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March 5, 2012

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

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

Dear Ms. Boyd:

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

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

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
enclsoure
cc: All Parties of Record
1025173

**BEFORE THE**
**PUBLIC SERVICE COMMISSION**
**OF SOUTH CAROLINA**

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

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

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

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

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

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

**AT&T SOUTH CAROLINA'S NOTICE OF SUBSEQUENT DEVELOPMENT**

BellSouth Telecommunications, LLC d/b/a AT&T South Carolina ("AT&T South Carolina") respectfully submits the attached documents to inform the Commission of recent legal developments in Kentucky.

On Friday, March 2, 2012, the Kentucky Commission entered its Order denying dPi's Motion for Reconsideration of its initial Order finding that when dPi qualifies to resell a cashback promotion, AT&T Kentucky can apply the Commission-approved resale discount rate

to the retail value of the cashback benefit.[1] Attachment A to this Notice is a copy of the Kentucky Commission's Order denying reconsideration.

The Kentucky Commission's Order denying reconsideration acknowledges dPi's argument that "wholesale pricing should always reflect a price below retail," *see* Attachment A at 2, which is the same argument the Resellers made and this Commission apparently accepted in its Directive in these Consolidated Phase proceedings. The Kentucky Commission explains that its initial Order "considered all of dPi's arguments that the cashback promotion should not be discounted by the wholesale discount, and rejected them." *Id.* at 3. The Kentucky Commission then states that "[e]ven assuming that dPi's Motion . . . had some merit," the "reasoning and conclusion" of the recent Order of the federal district court in North Carolina, including its analysis of the Fourth Circuit's *Sanford* decision, "underscores the Commission's confidence that it reached the correct decision in its January 19, 2012 Order." *Id.* at 4.

In reaching this decision, the Kentucky Commission necessarily rejected all of the arguments set forth in the "Response to AT&T's Notice of Subsequent Development" that the Resellers filed in these consolidated dockets on the same day the Kentucky Commission issued its Order denying reconsideration. That is not surprising, given that AT&T Kentucky's Response to dPi's Motion for Reconsideration[2] carefully explains how the Kentucky Commission's initial Order is fully supported by the North Carolina federal court Order, *see* Attachment B at 3-4, the *Sanford* decision, *Id.* at 11-14, and the 16.79% resale discount rate established by the Kentucky Commission. *Id.* at 14-25. While the figures in the Tables and accompanying text of AT&T Kentucky's filing are different than they would be in South

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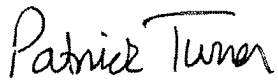
[1] AT&T South Carolina filed the Kentucky Commission's initial Order with this Commission on January 20, 2012.

[2] Attachment B is a copy of AT&T Kentucky's Response to dPi's Motion for Reconsideration.

Carolina (as a result of this Commission's establishing a different resale discount rate – 14.8% – than the Kentucky Commission established), the reasoning is exactly the same and is as applicable in South Carolina as it is in Kentucky. AT&T South Carolina, therefore, respectfully requests that the Commission consider AT&T Kentucky's Response as it crafts its written order in this proceeding.

Finally, AT&T South Carolina respectfully requests that the Commission take any action necessary to ensure that any written Order it issues in these consolidated dockets complies with federal law as announced by the federal district Court in North Carolina and as acknowledged by the Kentucky Commission's Order.

Respectfully submitted on this the 5th day of March 2012.



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1026537

# ATTACHMENT A

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|---|---|---|
| DPI TELECONNECT, L.L.C.<br><br>COMPLAINANT<br><br>V.<br><br>BELLSOUTH TELECOMMUNICATIONS, INC.<br>D/B/A AT&T KENTUCKY<br><br>DEFENDANT<br><br>DISPUTE OVER INTERPRETATION OF THE PARTIES' INTERCONNECTION AGREEMENT REGARDING AT&T KENTUCKY'S FAILURE TO EXTEND CASH-BACK PROMOTIONS TO DPI | ) | CASE NO.<br>2009-00127 |

ORDER

On February 13, 2012, dPi Teleconnect, Inc. ("dPi") filed with the Commission a Motion to reconsider the Commission's January 19, 2012 Order. BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky") filed its response in opposition to the Motion on February 23, 2012.

DPi challenges the Commission's decision that an AT&T Kentucky promotional "cashback" offer that is offered at resale to dPi must be reduced by the wholesale discount that is normally applied to resale. DPi argues that, because this might result in the wholesale price being higher than the retail price, it is prohibited by the 1996 Telecommunications Act.

DPi initially argued that it should receive the full value of the cashback promotion and that the value of the promotion should not be reduced by the wholesale discount rate applied to resale of regular services. For example, if AT&T Kentucky offers retail service to its customers at $20.00, it must sell it to dPi at a Commission-mandated discount of 16.79 percent. Therefore, dPi is able to purchase the service at $16.64. DPi argued, however, that if AT&T Kentucky offered a promotion for a certain monetary value, the discount rate did not apply to the promotional price. For example, if AT&T Kentucky offered a cashback promotion of $50.00, it must offer dPi a credit for the whole $50.00 and not reduce that $50.00 by the wholesale discount.

The Commission found that any promotional discounts should be adjusted by the wholesale discount and to adopt dPi's position would be to put AT&T Kentucky in the position of paying its competitors to "purchase" AT&T Kentucky's service. The Commission concluded that such a result was absurd and would lead to an anticompetitive environment. The Commission, therefore, ordered that any promotional discount must be reduced by the wholesale discount.

dPi's Argument

DPi argues that the calculation the Commission adopted in its Order "conflicts with federal law and regulations because it violates the core principle of the Telecommunications Act that wholesale pricing should always reflect a price below retail."[1] DPi asserts that applicable federal statutes and regulations require that resale rates be lower than wholesale rates in order to promote competition. DPi also asserts

[1] Motion for Rehearing at 4.

that the FCC, in the Local Competition Order,[2] also indicated that the wholesale price should be below retail prices, and that promotions cannot be used to circumvent the rule. DPi also relies upon the decision in the Sanford[3] case out of the Fourth Circuit Court of Appeals. DPi argues that, in Sandford, the Fourth Circuit determined that, "wholesale must be less than retail," and that the Commission's Order turns the Sanford reasoning on its head. DPi raises several other arguments, none of which are new, all arguing that wholesale rates must always be lower than retail rates.

Discussion

KRS 278.400 contains the standard for the Commission to grant rehearing. If the rehearing is granted, any party "may offer additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. The Commission may also take the opportunity to address any alleged errors or omissions.

DPi has not raised any new arguments in its Motion for Rehearing. Its motion is a recitation of the arguments that it presented in its complaint, in filed testimony, at oral argument and in its post-hearing briefs. The Commission considered all of dPi's arguments that the cashback promotion should not be discounted by the wholesale discount, and rejected them. DPi has presented no compelling argument, produced no new evidence, and pointed to no omissions or errors in the Commission's Order that warrant granting rehearing.

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[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 (rel. Aug. 8, 1996).

[3] BellSouth Telecom. Inc. v. Sanford, 494 F.3d 439 (4th Cir. 2007).

