2007).

Significantly, the Commission addressed BellSouth's 1FR + 2 Cash Back promotion in detail:

> With respect to BellSouth's 1FR + 2 Cash Back promotion, based on the Commission's current knowledge, the Commission would be inclined to find that a restriction on resale is reasonable and nondiscriminatory. Resellers have not complained or asked the Commission to find the restriction unreasonable or harmful to competition.[3] Resellers have not been precluded from reselling the regulated service and are able to purchase the service at the tariffed rate minus the wholesale discount. The wholesale discount was, in part, set by deducting the ILEC marketing expense from the ILEC's cost for the regulated service – at least in part in recognition that resellers have their own marketing expenses. Resellers remain free to offer, at their own expense, promotional discounts to customers who purchase the tariffed service(s) from them. Although the Commission would ordinarily be concerned about a promotion in competition with the tariffed offering for a nine-month period (from June to March), BellSouth's promotion will be offered for a limited time, and the resellers' apparent disinterest or indifference would tend to persuade the Commission that, at least with respect to 1FR + 2 Cash Back, the anti-competitive effects caused by a nine-month promotion that is unavailable to resellers are outweighed by the procompetitive effects.

Docket No. P-100, Sub 72(b), December 22, 2004, Order, p. 13.

BellSouth challenged the Commission's orders in Federal District Court. The District Court held that because the promotional offerings, such as gift cards, were not "telecommunications services" under 47 U.S.C. § 251(c)(4), they were not subject to BellSouth's resale duty. The Court also concluded that the promotional offerings were not "price discounts" under the FCC requirements that BellSouth pass on discounts and promotions to competing providers.

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[2] The FCC also recognized that short term promotions serve pro-competitive ends through enhanced marketing and sales based competition. Local Competition Order, ¶¶ 948, 949.

[3] Even now, only one reseller, dPi, complains. dPi's complaint arises from the efforts of dPi's billing agent, Lost Key, to collect promotions. dPi paid Lost Key substantial fees in return for its successful promotion collection efforts. Tr. pp. 68-70. Of course, the Commission's guidance would have been unnecessary if its anticipation was that no CLP would ever complain.

Upon appeal to the Fourth Circuit, that Court reversed the District Court. The Fourth Circuit held that the incentives offered for longer than 90 days affected the fees subscribers pay for the tariffed services and therefore change the actual retail rate.

The Fourth Circuit issued a majority and a concurring opinion. The majority opinion, like the Commission's, does not address the distinction between a promotional program offered for greater than 90 days providing any single consumer a one-time economic benefit and a promotional offering that affects the tariffed rate for each month for more than three months. In fact the majority describes the promotional offerings at issue differently at varying points in its decision. At one point the majority used the oxymoronic "one-time incentives for more than 90 days." Sanford, at 444, 450. "Accordingly, the North Carolina Commission concluded that telecommunications . . . must be resold to competing LECs 'at rates that give the resellers the benefit of the change in rates brought about by offering one-time incentives for more than 90 days.'" (emphasis in the original). Id. at 444, 450. Elsewhere, the majority describes the incentives in terms of recurring monthly rate reductions. "Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, . . . BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to compete with BellSouth's . . . retail fee. Now suppose BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100." Id. at 450-51. Of course, one-time offerings, in contrast to the majority's hypothetical, cannot reduce any consumer's bill more than in the first month. See, Id. at 457 (Chief Judge Williams concurring).

Chief Judge Williams, concurring in the result that in a given case the Commission had authority to order an ILEC to make the promotional offering at issue available to competing resellers, determined as had the District Court that one-time promotional offerings such as 1FR + 2 Cash Back were not tariffed rate discounts per se and therefore not "promotions" as referred to in ¶¶ 48 and 49 of the FCC's Local Competition Order and FCC Rule 47 C.F.R. § 51.613(a)(2)(i). Chief Judge Williams determined that for one-time promotional offerings the shorter than, longer than 90 day analysis did not apply. "... the FCC's Local Competition Order limits the scope of the term 'promotions' and therefore forecloses the interpretation adopted by the NCUC." Sanford at 455-56. "The FCC (in the Local Competition Order) was 'only referring to price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts.'" Id. at 456. "Section 51.613(a)(2)(i) and the Local Competition Order . . . do not broadly encompass 'something of economic value' . . ., but instead contemplate only 'temporary price discounts' giving rise to 'special promotional rates.'" Id. Chief Judge Williams classified the offerings as inducements to subscription (Id. at 457), not promotions as addressed by the FCC. He concluded that restrictions on the gift offers had lesser anti-competitive effect than promotions. Id. at 456, 458.

> Consideration of the one-time gift offers addressed by the NCUC's orders reveals an important distinction between such offers and price discounts.

> A customer must continue to subscribe to an incumbent LEC's services to receive a discounted rate for these services. Customers receiving one-time gifts with no corresponding obligation to commit to a particular term of service, in contrast, may attempt to take advantage of the special offer by signing up for the gift benefit and cancelling the service soon or shortly thereafter. Moreover, the time period during which the incumbent LEC makes a one-time gift offer available does not affect the value of the gift. With a direct price discount (or a recurring gift benefit), the longer the discount is offered, the more savings a customer receives. With a one-time gift offer, in contrast, the customer receives the same gift regardless the duration of the offer, thus, whether the offer extends for more than 90 days would have a minimal impact on the anticompetitive effects of the special offer.

Id. at 457-58.

In spite of the Commission's statements in P-100, Sub 72 that 1FR + 2 Cash Back, even though the program lasts for more than 90 days, appears reasonable and procompetitive, the panel majority renders just the opposite conclusion in this case and gives as its first and primary justification the fact that the program lasts for more than 90 days. Also, in spite of the extensive discussion in Sanford as to whether duration of a program consisting of one-time promotional offerings has any effect on the ability of CLPs to compete, the majority does not address this issue. In defining the burden by which the ILEC's evidence is to be judged, the majority makes no distinction between one-time inducements to subscription and recurring promotions as addressed by the FCC. Significantly, no party in this docket raises this issue or discusses it at all.

I am persuaded by the uncontradicted analysis of Chief Judge Williams that the cash payments subscribers receive under AT&T's 1FR + 2 Cash Back program, while providing value to the subscriber, are not "promotions" under the Local Competition Order and FCC rules.[4] The subscriber receives a one-time benefit or sign up bonus that does not recur from month to month, and the duration of the program has minimal effect on competitors like dPi. I also agree with the Commission's conclusion in P-100, Sub 72 that the procompetitive features of 1FR + 2 Cash Back outweigh any anticompetitive ones, especially with respect to AT&T's competitive posture vis-à-vis dPi.

I likewise conclude that AT&T does not compete with dPi for the same retail customers. I disagree with the majority that the record before us supports the conclusion that the two carriers compete for any retail customers. AT&T's witnesses testified that they did not compete. Tr. p. 147. dPi witness O'Roark testified at length in his unscripted summary that dPi serves a niche market of "working poor" that conventional carriers like AT&T seek to avoid. Tr. pp. 58-59. ". . . we feel like we

[4] While Chief Judge Williams' analysis occurs in a concurrence, this is the only place in Sanford where the issue is directly addressed. Nowhere in the majority opinion is there any rebuttal to Chief Judge Williams' analysis and conclusions.

provide a valuable and needed service in our prepaid niche that's not served by BellSouth and it's not served by any . . . post paid provider." Tr. p. 59. dPi serves subscribers with poor credit or a history of nonpayment who are forced to pay in advance for monthly telephone service. AT&T, in contrast, provides service in advance, charges in arrears, requires deposits to assure payment, and rejects customers with a poor credit record. AT&T's basic retail price is $19.95, dPi's is $39.99, $20 higher. Tr. pp. 80-83, AT&T O'Roark cross Ex. 2. It defies logic to suggest that any customer would pay in advance $20 more per month for service from dPi if the customer were one AT&T or other conventional carriers sought or were willing to serve.

The anticompetitive harm the FCC and the federal courts identify in preventing restrictions on the resale of promotional rates is a price squeeze. dPi charges what the market it serves will bear. dPi's success in its market appears independent of AT&T's promotion practices and responsive instead on actions of other carriers. Tr. pp. 85-86, 109-10. Its market consists of subscribers conventional carriers actively seek to avoid. dPi's retail prices do not change in reaction to fluctuations in the retail rates AT&T charges or else they would not be $20 higher.

Significantly, dPi forcefully resisted AT&T's efforts to discover whether dPi passes the economic value of the promotions it receives from AT&T to dPi's customers. The inference to be drawn from this resistance is that dPi does not, thus further supporting the evidence that dPi's competitive position is not diminished by AT&T's restriction. If dPi does not provide the incentive to its subscribers, forcing AT&T to make the incentive payment to dPi results in the harm ILECs complain of where they "pay[ ] for those incentives twice – once in paying for the incentives and again in reducing [their] retail rates for [their] competitor." The harm CLPs complain of is not present: "they would have to pay for the incentives twice in order to compete – once when they pay for the service at a wholesale rate that is not adjusted for the incentives and again when they pay for similar marketing incentives to offer their own customers." Sanford at 452. Therefore, it is unreasonable to assume that a restriction on AT&T's 1FR + 2 Cash Back offering (a one time payment) will impose a price squeeze on dPi, reducing dPi's ability to compete with AT&T.