Even assuming that dPi's Motion for Rehearing had some merit, a recent court decision further supports the Commission's decision to discount the cashback promotion by the wholesale discount. In dPi Teleconnect v. Finley, et al.,[4] the United States District Court for the Western Division of North Carolina addressed a similar issue to the one that is raised at rehearing -- whether a cashback promotion should be reduced by the wholesale discount when it is provided at retail. The Court, applying the reasoning in Sanford, concluded that, "dPi is entitled only to the difference between the rate that it originally paid and the rate it should have paid to AT&T North Carolina. The rate it should have been charged is the promotional rate available to the retail customers less the wholesale discount for residential services . . . ."[5] The Court's reasoning and conclusion in its Opinion underscores the Commission's confidence that it reached the correct decision in its January 19, 2012 Order.

Based on the foregoing, IT IS THEREFORE ORDERED that dPi's Motion for Rehearing is DENIED.

By the Commission

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KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director

[4] dPi Teleconnect LLC v. Finley, (___ F. Supp.2d ____, 2012 WL 580550 (W.D.N.C). The Order was entered on February 19, 2012, approximately one month after the Commission issued its decision in this case.

[5] Id. at 3 (Emphasis added.)

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# ATTACHMENT B

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|---|---|---|
| DPI TELECONNECT, LLC<br><br>COMPLAINANT<br>V.<br><br>BELLSOUTH TELECOMMUNICATIONS, INC.<br>D/B/A AT&T KENTUCKY<br><br>DEFENDANT<br><br>_____<br><br>DISPUTE OVER INTERPRETATION OF THE<br>PARTIES' INTERCONNECTION AGREEMENT<br>REGARDING AT&T KENTUCKY'S FAILURE TO<br>EXTEND CASH-BACK PROMOTIONS TO DPI | ) | CASE NO.<br>2009-00127 |

**AT&T KENTUCKY'S RESPONSE TO DPI'S MOTION FOR RECONSIDERATION**

dPi's Motion for Reconsideration of the Commission's January 19, 2012 Order ("the Challenged Order") merely repeats the same arguments that dPi has already presented, AT&T Kentucky has already rebutted, and the Commission has already rejected.[1] Additionally, the Challenged Order's findings and conclusions that dPi attacks are fully supported by:

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[1] KRS § 278.400 states in relevant part that "[u]pon the rehearing any party may offer additional evidence that *could not with reasonable diligence have been offered on the former hearing.*" (Emphasis added). dPi, however, has proffered no additional evidence or arguments that it has not already presented to the Commission. *See* **Attachment A** to this Response (a spreadsheet that cites to: each argument dPi presents in its Motion; earlier dPi submissions that present the same arguments; and earlier AT&T Kentucky submissions that rebut these arguments).

the only federal court decision resolving the exact issue dPi presents in its Motion (the February 19, 2012 Order affirming the North Carolina Commission's decision in favor of AT&T in the companion dPi complaint case);[2]

the FCC's *Local Competition Order;*[3]

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

the Proposed Recommendation of the administrative law judge in companion proceedings in Louisiana;[4]

the Proposed Recommendation of the administrative law judge in the "Consolidated Phase" proceedings in Louisiana;[5]

the North Carolina Commission's final Order in companion proceedings in that state;[6]

the North Carolina Commission's Appellate Brief (submitted by the Office of the North Carolina Attorney General) supporting that Order;[7]

the South Carolina Office of Regulatory Staff's recommendation in the companion Consolidated Phase proceedings before the South Carolina Commission;[8] and

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[2] *See* **Attachment B** to this Response.

[3] *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.*

[4] *See* AT&T Kentucky's Initial Brief, Exhibit 9.

[5] *See* AT&T Kentucky Oral Argument Handout No. 2. As discussed by AT&T during the Oral Argument in this docket, the Louisiana Commission remanded this Proposed Recommendation to the Administrative Law Judge for further consideration. The parties presented oral arguments on November 30, 2011, and the judge has not yet issued a proposed recommendation on remand.

[6] *See* AT&T Kentucky's Initial Brief, Exhibit 7.

[7] *See* AT&T Kentucky's April 27, 1011 Notice of Subsequent Developments (received April 28, 2011).

[8] *Id.* dPi's Motion relies on a Directive subsequently issued by the South Carolina Commission, which announces that Commission's intent to adopt dPi's Method 1 when the retail cashback benefit exceeds the retail price of the underlying service. As explained below, this Directive is contrary to controlling law as set out in the most recent federal Court Order addressing cashback promotions (**Attachment B**). Moreover, as AT&T Kentucky explains in this Response (and in its previous submissions in this docket), dPi's Method 1 violates federal law by overstating the estimated avoided costs,

the North Carolina Commission's September 22, 2011 Order in its companion Consolidated Phase proceedings (addressing the same issues as presented in these proceedings).[9]

Accordingly, for the reasons set forth below, AT&T Kentucky respectfully requests that the Commission deny dPi's Motion for Reconsideration.

## I. THE MOST RECENT FEDERAL COURT DECISION ADDRESSING CASHBACK PROMOTIONS SUPPORTS THE CHALLENGED ORDER.

dPi filed the same complaint that is the subject of these proceedings against AT&T in North Carolina. Like this Commission, the North Carolina Commission found that AT&T is entitled to apply the resale discount rate to both the monthly price of the service and to any promotional cashback credits for which resellers like dPi qualify. dPi challenged the North Carolina Commission's decision in federal district court, and the Court affirmed the North Carolina Commission's decision, finding that "AT&T North Carolina's method properly makes wholesale discount adjustments to both relevant rates ***as dictated by the statute***."[10] In doing so, the Court noted dPi's "suggest[ion] that this method produces anomalous results because, in the case where the cashback amount exceeds the monthly retail price, the 'price' to the retail customer in a given month is a negative number," and it also noted that "dPi argues that this cannot be the correct result because the Act dictates that the wholesale price must always be less

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understating the wholesale price, and creating a resale discount rate in excess of the rate established by the Commission. Accordingly, AT&T South Carolina will seek reconsideration if the South Carolina Commission's written Order (which has not yet been issued) does not appropriately modify the decision described in the Directive.

[9] *See* AT&T Kentucky's Letter dated September 23, 2011 (received September 26, 2011).

[10] *See* **Attachment B** at 6 (emphasis added).

than the retail price."[11] The Court then expressly found that these arguments are wrong as a matter of law, stating that "dPi misapprehends the Act's mandate."[12] The Court explained that short-term promotional rates

> are exempted from the ILEC's resale obligation so long as the rate is 'in effect for no more than 90 days.' 47 C.F.R. 51.613(a)(2). Even if dPi's anomaly should occur, ***the effect of a cashback amount greater than the monthly retail price is appropriate and permitted for a period of 90 days or less***, after which any continuing distortion could be remedied by additional promotional credits.[13]

The Court, therefore, entered judgment in favor of the North Carolina Commission and AT&T North Carolina, and against dPi. In these Kentucky proceedings, dPi has not presented (and cannot present) any evidence that the promotions at issue create a so-called "negative price" scenario that lasts more than ninety days. Accordingly, the Commission's Challenged Order is fully supported by the only federal court decision resolving the exact issue dPi presents in its Motion.

## II. EACH OF DPI'S ARGUMENTS AGAINST THE CHALLENGED ORDER IS MERITLESS.

To illustrate the issue on reconsideration, assume AT&T Kentucky offers a $50.00 cashback benefit to its retail customers who purchase a telecommunications service with a monthly price of $30.00.[14] dPi questions why it should receive a lower cashback benefit than a retail customer who purchases the service. The simple answer, of course, is dPi pays less (by exactly 16.79%) than the retail customer pays for the service, so dPi should receive less (by exactly 16.79%) of a cashback benefit than

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11 *Id.*

12 *Id.*

13 *Id.* at 7 (emphasis added).