AT&T has the burden of showing that restrictions on resale are not unreasonable and discriminatory. 47 C.F.R. § 51.613(b)[5] AT&T presented through direct and cross examination testimony, exhibits and post hearing arguments substantial evidence and persuasive argumentation to make this showing. AT&T's evidence and position support the Commission's 2004 conclusion that the one-time offerings are reasonable and procompetitive. dPi did not address the evidence, arguing instead against a nonexistent AT&T argument that the incentives were not telecommunications service. The Public

[5] Even if the 90 day durational threshold set forth in 47 C.F.R. § 52.613(a)(2)(i) applied, and a recurring month to month promotion exceeded 90 days, the ILEC may still demonstrate that the restriction on resale is reasonable and nondiscriminatory and avoid the requirement that the promotion go to the resellers. "(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose restrictions only if it proves to the state Commission that the restriction is reasonable and nondiscriminatory ." (emphasis added)

Staff mentioned the issue only briefly and for the most part avoided its merits.[6] AT&T's unaddressed and unrebutted evidence and arguments satisfy its burden.

One time incentives, not part of any ILEC tariff, qualify for pass through treatment to resellers under 47 U.S.C. § 251(c)(4), but only just. Both the Commission and the Fourth Circuit agree that they do not rise to the level of recurring per se tariffed rate discounts as contemplated and addressed by the FCC. Sanford at 457-58. Their "economic value" is of a lesser brand. By definition their potential anti-competitive harm to resellers is less than that of "promotions" as defined by the FCC. As only inducements to subscription, the duration of the program of which they are a part is not a negative factor in determining the reasonableness and discriminatoriness of ILEC restrictions on them. This case, unlike the 2004 generic docket, requires the Commission to articulate in greater specificity the justification of the legal standard it will apply in weighing ILEC evidence. In my view the majority has misapplied the standard from the FCC's orders and rules and has penalized the ILEC impermissibly through its emphasis on the duration of the 1FR + 2 Cash Back and similar programs. Disregarding the Commission's own guidance in Docket No. P-100, Sub 72 that these offerings are of lesser value than recurring tariffed offerings and are presumptively reasonable and nondiscriminatory, the majority has imposed a standard on AT&T that assumes just the opposite. dPi, serving a niche market, must do more to receive the diminished "economic value" of the one-time incentive than it has done in this case.

\s\ Edward S. Finley, Jr.
Chairman, Edward S. Finley, Jr.

[6] The Public Staff relies primarily on the post merger (2007) change in policy. What AT&T's policy was with respect to wholesale restrictions on offerings such as 1FR + 2 Cash Back before its merger with BellSouth or thereafter sheds no light on the merits of the reasonableness or competitive nature of the incentives at issue. This issue has been addressed extensively by this Commission, the United States District Court for the Western District of North Carolina and the Fourth Circuit. This precedent along with the 96 Act and FCC rules and orders are the proper reference, not AT&T's business decisions or policy decisions at other times and in other jurisdictions. Moreover, pre-merger AT&T's legal position before the FCC was that the one-time offerings were not telecommunications services or promotional discounts subject to resale obligations. Attachment C – AT&T's post hearing brief.

# ATTACHMENT G

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

**Civil Action 5:10-cv-00466-BO**

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

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

**Civil Action 5:10-cv-00466-BO**

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

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

## SUMMARY OF THE NATURE OF THE CASE

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

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

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

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

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

## STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

The discount rate for AT&T (i.e., the "BellSouth") was determined by the NCUC in the *Recommended Arbitration Order* issued 23 December 1996 in *In the matter of Petition of AT&T Communications of the Southern States, Inc. For Arbitration of Interconnection with BellSouth Telecommunications, Inc.,* Docket No. P-140, Sub 50.("*AT&T RAO 1996*")[2] The NCUC adopted a wholesale discount rate of 21.5% for residential services and 17.6% for business services. *Id* p 43. The parties have not challenged the accuracy of the percentage or supplied new cost studies for the purpose of establishing additional classes of service to which

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

a different discount rate should apply.

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

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

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

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

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

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

Example 1: Wholesale discount for $75 = $16.12

Example 2: Wholesale discount for $50 = $10.75

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

$58.88 - $39.25 = $19.63

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

the discount to the amount of the reduction:

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

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

When the NCUC considered the issue about what method is appropriate for calculating the impact of cashback promotions on the wholesale price that dPi should have paid between 2003 through 2007, dPi had already paid for the services.(Doc 39-1 pp 50-51) The wholesale price dPi had paid was based on AT&T's *standard* retail rate unadjusted for the reductions caused by the cash-back promotions. *Id.* Therefore the NCUC calculated what *correction* should be made to credit dPi for the difference between the wholesale price applicable to the standard retail rate and the wholesale price applicable to the promotional retail rate. It found that what is required is "that the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price be determined and that the benefit of such a reduction be passed on to resellers by applying the wholesale discount to the lower actual retail price." *RO* p 21 (Doc 39-10 p 22)(quoting *Restriction on Resale Order II* p 6)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

dPi also appears to argue that the full value of the cashback offers should be credited (e.g., the full $100 amount) so that the same terms and conditions offered to retail customers are offered to resellers. As the NCUC stated in the *RO* and in previous determinations, the obligation relating to promotional offers is to provide the *benefit* of the promotional offer through the wholesale price charged the reseller, not to provide the promotional item (such as a gift or cash) itself. *RO* 21 (Doc 39-10 p 22) The face value of the promotion is not required to be passed through to a reseller. Instead, "the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price [must] be determined and ... the benefit of such a reduction [must] be passed on to resellers by applying the wholesale discount to the lower actual retail price." *RO* 21 (Doc 39-10 p 22), *quoting Restriction on Resale Order II*, issued 3 June 2005 in Docket No. P-100, Sub 72(b), *affirmed* in *Sanford*, 494 F.3d 439) The formula approved by the NCUC for determining promotional credits accomplishes the purpose of correcting the wholesale price that dPi paid from 2003 through 2007 to reflect the price lowering impact of the cashback promotions on the standard retail rate.

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

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

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

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

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

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

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

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

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

## CONCLUSION

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

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

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/s/ Margaret A. Force
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## CERTIFICATE OF SERVICE

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

Respectfully submitted,

/s/ Margaret A. Force
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# ATTACHMENT H

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*Nanette S. Edwards*
*Chief Counsel and Director of Legal Services*

April 6, 2011

**VIA ELECTRONIC FILING**

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

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

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

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

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

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

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

Dear Ms. Boyd:

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

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

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

## I. Cash-Back Promotions

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

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

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

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

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

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

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

## II. Word-of-Mouth Promotions

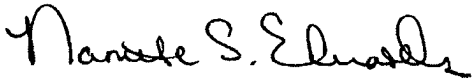
AT&T states that qualifying AT&T South Carolina retail customers can receive promotional benefits such as gift cards under these offerings if they convince friends and family members who are not AT&T retail customers to purchase particular AT&T services (i.e. word-of-mouth promotion). The Resellers in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

## III. Waiver of Line Connection Charge Promotions

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

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

Respectfully submitted,



Nanette S. Edwards

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

# ATTACHMENT I

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N.C. Utilities Commission

# NORTH CAROLINA
# PUBLIC STAFF
# UTILITIES COMMISSION

June 13, 2011

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Hinton
Hoover
Sessoms
Kite
Paschal
Wigfall

Ms. Renné C. Vance, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4325

Re: Docket No. P-836, Sub 5
Docket No. P-908, Sub 2
Docket No. P-1272, Sub 1
Docket No. P-1415, Sub 2
Docket No. P-1439, Sub 2

Dear Ms. Vance:

Enclosed herewith for filing in the above-referenced docket are twenty-one (21) copies of the Proposed Order of the Public Staff.

By copy of this letter, I am forwarding a copy to all parties of record.

Yours very truly,

Lucy E. Edmondson

Lucy E. Edmondson
Staff Attorney
lucy.edmondson@psncuc.nc.gov

LEE/bll

Enclosures

c: Parties of Record

FILED
JUN 13 2011
Clerk's Office
N.C Utilities Commission

**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. P-836, SUB 5
DOCKET NO. P-908, SUB 2
DOCKET NO. P-1272, SUB 1
DOCKET NO. P-1415, SUB 2
DOCKET NO. P-1439, SUB 2

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

| | | |
|---|---|---|
| In the Matter of<br>BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina,<br>Complainant | ) | |
| v. | ) | PROPOSED ORDER OF THE PUBLIC STAFF |
| dPi Teleconnect, LLC, Image Access, Inc., d/b/a NewPhone, Affordable Phone Services, Inc., BLC Management, LLC, d/b/a Angles Communications Solutions, and LifeConnex Telecom, Inc., d/b/a Swiftel,<br>Respondents | ) | |

HEARD IN: Commission Hearing Room 2115, Dobbs, Building, Raleigh, North Carolina, on April 15, 2011

BEFORE: Commissioner William T. Culpepper, III, Presiding; Chairman Edward S. Finley, Jr.; and Commissioners Lorinzo L. Joyner, Bryan E. Beatty, Susan Warren Rabon, and ToNola D. Brown-Bland

APPEARANCES:

For BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina:

Patrick W. Turner, AT&T North Carolina, 1600 Williams Street, Suite 5200, Columbia, South Carolina 29201

Dwight Allen, Allen Law Offices, PLLC, 1514 Glenwood Avenue, Suite 260, Raleigh, North Carolina 27608

For the Using and Consuming Public:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