14 As explained at pages 7-8 of AT&T Kentucky's Reply Brief, this example is based on one of the promotions at issue in this proceeding – the $50 Cashback 2-Pack Bundle Plan.

the retail customer receives. Table 1 below shows that this appropriately provides dPi the same proportional benefit as the retail customer receives.

| | Price | Table 1<br>Cashback | % of Price Paid |
|---|---|---|---|
| **Retail Customer** | $ 30.00 | $50.00 | 167% |
| **dPi** | $ 24.96 | $41.61 | **167%** |
| **Resale Discount** | **16.79%**[15] | | |

Discounting the cashback benefit by the 16.79% resale discount rate the Commission established – as the Challenged Order finds is appropriate – gives dPi the same benefit as the retail customer receives: exactly 167% of the price paid for the qualifying service. Stated another way, the methodology adopted by the Challenged Order gives dPi the same benefit the retail customer receives: the equivalent of 1.67 months of free service from AT&T Kentucky.

In contrast, Table 2 below shows that providing dPi the full retail value of the cashback benefit gives dPi a windfall and, in the process, produces a resale discount rate far in excess of the rate established by the Commission in 1997.

[15] As shown in Table 8 below, discounting the cashback benefit in compliance with the Challenged Order results in a 16.79% resale discount – exactly as required by the Commission's prior orders that established this resale discount percentage – regardless of how many months the service is kept.

| | Price Paid | Table 2<br>Cashback | % of Price Paid |
|---|---|---|---|
| **Retail Customer** | $ 30.00 | $50.00 | 167% |
| **dPi** | $ 24.96 | $50.00 | **200%** |
| **Resale Discount** | **Up to 100.74%**[16] | | |

Whereas the retail customer receives a benefit of only 167% of the price paid for the qualifying service, providing dPi the full retail cashback benefit would provide dPi a much higher "return" on the price it paid for the service – 200%. Stated another way, providing dPi the full retail value of the cashback benefit impermissibly gives dPi a greater benefit than the retail customer receives – the equivalent of more free service from AT&T Kentucky (approximately ten days more, in this example) than the retail customer receives. And while ten days of free service may not seem significant in the context of a single customer, in the aggregate dPi and other Resellers have used this rationale to withhold millions of dollars of payment from AT&T Kentucky (and to withhold tens of millions of dollars of payment from AT&T across the country). Clearly, this is inconsistent with the resale discount methodology established by the Commission, and the Challenged Order appropriately finds as much.

dPi, however, continues to dispute this simple and compelling logic. In the remainder of this Response, AT&T Kentucky addresses, and refutes, the various arguments dPi repeats in its Motion for Reconsideration.

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[16] As shown in Table 8 below, if the cashback benefit is not discounted, the actual resale discount varies depending on how long the service is kept, but it always exceeds the 16.79% resale discount rate established by the Commission. If the service is kept for two months, for instance, the actual resale discount is a whopping 100.74% .

### A. Cashback Promotions Must Be Evaluated Over a Reasonable Period of Time and Not in a Single Month as dPi Erroneously Contends.

Historically, the Kentucky Commission has addressed pricing issues like the ones in these proceedings by considering the price and cost of a service over a reasonable period of time, and not by considering the price and cost in a single month. The Commission, for example, has never required providers to recover all of the "up front" costs in the first month's price. Rather, the Commission has facilitated affordable prices by allowing providers to recover the initial costs to establish service over a reasonable period of time, even though doing so means that a provider will not recover all of its costs from the occasional customer who keeps the service for only a month. A facilities-based telecommunications service provider, for example, incurs substantial "up-front" costs to extend facilities to its customers and to implement customer-care and billing relationships with them. The same is true of electric and gas utilities – in some instances, the initial costs to establish a customer's service can run into the hundreds, or even thousands, of dollars. The Commission has never required all those "up-front" costs to be recouped in a single service installation charge or on the first month's bill. Rather, like commissions across the country, this Commission has long recognized that in most instances, these "up-front" costs can, and should, be recovered over a reasonable period of time.

This is especially appropriate in the highly competitive telecommunications market, where providers compete to attract customers for more than a single month. The evidence in this docket, for example, shows that dPi has a "churn rate" of between

10% and 30% per month,[17] which means that on average, its customers retain service from 3 to 10 months. Similarly, AT&T Kentucky's customers who accept cashback promotional offerings obviously keep the underlying service for more than a single month – AT&T Kentucky would not offer these cashback promotions for extended periods if a significant number of its own retail customers were accepting these cashback offerings and disconnecting service after only one month. Accordingly, it is appropriate and consistent with decades of prior Commission practice to consider pricing issues like the ones dPi presents over more than a single month.

And when considered over any reasonable period of time, applying the methodology adopted by the Challenged Order to the cashback promotions in these proceedings results in a "positive" wholesale price that is precisely 16.79% lower than the "positive" retail price over the same period. This is shown by Table 3 below, which applies the methodology adopted by the Challenged Order to the example of a one-time $50.00 cashback benefit applied to a telecommunications service with a monthly price of $30.00.

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[17] *See* NC Hearing Tr. (submitted by AT&T Kentucky on February 4, 2011) at 112 (dPi witness Mr. O'Roark testifying that "the turn (sic) rate for prepaid customers is – varies by state and by company and – but generally speaking, it ranges from a low of 10% turn (sic) every month to a high of 30% turn (sic).").

**Table 3**
**($30.00 Monthly Price, One-Time $50 Cashback)**

| | | Months Service is Kept 1 | 2 | 3 |
|---|---|---|---|---|
| **AT&T Retail Customer** | | | | |
| | Total Paid | $30.00 | $60.00 | $ 90.00 |
| | Total Cashback Credit | $(50.00) | $(50.00) | $(50.00) |
| | Net Amount Paid | $(20.00) | $10.00 | $40.00 |
| **dPi** | | | | |
| | Total Paid | $24.96 | $49.93 | $74.89 |
| | Total Cashback Credit | $(41.61) | $(41.61) | $(41.61) |
| | Net Amount Paid | $(16.64) | $ 8.32 | $33.28 |
| | Percent Difference | 16.79% | 16.79% | 16.79% |

As Table 3 shows, when dPi keeps this service for any period other than a single month, it always pays less than a retail customer pays over that same period, and dPi pays 16.79% less than the retail customer. This is exactly what is required by the Commission's 16.79% resale discount rate, and that is simply the end of the inquiry.

dPi, however, presents strained arguments that myopically focus exclusively on the first month of service and inexplicably ignore anything that happens after that.[18] As a result, dPi mistakenly asserts that when the cashback benefit exceeds the monthly retail price of the service, the wholesale price is higher than the retail price in that single

[18] *See* dPi's Rebuttal Brief at 15 ("The cash back promotion is provided a single time in a lump sum in a single month, and it is the pricing in ***this*** month that must be examined . . . .")(emphasis in original); *See also* dPi's Motion for Reconsideration at 15 (repeating the same argument).

month because (in the example above) the net credit to dPi ($16.64) is lower than the net credit to a retail customer ($20.00).

But as explained above, it is inappropriate as a matter of law and contrary to decades of Commission policy and practice to evaluate a service offering on the basis of what happens in a single, isolated month. Indeed, no aspect of a cashback promotion makes economic sense in such a short term, because it would be irrational for AT&T Kentucky to offer a $50.00 benefit to woo customers who will pay only $30.00 for a single month of service and then leave. And AT&T Kentucky clearly is not acting irrationally – on average, AT&T Kentucky's customers (like dPi's customers) keep the service for much longer than one month. AT&T Kentucky recoups the cashback benefit over time, and over the same period of time, dPi pays 16.79% less than a retail customer pays for the service.