For dPi Teleconnect, LLC, Image Access, Inc., d/b/a NewPhone, Affordable Phone Services, Inc., and BLC Management, LLC d/b/a Angles Communications Services:

Ralph McDonald, Bailey & Dixon, LLP, Post Office Box 1351, Raleigh, North Carolina 27602-1351

For dPi Teleconnect, LLC:

Christopher Malish, Malish & Cowan, PLLC, 1403 West Sixth Street, Austin, Texas 78703

For Image Access, Inc. d/b/a NewPhone:

Paul Guarisco, Phelps Dunbar, LLP, II City Plaza, 400 Convention Street, Suite 1100, Baton Rouge, Louisiana 70821

For Affordable Phone Services, Inc., and BLC Management, LLC, d/b/a Angles Communications Solutions:

Henry Walker, Brantley Arant Boult Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203

BY THE COMMISSION: On January 8, 2010, BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina (AT&T or Complainant) filed in separate dockets complaints and petitions for relief against dPi Teleconnect, LLC (dPi), Image Access, Inc., d/b/a NewPhone (NewPhone), Affordable Phone Services, Inc. (Affordable Phone), and BLC Management, LLC, d/b/a Angles Communications Services (Angles) (collectively Respondents), requesting that the Commission resolve outstanding billing disputes that exist between Complainant and Respondents, determine the amount that each Respondent owes Complainant under its respective interconnection agreement with AT&T, and require each Respondent to pay the amount to Complainant.

On February 25, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed defensive pleadings to AT&T's complaints. On April 9, 2010, Complainant filed responses to each of the defensive pleadings. On April 30, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed reply pleadings to Complainant's April 9, 2010, responsive pleadings.

On May 14, 2010, the Respondents and Complainant filed a Joint Motion on Procedural Issues in which the parties requested that the Commission hold all other pending motions in abeyance and convene a consolidated proceeding o which the Complainants and all Respondents are parties to resolve the following issues: how cash-back credits to the resellers should be calculated; whether the word-of-mouth promotion is available for resale and, if so, how the credits to resellers should be calculated; and how credits to resellers for waiver of the line connection charge should be calculated. This Joint Motion was granted by Commission Order issued May 20, 2010.

On July 23, 2010, Complainant filed stipulations entered into by Complainant and Respondents for the consolidated phase. On August 3, 2010, the Commission issued its Order Allowing Intervention by LifeConnex Telecom, LLC, d/b/a Swiftel (LifeConnex) in the consolidated proceeding.

On August 27, 2010, Complainant prefiled the direct testimony and exhibits of William E. Taylor, and Respondents prefiled the direct testimonies and exhibits of Joseph Gillan and Christopher C. Klein. On October 1, 2010, Complainant filed the rebuttal testimony of William E. Taylor, and Respondents filed the rebuttal testimonies of Joseph Gillan and Christopher C. Klein.

On February 8, 2011, the Commission issued its Order Scheduling Hearing. On April 11, 2011, dPi filed Objections to and Motion to Strike Portions of Dr. William Taylor's Testimony. On April 13, 2011, Complainant filed a Response to Motion to Strike. The matter came on for hearing as scheduled on April 15, 2011. dPi's motion to strike was denied from the bench by Presiding Commissioner Culpepper.

Whereupon, based upon the foregoing and the entire record in this matter, the Commission makes the following findings of fact:

## FINDINGS OF FACT

1. Credits to resellers for the Cashback promotions should be calculated by reducing the credit by the amount of the wholesale discount.

2. Credits to resellers for the Line Connection Charge Waiver (LCCW) should be calculated by reducing the credit by the amount of the wholesale discount.

3. The Word-of-Mouth referral program is not subject to 47 U.S.C. § 251(c)(4), the resale obligations of the federal Telecommunications Act of 1996 (the Act).

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

The evidence for this finding is contained in the testimony and exhibits of AT&T witness Taylor and Respondents' witnesses Gillan and Klein. In addition, the

Commission takes judicial notice of its May 7, 2010, *Recommended Order (dPi Recommended Order)* and October 1, 2010, *Order Denying Exceptions and Affirming Recommended Order* (*dPi Order Denying Exceptions*) in Docket No. P-55, Sub 1744; its December 22, 2004, Order (*Restriction on Resale Order I*) and June 3, 2005, Order (*Restriction on Resale Order II*) in Docket No. P-100, Sub 72b; and its December 23, 1996, *Recommended Arbitration Order* and May 12, 1997, *Order Ruling on Objections, Comments, Unresolved Issues, and Composite Agreement* in Docket No. P-140, Sub 50.

Pursuant to 47 U.S.C. § 251(c)(4), incumbent local providers (ILECs) such as AT&T, are required to sell their services at wholesale to competitors, such as the Respondents, for resale to consumers. The rate an ILEC may charge for these services is the ILEC's retail rate less a wholesale discount determined by the state utility commission. *Id.* § 252(d)(3). In adopting rules to implement this requirement,[1] the Federal Communications Commission (FCC) allowed state commissions to approve either uniform or non-uniform rates. The FCC noted that the benefits of uniform rates were that they were simple to apply and did not require allocation of costs among services. *Local Competition Order* at ¶ 916.

In Docket No. P-140, Sub 50, the Commission determined the appropriate wholesale discount rate for all of the residential services of BellSouth Telecommunications, Inc. (doing business now as AT&T Southeast) to be 21.5% based upon 1995 revenues and costs. This rate was calculated by dividing BellSouth's total actual avoided costs, both direct and indirect, by its total revenues subject to resale, and then allocating the costs and revenues to either residential and business categories. The Commission calculated a wholesale discount rate of 21.5% for residential services. *See* 86 N.C.U.C. 418-21 (1996) and 87 N.C.U.C. 292-93 (1997). The Commission chose to create a uniform rate for all services, as opposed to non-uniform rates for different services.

In Docket No. P-140, Sub 50, the Commission also held that promotions are retail services subject to resale if the promotion lasts more than 90 days. It further noted that an ILEC may not use promotions to evade its wholesale rate obligation, such as offering sequential promotions lasting less than 90 days. 86 N.C.U.C. 392 (1996). This is in keeping with the FCC's admonition against promotions or discounts that allow ILECs to "avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." Local Competition Order ¶ 948. The Commission directly addressed questions regarding resale of promotions in its *Restriction on Resale Order I* and *Restriction on Resale Order II.* The Fourth Circuit Court of Appeals in *BellSouth Telecom, Inc. v Sanford*, 494 F3d 439 (4th Cir.) 2007 (*Sanford*), upheld the Commission's decisions in its *Restriction*

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, (1996) (*Local Competition Order*).

*on Resale Orders* that the effect of promotional offerings offered over 90 days is to change the actual retail rate to which the wholesale discount must be applied.[2]

In the *Sanford* decision, the 4th Circuit used the following example:

> Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to compete with BellSouth's $20 retail fee. Now suppose that BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100. According to the NC Commission's orders, the appropriate wholesale rate is still $16, because that is the net price paid by the retail customer ($20), less the wholesale discount (20%).[3]

The 4th Circuit affirmed the Commission's holding in the *Restriction on Resale Orders,* that a reseller is entitled to a wholesale price derived by applying the wholesale discount to the actual retail price, i.e., the full retail price less the value of the promotion. Thus, the formula for calculating the price to the reseller of a promotion is as follows: wholesale price = (retail price – value of promotion) x (100 - wholesale discount).

This is the same formula advanced by AT&T in Docket No. P-55, Sub 1744, and used by the Commission for calculating the amount to which a reseller is entitled in regard to a promotion or a discount in Finding of Fact 26 in the *dPi Recommended Order.* Noting that the *Restriction on Resale Orders* do not require that a reseller receive the face value of a promotion, but rather the price lowering impact of the promotion, the Commission determined that a reseller should receive the benefit of a promotion by subtracting the value of the promotion from the retail rate and then reducing the result by the wholesale discount. In that matter, dPi contended that it should receive the benefit of the entire amount of the promotion without any reduction by the wholesale discount. At the oral argument on July 12, 2010, counsel for dPi discussed three scenarios: where the value of the promotion was less than, equal to, and greater than the retail rate.[4] The Commission, however, agreed with AT&T's position and held that if dPi's position regarding promotional credits was to be adopted and it were paid the full amount of the promotion without any discount, dPi would receive a greater benefit than to which it would otherwise be entitled.

The parties have stipulated that the Commission is to assume in the consolidated phase that a Respondent is entitled to receive a promotional credit for the Cashback and Line Connection Charge Waiver (LCCW) promotions and the only dispute is the

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[2] *Id.* at 442.

[3] *Sanford* at 450.

[4] *See* Transcript of July 12, 2010 Oral Argument pp. 21-26, Docket No. P-55, Sub 1744.

formula for calculation of the credit to which the Respondents are entitled.[5] The first promotion under consideration in this docket is the Cashback promotion, an offer that provides a one-time cash or near-cash incentive for customers to subscribe to a service and often takes the form of a coupon to be mailed back or an online redemption process. According to witness Taylor, AT&T resells Cashback promotions by billing qualifying resellers the monthly retail price of the telecommunications service less the 21.5% wholesale discount and then providing the reseller a one-time bill credit in the amount of the retail Cashback amount less the 21.5 %wholesale discount. (Tr. pp. 29-30) An example of a Cashback promotion is the Competitive Acquisition for Complete Choice (Basic and Enhanced) that was introduced by AT&T in November of 2008 and terminated in March 2010. This promotion provided a cash payment of $50 if the customer was not a current AT&T customer and retained the service for at least one month. (Tr. pp. 198-99)