Significantly, if it really were appropriate to view the first month in isolation (as is necessary to even consider either of the alternative proposals dPi submits in this docket), the Staff should have objected to every cashback promotion that AT&T Kentucky has ever offered, and the Commission should not have allowed any such offering to go into effect, because the price in the first month would clearly be below the price of the service. Beyond that, the Department of Justice undoubtedly would challenge AT&T for offering cashback promotions across the nation at prices that are "below cost" in the first month. None of this has happened, of course, because prices appropriately are considered over a reasonable period of time and not on the basis of a single, isolated month.

Finally, while dPi cloaks its arguments against the Challenged Order in terms of "competition,"[19] the evidence shows that dPi does not even attempt to offer its end users competitive prices. To the contrary, AT&T Kentucky witness Mr. Ferguson testified that because dPi targets end users whose credit history prevents them from qualifying for the services of AT&T Kentucky and other reputable providers, dPi can and does charge prices that are significantly higher than AT&T Kentucky's retail prices for the same services.[20] dPi provided absolutely no evidence to the contrary. Accordingly, if dPi were to prevail on its erroneous arguments, it is clear that every penny of the additional promotional bill credits it would receive from AT&T Kentucky would go straight into dPi's pockets and not to any Kentucky consumers. And as AT&T Kentucky demonstrated in prior submissions and oral argument, the methodology adopted by the Challenged Order simply does not impede dPi's ability (or the ability of any other reseller) to compete with AT&T were they inclined to do so.[21]

### B. Even if it were appropriate to consider the first month in isolation (and it is not), the *Sanford* decision does not require the wholesale price to be lower than the retail price each and every month.

dPi suggests that *BellSouth Telecom. Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007) requires the wholesale price to be lower than the retail price each and every month.[22] Again, dPi is simply wrong.[23] In *Sanford*, the court applied a hypothetical

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[19] *See* dPi's Oral Argument Slide 20; dPi's Motion for Reconsideration at 5 (repeating the same argument).

[20] *See* AT&T Kentucky's Initial Brief at 2-3; Ferguson Direct at 23; Exhibit PLF-10.

[21] *See* AT&T Kentucky's Reply Brief at 12-16; AT&T Kentucky's Oral Argument Slide 19; AT&T Kentucky's Oral Argument Handouts 8-10.

[22] *See* dPi's Rebuttal Brief at 14. *See also* Motion for Reconsideration at 10-11 (repeating the same argument).

resale discount of 20% to a hypothetical promotion that provides a ***monthly*** $100 rebate check for a telephone service with a monthly price of $120. The *Sanford* Court explained that the $100 monthly rebate check must be considered in determining the wholesale price of the service in that hypothetical because if it were ignored, dPi would pay $96[24] ***each and every month*** while a retail customer would pay a net of only $20 for the service each month. It is hardly surprising that the Fourth Circuit observed that this hypothetical situation – one in which the wholesale price is ***always*** nearly five times higher than the retail price[25] – "would obviously impede competition."[26] What is surprising is dPi's illogical attempt to distort this unremarkable observation into a suggestion that the wholesale price can never be higher than the retail price in any single month. At least two passages from the opinion make clear that the *Sanford* decision does not support dPi's position.

First, as AT&T Kentucky has explained in prior submissions, the FCC's *Local Competition Order* contemplates – and even encourages – short-term "wholesale is greater than retail" situations that last less than ninety days.[27] *Sanford* acknowledges this, explaining that "the FCC observed that short-term promotions serve 'pro-competitive ends through enhanced marketing'" and that the FCC "tempered its Order to exclude short-term promotions" based on its belief that "their pro-competitive effects

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[23] AT&T Kentucky has thoroughly explained in prior submissions that the methodology adopted in the Contested Order is consistent with *Sanford*. *See* AT&T Kentucky's Initial Brief at 24-27; AT&T Kentucky's Oral Argument Slides 10, 13.

[24] This is "the nominal retail rate of $120, less the 20% discount for avoided costs." *See Sanford* at 450-51.

[25] None of the promotions at issue in this proceeding result in a wholesale price that always exceeds the retail price. To the contrary, the "wholesale is higher than retail" scenario dPi attacks never lasts for more than a month or two.

[26] *Sanford* at 451.

[27] *See* AT&T Kentucky's Reply Brief at 12-14.

will outweigh any potential anti-competitive effects."[28] The *Sanford* court clearly understood and embraced the reality that wholesale prices can exceed retail promotional prices for ninety days or less, as did the federal district Court in North Carolina that recently rejected dPi's arguments to the contrary.[29]

Second, the *Sanford* court further understood that state commissions can permit wholesale prices that exceed retail prices for even longer periods when doing so is "reasonable and nondiscriminatory." In discussing the North Carolina Commission Order it affirmed, the *Sanford* court favorably noted that:

> 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.").[30]

Clearly, if a promotion lasting more than ninety days can be exempted from resale obligations, the wholesale price could be lower than the retail price for more than ninety days (and certainly for more than a single month). Far from suggesting that this result is prohibited by the federal Act, the *Sanford* court acknowledged that it is permissible.

Accordingly, even assuming it could be appropriate to consider a single month in isolation (and it is not), the appropriate question is not whether the methodology adopted in the Challenged Order yields a wholesale price that is lower than the retail price in any given month. Instead, the appropriate question is whether that

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28 *Sanford* at 446.

29 *See* **Attachment B** at 7 ("Even if dPi's anomaly should occur, the effect of a cashback amount greater than the monthly retail price is appropriate and permitted for a period of 90 days or less . . . .").

30 *Sanford* at 453.

methodology impedes dPi from competing.[31] And as explained in detail in AT&T Kentucky's prior submissions, it does not – the methodology allows dPi to use the same cashback marketing tool that AT&T Kentucky uses to attract customers and to always experience a better first-month cash flow than AT&T Kentucky experiences.[32] In no sense can that be said to impede dPi's ability to compete in the marketplace.

### C. Even if it were appropriate to consider the first month in isolation (and it is not), both of dPi's proposed alternative methodologies violate federal law as implemented by the Kentucky Commission by overstating the estimated avoided costs, understating the wholesale price, and creating a resale discount rate in excess of the 16.79% established by the Commission.

It is undisputed that for promotions like the cashback offerings at issue in this docket, the wholesale price of the service is determined by subtracting the estimated avoided costs from the promotional price:

| Wholesale Price = Retail Promotional Price – Estimated Avoided Costs |
|---|

This section of AT&T Kentucky's Response first explains how the Estimated Avoided Costs and the Wholesale Price are calculated under dPi Method 1,[33] dPi Method 2,[34] and the methodology adopted by the Challenged Order. Next, it explains how the

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[31] *See, e.g., Sanford* at 451 (exploring whether competition is impeded and whether AT&T would be able to price its competitors out of the market).

[32] *See* AT&T Kentucky's Reply Brief at 12-16; AT&T Kentucky's Oral Argument Slide 19; AT&T Kentucky's Oral Argument Handouts 8-10.

[33] dPi Method 1 is explained at pages 8-9 of AT&T Kentucky's Reply Brief. As explained below, dPi Method 1 is identical to the method the South Carolina Directive adopts when the retail cashback amount is greater than the price of the underlying service. Accordingly, the South Carolina Directive suffers from the same fatal flaws from which dPi's Method 1 suffers.

[34] dPi Method 21 is explained at pages 9-10 of AT&T Kentucky's Reply Brief. As explained below, dPi Method 2 is identical to the method the Louisiana Staff (thus far unsuccessfully) supports in proceedings in that state. Accordingly, the Louisiana Staff proposal suffers from the same fatal flaws from which dPi's Method 2 suffers.

methodologies proposed by dPi overstate the Estimated Avoided Costs, while the methodology adopted by the Challenged Order produces the appropriate Estimated Avoided Costs. Finally, it demonstrates that as a result, the methodologies proposed by dPi produce an actual resale discount that improperly exceeds the 16.79% discount adopted by the Commission ***(in some instance, by a factor of six),*** while the methodology adopted by the Challenged Order always produces an actual resale discount of 16.79%, exactly as the Commission has determined is appropriate.

In its Motion, dPi relies alternatively on the method announced in the South Carolina Directive[35] and the method proposed (thus far without success) by the Louisiana Staff.[36] These methods, however, are identical to dPi's Method 1 and Method 2 respectively – Figure 2 (at page 25) of dPi's Motion for Reconsideration correctly equates the "SC Commission" method with the "Reseller" method that dPi prefers (dPi Method 1), and it correctly equates the "LPSC Staff" method with the "True 'Percentage Below' Method (dPi Method 2). By demonstrating below that dPi's Method 1 and Method 2 both violate federal law, AT&T Kentucky demonstrates that the method announced in the South Carolina Directive and the method proposed by the Louisiana Staff also violate federal law.

Moreover, the South Carolina Directive and the Louisiana Staff proposal both are premised on the notion that the wholesale price can never be higher than the retail price, even in a single month.[37] dPi presented that very same notion to the federal

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35 *See* dPi's Motion at 4, 15-17.

36 *See Id.* at 4, 17.

37 *See* South Carolina Directive (attached to dPi's November 11, 2011 filing) at 2 ("In the case whether the rebate is greater than the first month's charges, discounting the rebate means that the BellSouth retail customer in effect gets a better price than the

district court in North Carolina, and the Court flatly rejected the notion, finding that "dPi misapprehends the Act's mandate."[38] Federal law, as stated by the Court, is that "the effect of a cashback amount greater than the monthly retail price ***is appropriate and permitted*** for a period of 90 days or less . . . ."[39] dPi has not presented (and cannot present) any evidence that the promotions at issue create a so-called "negative price" scenario that lasts more than ninety days. Accordingly, this most recent federal court decision addressing cashback offerings fully supports the Commission's Challenged Order and flatly refutes both the South Carolina Directive and the Louisiana Staff proposal upon which dPi relies.

### *1. Calculating the Estimated Avoided Costs and the Resulting Wholesale Price.*

Table 4 below continues to use the example of a one-time $50.00 cashback benefit applied to a service with a monthly price of $30.00 to illustrate how the Estimated Avoided Costs amount is calculated under the two alternate methodologies proposed by dPi and the methodology adopted by the Challenged Order.

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CLEC. This is definitely not what we believe the Telecommunications Act of 1996 intended."); Louisiana Staff's Brief on Remand (attached to dPi's Motion for Reconsideration) at 2 ("What is at issue is the "negative effective price" that exists when the cash-back offering exceeds the price of the service.").

38 *See* **Attachment B** at 6.

39 *Id.* at 7. As noted above, the *Sanford* court made clear that state commissions can permit wholesale prices that exceed retail prices for even longer periods when doing so is "reasonable and nondiscriminatory," but that issue in not before the Commission in this case.

**Table 4**
**ESTIMATED AVOIDED COSTS WHEN RETAIL PRICE IS "NEGATIVE" $20.00**
**($30.00 Monthly Price, One-Time $50 Cashback)**

| **dPi 1**<br>16.79% of Standard Retail | **dPi 2**<br>Absolute Value of 16.79% of Promotional Retail | **Challenged Order**<br>16.79% of Promotional Retail |
|---|---|---|
| $30.00 x .1679 | ABS(–$20.00 x .1679) | –$20.00 x .1679 |
| +$5.04 | +$3.36* | **–$3.36** |

*dPi's Method 2 forces this to be a positive number instead of the negative number that it is

As Table 4 shows, dPi's Method 1 calculates the Estimated Avoided Costs as $5.04 (16.79% of the $30.00 "standard retail price"). dPi's Method 2 calculates the Estimated Avoided Costs as 16.79% of the Retail Promotional Price of "negative" $20.00.[40] Mathematically, this produces Estimated Avoided Costs of ***negative*** $3.36. But while dPi is willing to accept the concept of a negative Retail Promotional Price, it is somehow unwilling to accept the concept that a negative Retail Promotional Price would result in negative Estimated Avoided Costs, so it ***changes the sign*** to manufacture Estimated Avoided Costs of ***positive*** $3.36. The method adopted by the Challenged Order properly calculates Estimated Avoided Costs by applying the 16.79% discount to the Retail Promotional Price of "negative" $20.00. This produces Estimated Avoided Costs of "negative" $3.36.

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[40] As explained above and in prior submissions by AT&T Kentucky, the price of the service must be considered over a reasonable period of time and when it is, it clearly is positive. Without conceding otherwise, this section of AT&T's Response demonstrates that even if the retail price were "negative" in any given month (and it is not), the methodology adopted by the Challenged Order is the only one that appropriately calculates the Estimated Avoided Costs consistent with federal law as implemented by the Commission and, therefore, is the only one that establishes the appropriate Wholesale Price of the service.

These different calculations of the Estimated Avoided Costs produce different Wholesale Prices, as shown in Table 5 below:

**Table 5**
**WHOLESALE PRICE WHEN RETAIL PRICE IS "NEGATIVE" $17.50**
**($30.00 Monthly Price, One-Time $50 Cashback)**

| dPi 1 | dPi 2 | Challenged Order |
|---|---|---|
| Retail Promo Price – Est. Av'd Costs | Retail Promo Price – Est. Av'd Costs | Retail Promo Price – Est. Av'd Costs |
| –$20.00 – (+$5.04) | –$20.00 – (+$3.36) | –$20.00 – (–3.36) |
| –$20.00 – $5.04 | –$20.00 – $3.36 | –$20.00 + $3.36 |
| **–$25.04 (Bill Credit to dPi)** | **–$23.36 (Bill Credit to dPi)** | **–$16.64 (Bill Credit to dPi)** |
| **25.20% Resale Discount** | **16.79% Resale Discount (IN THE WRONG DIRECTION)** | **16.79% Resale Discount** |

dPi Method 1 subtracts $5.04 of Estimate Avoided Costs from the Retail Promotional Price of "negative" $20.00 to produce a Wholesale Price of "negative" $25.04 (that is, a bill credit of $25.04). dPi Method 2 subtracts the positive $3.36 of Estimated Avoided Costs (which, as explained in Table 4, dPi manufactures by changing the sign without providing any principled basis for doing so and without explaining how this complies with the avoided cost methodology established by the Commission) from the Retail Promotional Price of "negative" $20.00 to produce a Wholesale Price of "negative" $23.36 (that is, a bill credit of $23.36). The method adopted by the Challenged Order appropriately subtracts "negative" $3.36 of Estimated Avoided Costs from the Promotional Retail Price of "negative" $20.00 to produce a Wholesale Price of "negative" $16.64 (that is, a bill credit of $16.64).