AT&T witness Taylor testified that the correct method for calculating the proper credit for the Cashback promotion is to calculate the effective retail price of the telecommunications service less the avoided-cost discount, which equals the previous wholesale price less the discounted amount of the Cashback promotion credit. (Tr. p. 64) Dr. Taylor explained that this formula is appropriate because it treats the Cashback promotion as an effective reduction in the retail price, and is consistent with Commission decisions and interconnection agreements that require that the wholesale price be a fixed percentage discount of the retail price. (Tr. pp. 44-45)

In his direct testimony, Respondent witness Gillan testified that the full flow-through of the promotion was needed to ensure that AT&T's wholesale prices conform to the FCC's pricing rules for resale. (Tr. p. 204) He contended that to do otherwise would impose an unlawful restriction or condition on a reseller, contrary to Sections 251 (c)(4)(B) and 271 (c)(2)(B)(xiv) of the Act 47 C.F.R. Section 51.605(e), and distort the relationship between wholesale and retail pricing. Mr. Gillan contended that the Commission must establish a rate that is the amount of the wholesale discount less than the effective retail rate. (Tr. p. 231)

In his direct testimony, Respondent witness Klein argued that for Cashback promotions the reseller should receive the full amount of the Cashback promotion without any reduction by the standard wholesale discount. (Tr. pp. 273-74) He contended that AT&T's method of calculation can result in a regulatory price squeeze. (Tr. pp. 272-74) Dr. Klein also contended that if the reseller is credited the full amount of the promotion without deduction of the wholesale discount, AT&T should be economically indifferent to selling the telecommunications service directly to a customer or through a reseller. (Tr. p. 275)

Respondent witness Klein agreed on cross examination that it would be appropriate to look at more than one month of service in determining whether pricing is below cost or predatory. (Tr. p. 306) Further, AT&T demonstrated on cross examination

[5] Joint Stipulation Item 1a.

of Respondent witness Gillan that if a customer of a reseller maintains service for more than a month, the reseller would pay a net amount less than what the retail customer pays, i.e., less the Commission-established wholesale discount rate. (See Gillan Cross Exam. Exh. No. 8) Thus, while in a single month the wholesale rate may exceed the retail price, it is appropriate to compare the wholesale and effective retail rates over a longer period than a single month.

Another argument presented by the Respondent witness Klein was that a distinction should be made between promotions that offer a temporary discount to the standard retail rate and those that provide a one-time rebate. According to Dr. Klein, a temporary promotional discount of the monthly standard retail rate is the most obvious type of promotion that the FCC sought to require ILECs to provide to resellers. This discounting is realized immediately in contrast to a rebate. (Tr. p. 286) Dr. Klein testified that this distinction is important because rebates do not change the retail rate paid by the consumer, so the wholesale rate for the service is not changed. Thus, the wholesale rate remains the standard retail rate less the avoided cost discount. As a result, the reseller would then be entitled to the entire rebate amount, just as a retail customer. (Tr. p. 287) Dr. Klein concluded that the Cashback promotion is structured as a rebate and does not change the standard retail rate. (Tr. p. 288)

The classification of the Cashback promotions as rebates or temporary discounts to retail rates is irrelevant. Both types of promotions effectively reduce the retail rate for a telecommunications service. In *Sanford*, the 4th Circuit noted "[w]hile an incentive, such as a rebate or a gift card, is obviously not 'telecommunications,' it does reduce the retail price or "fee" for telecommunications. As such, an incentive is part of 'the offering of telecommunications' which incumbent LECs must make to would-be competitors."[6] Thus, even if Dr. Klein is correct in his characterization of the Cashback promotions as a rebate, rebates reduce the retail price for telecommunications. Moreover, consistent with the Commission's decision in this proceeding and in prior cases, the Court in *Sanford* calculated the amount due a reseller for a promotion in the form of a monthly rebate check, by first determining the effective retail rate and then applying the wholesale discount.

The Commission acknowledges that the effect of its methodology for calculating the discount may mean that for a <u>single</u> month to which the promotion applies, the wholesale price may exceed the retail price, if the value of the promotion exceeds the retail price. Generally, however, a wholesale price would be less than the retail price. Moreover, the wholesale discount is an average for all AT&T retail services, so it was never intended to represent the actual avoided cost for a particular service for an individual month.

While the Commission has considered the issue of the proper methodology for calculation of the amount to be credited to resellers for promotions in greater detail in this proceeding than in prior dockets, the Commission's conclusion in the *Restriction on*

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[6] *Sanford* at 450.