### 2. *Both of dPi's proposed methodologies produce Estimated Avoided Costs in excess of those allowed by federal law as implemented by the Commission.*

The alternate methodologies proposed by dPi overstate the Estimated Avoided Costs. To see how, it is instructive to revisit how the Commission established the 16.79% discount. In 1997, after reviewing hundreds of pages of testimony, transcript, and argument, the Commission implemented the resale provisions of federal law by: determining AT&T Kentucky's ***aggregate*** avoided costs; dividing that figure by AT&T Kentucky's ***aggregate*** retail revenue; and applying the resulting percentage (16.79%) to the actual retail price charged for a given service to calculate the Estimated Avoided Costs for that service. Accordingly, the 16.79% resale discount produces an appropriate Estimated Avoided Costs only if it is consistently applied the same way to each retail price – if the 16.79% discount were applied to "standard" or "positive" prices in a different manner than it is applied to "promotional" or "negative" prices respectively, it would produce an improperly inflated Estimated Avoided Costs in the aggregate. And that is exactly the case with both of dPi's proposed methodologies – because they apply the 16.79% resale discount to "standard" or "positive" prices in one manner and to "promotional" or "negative" prices in a different manner, both improperly remove more avoided costs than allowed by federal law as implemented by this Commission.[41]

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[41] As explained at pages 19-20 of AT&T Kentucky's Reply Brief, by proposing to apply the resale discount methodology to "standard" or "positive" prices in a different manner than it is applied to "promotional" or "negative" prices, dPi is asking the Commission to adopt non-uniform wholesale discount rates. The Commission, however, can do so only on the basis of an avoided cost study supporting the proposed non-uniform discount. *See Local Competition Order* at ¶916. Because dPi has not presented any avoided cost study, the Commission cannot adopt either of its proposals.

To demonstrate, Table 6 below assumes that the Commission established the 16.79% resale discount rate on the basis of evidentiary findings that AT&T Kentucky's aggregate retail revenue was $100 (generated from selling one unit of Service A for $70.00 and one unit of Service B for $30.00) and AT&T Kentucky's aggregate avoided costs were $16.79.

**Table 6**

**EVIDENCE AT AVOIDED COST HEARING**

| | |
|---|---|
| Revenue Service A | $70.00 |
| Revenue Service B | $30.00 |
| Total Revenue | $100.00 |

Total Avoided Costs $16.79

Resale Discount = $16.79 / $100 = 16.79%

**ESTIMATED AVOIDED COSTS**

| | | | | |
|---|---|---|---|---|
| Service A | = | $70.00 x .1679 | = | $11.75 |
| Service B | = | $30.00 x .1679 | = | $ 5.04 |
| **Aggregate Estimated Avoided Costs** | | | **=** | **$16.79** |

As shown in the table, this would produce a resale discount rate of 16.79% ($16.79 / $100). Significantly, the Commission never determined the actual avoided costs for Service A, Service B, or any other service – instead, it determined that a reasonable ***estimate*** of the avoidable costs for each service would be 16.79% of retail price actually charged for that service.[42] And, as shown in Table 6, when the 16.79% discount rate is

[42] This is why dPi is misguided when it attacks the methodology adopted by the Challenged Order by arguing that the actual avoided costs of a service are no different in the month the cashback benefit is applied than they are in any other month. *See* dPi's Initial Brief at 22; Motion for Reconsideration at 18 (repeating the same argument). Even assuming the actual avoided costs do not change, the 16.79% resale discount was not established based on the actual avoided cost of any particular service in any particular month. *See* **Attachment B** at 4 ("this 'avoided retail cost' figure is not an individualized determination that actually reflects the costs avoided on each transaction.

applied consistently to the retail price actually charged for each service, the ***aggregate*** amount of Estimated Avoided Costs is $16.79, which is exactly what the Commission found to be the actual aggregate avoided costs.

Now, consider Table 7 (on the following page), which assumes that immediately following the avoided cost hearing, AT&T Kentucky increases the price of Service A by $50.00 (from $70.00 to $120.00), decreases the price of Service B by $50.00 (from $30.00 to "negative" $20.00), and sells exactly one unit of each service. AT&T Kentucky's aggregate revenue from this activity is still $100, and its aggregate avoided costs associated with this activity are still $16.79.

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Such a scheme would be cumbersome and inadministrable."). Instead, it was established based on the relationship of the aggregate avoided costs of all services to the aggregate revenue generated by all services over a reasonable period of time. Accordingly, when the retail price actually charged for a service changes, the service's Estimated Avoided Costs necessarily change as well.

**Table 7**
**IMMEDIATEDLY FOLLOWING AVOIDED COST HEARING**
**(Increase Price of Service A by $50, Decrease Price of Service B by $50)**

| | |
|---|---|
| Service A | $120.00 |
| "Standard" Service B | $ 30.00 |
| Promotional Service B | $ (20.00) |
| Resale Discount | 16.79% |

| | |
|---|---|
| Revenue from Service A | $120.00 |
| Revenue from Service B | $( 20.00) |
| Total Revenue | $100.00 |

**ESTIMATED AVOIDED COSTS**

**dPi 1**

| | | | | |
|---|---|---|---|---|
| Service A | = | $120.00 x .1679 | = | $20.15 |
| Service B | = | $30.00 x .1679 | = | $ 5.04 |
| **Aggregate Estimated Avoided Costs** | | | **=** | **$25.19** |

**dPi 2**

| | | | | |
|---|---|---|---|---|
| Service A | = | $120.00 x .1679 | = | $20.15 |
| Service B | = | $(20.00) x .1679 | = | $ 3.36* |
| **Aggregate Estimated Avoided Costs** | | | **=** | **$23.51** |

**Challenged Order**

| | | | | |
|---|---|---|---|---|
| Service A | = | $120.00 x .1679 | = | $20.15 |
| Service B | = | $(20.00) x .1679 | = | $ (3.36) |
| **Aggregate Estimated Avoided Costs** | | | **=** | **$16.79** |

*dPi 2 forces a positive number

Accordingly, an appropriate application of the 16.79% discount to this activity should still produce an aggregate Estimated Avoided Costs of $16.79.

As shown in Table 7, however, dPi's Method 1 produces an aggregate Estimated Avoided Costs of $25.19, and dPi's Method 2 produces an aggregate Estimated Avoided Costs of $23.51. Both estimates exceed by far the actual aggregate avoided costs of $16.79. More significantly, both dPi's Method 1 and dPi's Method 2 produce aggregate Estimate Avoided Costs in excess of those allowed by the federal law as implemented by the Commission. In contrast, the methodology adopted by the Challenged Order produces aggregate Estimated Avoided Costs of $16.79, which is exactly as it should be.

### *3. As a result, the methodologies proposed by dPi produce a resale discount rate that exceeds the 16.79% established by the Commission.*

Because they overstate Estimated Avoided Costs and understate the Wholesale Price, the methodologies proposed by dPi produce a resale discount rate that is inconsistent with, and that far exceeds, the 16.79% established by the Commission. This is shown in Table 8 on the following page.

**Table 8**

**($30.00 Monthly Price, One-Time $50 Cashback)**

| | Months Service is Kept | | | | | |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 |
| AT&T Retail Customer | | | | | | |
| Total Amount Paid | $ 30.00 | $ 60.00 | $ 90.00 | $120.00 | $ 150.00 | $180.00 |
| Total Cashback | $(50.00) | $(50.00) | $(50.00) | $(50.00) | $(50.00) | $(50.00) |
| Net Amount Paid | $(20.00) | $10.00 | $40.00 | $70.00 | $100.00 | $130.00 |
| **Proposed Wholesale Price** | | | | | | |
| Challenged Order | | | | | | |
| Total Paid | $ 24.96 | $49.93 | $74.89 | $99.85 | $124.82 | $149.78 |
| Total Cashback | $(41.61) | $(41.61) | $(41.61) | $(41.61) | $(41.61) | $(41.61) |
| Net Amount Paid | $(16.64) | $ 8.32 | $33.28 | $58.25 | $83.21 | $108.17 |
| % Diff. from Net Retail | **16.79%** | **16.79%** | **16.79%** | **16.79%** | **16.79%** | **16.79%** |
| dPi 1 | | | | | | |
| Total Paid | $ 24.96 | $49.93 | $74.89 | $99.85 | $124.82 | $149.78 |
| Total Cashback | $(50.00) | $(50.00) | $(50.00) | $(50.00) | $(50.00) | $(50.00) |
| Net Amount Paid | $(25.04) | $(0.07) | $24.89 | $49.85 | $74.82 | $99.78 |
| % Diff. from Net Retail | **25.19%** | **100.74%** | **37.78%** | **28.78%** | **25.19%** | **23.25%** |
| dPi 2 | | | | | | |
| Net Amount Paid* | $(23.36) | $1.61 | $26.57 | $51.53 | $76.49 | $101.46 |
| % Difference from Net Retail | **(16.79%)** | **83.95%** | **33.58%** | **26.38%** | **23.51%** | **21.69%** |

*Under dPi 2, dPi would receive a $23.36 bill credit in month one and would pay $24.96 each month thereafter.

dPi's proposed methodology produces a difference between the wholesale price and the retail price that exceeds the 16.79% required by the Commission's orders regardless of how long an end user keeps service. dPi's Method 1, for example, would produce a resale discount of a whopping **100.74%** ***(six times the discount the***

***Commission established)*** if the service is kept for two months, and a resale discount of ***37.78% (more than twice the discount the Commission established)*** if the service is kept for three months. Similarly, dPi's Method 2 would produce a resale discount of a whopping ***83.95% (five times the discount the Commission established)*** if the service is kept for two months, and a resale discount of ***33.58% (twice the discount the Commission established)*** if the service is kept for three months. In sharp contrast to these patently absurd results, the method adopted by the Challenged Order always produces a difference of 16.79%, which is exactly what the Commission's Orders require.

## CONCLUSION

For the reasons explained above, AT&T Kentucky respectfully requests that the Commission issue an order denying dPi's Motion for Reconsideration and respectfully submits the language set forth in **Attachment C** for the Commission's consideration.

Respectfully submitted,

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**Attachment A to AT&T's Kentucky's Response to dPi's Motion for Reconsideration**

**Case No. 2009-00127**

**dPi's Motion for Reconsideration Merely Repeats Arguments That dPi's Has Already Presented and AT&T's Kentucky Has Already Rebutted**

| Arguments in dPi's Motion for Reconsideration | Where dPi's Previously Presented the Same Argument | Where AT&T's Kentucky Previously Rebutted the Same Argument |
|---|---|---|
| Figure 1 (pp. 2, 12) | dPi's Oral Argument Slide 26 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 16-20; AT&T's Oral Argument Slides 15-19 and Handouts 4-10 |
| "The core principal of the Telecommunications Act regarding resale is that wholesale should be priced below retail." Section III.A (pp. 4-5) | dPi's Rebuttal Brief at 13-14; dPi's October 20, 2011 Letter at 1-2; dPi's Oral Argument Slides 4, 6-8,10-12 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 10-12 |
| "Federal statutes and regulations: competition by resale requires that wholesale be less than retail." Section III.A.1 (pp. 5-7) | dPi's Rebuttal Brief at 13-14; dPi's October 20, 2011 Letter at 1-2; dPi's Oral Argument Slides 4, 6-8,10-12 | AT&T's Reply Brief at 5-7, 10-12; AT&T's Oral Argument Slides 6-9, 12 |
| AT&T's position harms a reseller's ability to compete (p. 5) | dPi's Oral Argument Slide 20 | AT&T's Reply Brief at 12-16; AT&T's Oral Argument Slide 19 and Handouts 8-10 |
| Reliance on SC Commission's Directive (p. 4, 15-17)* | dPi's November 11, 2011 Notice of Supplemental Authority | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 16-20; AT&T's Oral Argument Slides 15-19 and Handouts 4-10. *See also* Most Recent federal Court Order (**Attachment B** to AT&T's Response to Motion for Reconsideration) |
| Reliance on LA Staff's Position (p. 4, 17)** | dPi's Initial Brief at 26-28 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 16-20; AT&T's Oral Argument Slides 15-19 and Handouts 4-10. See also Most Recent federal Court Order (**Attachment B** to AT&T's Response to Motion for Reconsideration) |
| "The FCC's Local Competition Order repeatedly indicates that the wholesale price should be below the retail price, and that promotions cannot be used to circumvent this rule." Section III.A.2 (pp. 7-10). | dPi's Rebuttal Brief at 13-14; dPi's October 20, 2011 Letter at 1-3; dPi's Oral Argument Slides 4, 6-7, 8 | AT&T's Reply Brief at 5-7, 10-12; AT&T's Oral Argument Slides 6-9, 12, 17 |
| Discussion of Retail Promotion Methodology Adjustment (p. 9) | dPi's October 20, 2011 Letter at 3-4 | Irrelevant because this mythology simply is not at issue in this docket |
| "The Fourth Circuit's Sanford decision holds that wholesale rates should be below retail rates, and that promotions cannot be used to circumvent this requirement." Section III.A.3 (pp. 10-11). | dPi's Rebuttal Brief at 14; dPi's October 20, 2011 Letter at 4-5 | AT&T's Initial Brief at 24-27; AT&T's Oral Argument Slides 10, 13, 17 |