*Resale Orders I and II* and in the *dPi Recommended Order* make clear that the face value of a promotion is not required to be passed through to a reseller. Rather, only the benefit of such a reduction must be passed on to resellers by subtracting the wholesale discount from the lower actual retail price. Consistent with these decisions, the Commission, therefore, finds and concludes that the proper method for calculating the credit for the Cashback promotion is the effective retail rate (i.e., the retail rate less the value of the promotion) less the wholesale rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

The evidence for this finding is contained in the testimony and exhibits of AT&T witness Taylor and Respondents' witness Klein.

The LCCW promotion waives the nonrecurring installation charge for new retail customers who are eligible for the promotion. AT&T witness Taylor testified that resellers are initially billed the retail charge for the line connection less the standard wholesale discount. If a timely request for a promotional credit is submitted, AT&T credits the reseller with the amount it initially billed the reseller. As a result, neither the retail customer nor the wholesale customer pays the line connection charge. (Tr. p. 45)

Witness Taylor testifies that the line connection charge should be regarded as a telecommunications service since customers generally must buy it with their local exchange service. Thus, he contended that the two services should be treated as a single retail telecommunications service consisting of an upfront, one-time price and a monthly recurring charge, to which the wholesale discount is applied. (Tr. p. 46) Alternatively, Dr. Taylor proposes treating the LCCW as the Cashback promotion and providing it for resale at the retail price less the wholesale discount. (Tr. pp. 46-47)

Respondent witness Klein contends that AT&T should credit the reseller with the avoided cost of line connection when the reseller's customer qualifies for the LCCW. (Tr. p. 280) He argues that the LCCW is in the form of a rebate for the reseller and should be calculated by applying the avoided cost discount to the standard retail rate. (Tr. p. 278). Dr. Klein argues that like the Cashback promotion, the LCCW is a rebate and does not change the retail rate. (Tr. p. 286)

The Commission finds that the proper methodology for calculating the LCCW promotion should not differ from that determined as proper for the Cashback promotion. In regard to the LCCW, the effective retail rate is zero, so the effect of the promotion is that neither retail nor wholesale customers are charged the line connection charge. This hardly seems inequitable.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

The evidence for this finding of fact is contained in the testimony and exhibits of AT&T witness Taylor and Respondents' witness Klein.

AT&T witness Taylor testified that the Word-of-Mouth referral program should be regarded as an AT&T marketing expense. Customers are acting in the capacity of a part-time sales force for AT&T and compensated for successful referrals by receiving a cash reward. (Tr. p. 50) Dr. Taylor also stated that the benefit the recipient receives has no relationship to the services purchased by the recipient from AT&T, and that to receive the Word-of-Mouth payment the recipient must perform a service of value to AT&T by convincing someone to become a new AT&T customer.

Respondents' witness Klein testified that the Word-of-Mouth referral program is a rebate offered as a term and condition of service and FCC rules require that rebates must be available for resale. (Tr. pp. 287-88) Dr. Klein offered a formula used to calculate the effective rate to the customer based on the rebate, and concluded that if the referral program was not available for resale that AT&T would be evading its wholesale rate obligation.

The Commission agrees with AT&T that the Word-of-Mouth referral program is not subject to the resale obligations of the Act. As explained by witness Taylor, the referral program differs from promotions in several critical aspects. First, there is no correlation between the referral program and services purchased from AT&T by the recipient; those services may remain unchanged regardless of the number of successful referrals. Instead, the benefit received is directly tied to telecommunications services purchased by other end users, creating a situation where the recipient of the referral program is essentially performing a marketing or sales service on behalf of AT&T. (Tr. p. 51).

The parties agree that marketing and sales costs are specifically included in the calculation of avoided costs as required by FCC rules (§ 51.609). Under cross-examination, Dr. Klein agreed that sales costs associated with several potential individual promotional efforts would not be required to be made available for resale. (Tr. pp. 315-16). The Commission believes that the Word-of-Mouth referral program is analogous to the sales efforts described in the cross-examination of Dr. Klein and is essentially a marketing program for AT&T's services. The Commission is aware of nothing in the *Local Competition Order* requiring a program that markets retail services to be made available for resale by a competitor.

The Commission, therefore, finds and concludes that the Word-of-Mouth referral program should likewise not be required to be made available for resale. Since the Commission has determined that the program is not subject to the resale obligation, there is no need for the Commission to consider the question of how much credit is due to the Respondents.

IT IS, THEREFORE, ORDERED as follows:

1. That the wholesale price of the Cashback and Line Connection Charge Waiver promotions should be reduced to reflect the wholesale discount.

2. That the Word-of-Mouth referral program is not a promotion and does not have to be made available for resale.

ISSUED BY ORDER OF THE COMMISSION.

This the ___ day of _____, 2011.

NORTH CAROLINA UTILITIES COMMISSION

Renné Vance, Chief Clerk