| | | |
|---|---|---|
| "AT&T's method inexcusably violates state and federal law and the contract because it results in the wholesale price being greater than the effective retail price, thereby making wholesale less favorable than retail." Section III.B (p. 11). | dPi's Rebuttal Brief at 13-14; dPi's October 20, 2011 Letter at 1-2 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 10-16; AT&T's Oral Argument Slide 14 |
| "AT&T's method results in the wholesale price being greater than the effective retail price, violating state and federal law, and the terms of the contract." Section III.B.1 (pp. 11-13). | dPi's Rebuttal Brief at 13-14; dPi's October 20, 2011 Letter at 1-2 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 10-12 |
| "AT&T's violation of law and contract by imposing a method that results in the wholesale price being greater than the effective retail price is not excused." Section III.B.2 (p. 13). | dPi's Rebuttal Brief at 13-14; dPi's October 20, 2011 Letter at 1-2 | AT&T's Reply Brief at 10-12 |
| "Sanford disapproves, not justifies AT&T's method, because under Sanford, wholesale must be less than retail." Section III.B.2.a (pp. 13-15). | dPi's Rebuttal Brief at 14; dPi's October 20, 2011 Letter at 4-5 | AT&T's Initial Brief at 24-27; AT&T's Oral Argument Slides 10, 13, 17 |
| "AT&T's method cannot be excused under the theory that 'if the customer stays long enough, the effects will be diluted on average." Section III.B.2.b (p. 15). | dPi's Rebuttal Brief at 14-16 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 10-16; AT&T's Oral Argument Slides 14 |
| "The Public Service Commission of South Carolina rejects AT&T's method as violating the intent of the Act because it results in wholesale rates above, rather than below, retail rates." Section III.B.2.c (pp. 15-17). | dPi's November 11, 2011 Notice of Supplemental Authority | *See* Most Recent federal Court Order (**Attachment B** to AT&T's Response to Motion for Reconsideration) |
| "Because AT&T's formula results in wholesale rates higher than retail rates, it cannot be correct, and another method must be adopted." Section III.C (pp. 17-18). | dPi's Rebuttal Brief at 13-14; dPi's Oral Argument Slides 27-30 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 10-16; AT&T's Oral Argument Slide 17 |
| "Preferred method for calculating the avoided costs: subtracting the known avoided costs from the net retail rate." ("dPi's Method 1"). Section III.C.1 (pp. 18-22). | dPi's Initial Brief at 18-26; dPi's Oral Argument Slides 27-30 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 16-20; AT&T's Oral Argument Slides 15-19 and Handouts 4-10 |
| "Correcting AT&T's method to ensure that wholesale price actually is a fixed percentage less than the net retail price." ("dPi's Method 2") Section III.C.2 (pp. 22-26). | dPi's Initial Brief at 26-28; dPi's Oral Argument Slides 31-32 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 16-20; AT&T's Reply Brief at 16-20; AT&T's Oral Argument Slides 15-19 and Handouts 4-10 |
| Figure 2 (p. 25). | dPi's Oral Argument Slides 32 | AT&T's Initial Brief at 27-28; AT&T's Reply Brief at 16-20; AT&T's Reply Brief at 16-20; AT&T's Oral Argument Slides 15-19 and Handouts 4-10 |

| | | |
|---|---|---|
| * | The SC Commission Directive adopts dPi's Method 1 when the cashback benefit is greater than the monthly price of the underlying service. See dPi's Motion for Reconsideration at 25, Figure 2 (Equating "SC Commission" Method with "Reseller [i.e. dPi's] Method") | *See* Most Recent federal Court Order (**Attachment B** to AT&T's Response to Motion for Reconsideration) |
| | | |
| ** | The Louisiana Staff's proposal is identical to dPi's Method 2. See dPi's Motion for Reconsideration at 25, Figure 2 (Equating "LPSC Staff" Method with "True 'Percentage Below' Method.") | *See* Most Recent federal Court Order (**Attachment B** to AT&T's Response to Motion for Reconsideration) |

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

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

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

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

BACKGROUND

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

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

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

## DISCUSSION

### Standard of Review

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

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

## I. The Telecommunications Act of 1996

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

### 2. Calculating the Value of Promotional Credits

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

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

service to dPi and other resellers for $78.50.

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

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

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

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

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

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

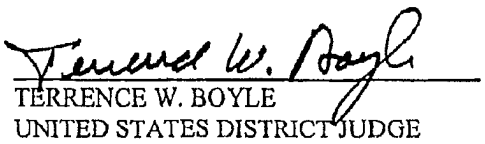
dPi suggests that this method produces anomalous results because, in the case where the cashback amount exceeds the monthly retail price, the "price" to the retail customer in a given month is a negative number. AT&T North Carolina has, therefore, effectively "paid" the retail customer that negative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

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

CONCLUSION

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

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



TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

**Attachment C - Proposed Order Language**
**AT&T Kentucky's Response to dPi's Motion for Reconsideration**
**Case No. 2009-00127**

We reject both of dPi's proposed alternative methods of applying the 16.79% resale discount to cashback offerings because we find that each method is inconsistent with the FCC's *Local Competition Order*,[1] the Fourth Circuit's *Sanford* decision,[2] and the recent Order of the North Carolina federal district court resolving this issue.[3] The evidence, the arguments presented in AT&T Kentucky's submissions and during oral argument, and the discussion at pages 7-10 of the North Carolina Commission's Order in its companion proceedings[4] all persuade us that both of dPi's alternative proposals overstate the avoided cost estimate, which in turn distorts the 16.79% resale discount rate established by the Commission and understates the wholesale price dPi is required to pay for the services it orders from AT&T Kentucky.

We are not persuaded by the argument that AT&T Kentucky's method produces wholesale prices that are higher than retail prices. This condition arises only if the one-time cashback promotional benefit exceeds the monthly retail price of the service – in those situations, dPi receives less money from AT&T Kentucky for keeping the service for only a month than a retail customer would receive from AT&T Kentucky for keeping the service only a month. As an initial matter, we find it is not appropriate to consider a

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

3 Order, *dPi Teleconnect, LLC. v. Finley*, Case No. 5:10-CV-466-BO (E.D.N.C. February 19, 2012).

4 *See* Order Resolving Credit Calculation Dispute, *In re AT&T North Carolina v. dPi Teleconnect, LLC et. al.,* Docket Nos. P-836, Sub 5; P-908, Sub 2; P-1272, Sub 1; P-1415, Sub 2; P-1439, Sub 2 at 7-10 (September 22, 2011).

single month in isolation. It would be contrary to decades of Commission policy and practice to evaluate a service offering on the basis of what happens in a single, isolated month. Indeed, no aspect of a cashback promotion makes economic sense in such a short term, because it would be irrational for AT&T Kentucky to offer a $50.00 benefit to woo customers who will pay only $30.00 for a single month of service and then leave. AT&T Kentucky recoups the cashback benefit over time, and over the same period of time, dPi pays 16.79% less than a retail customer pays for the service.

Under AT&T Kentucky's method, when dPi keeps the service for more than a month or two, it always pays a net amount that is not only *less* than what the retail customer pays, but that is less by the 16.79% resale discount rate the Commission established.[5] The evidence shows that on average, dPi's customers (like AT&T Kentucky's customers) keep the service for much longer than a month or two.[6] Based on this evidence, we find that over any reasonable period of time, dPi appropriately pays 16.79% less than retail customers pay under AT&T Kentucky's method.

Even if it were appropriate to consider only a single month in determining this issue (and it is not), we nonetheless would approve AT&T Kentucky's method. In its *Local Competition Order,* the FCC excluded short-term promotions from the federal Act's resale obligations and thus sanctioned retail prices that temporarily are higher than wholesale prices, recognizing that

> promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition and ***we do not***

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5 *See* AT&T Kentucky Oral Argument Handout No. 7.

6 *See* NC Hearing Tr. (submitted by AT&T Kentucky on February 4, 2011) at 112 (dPi witness Mr. O'Roark testifying that "the turn (sic) rate for prepaid customers is – varies by state and by company and – but generally speaking, it ranges from a low of 10% turn (sic) every month to a high of 30% turn (sic).").

> ***wish to unnecessarily restrict such offerings.*** We believe that, ***if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive 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 (emphasis added). The Fourth Circuit court of appeals acknowledged this in its *Sanford* decision, explaining that "the FCC observed that short-term promotions serve 'pro-competitive ends through enhanced marketing'" and that the FCC "tempered its Order to exclude short-term promotions" based on its belief that "their pro-competitive effects will outweigh any potential anti-competitive effects."[7] The *Sanford* court clearly understood and embraced the reality that wholesale prices can exceed retail promotional prices for ninety days or less, as did the federal district Court in North Carolina that recently rejected dPi's arguments to the contrary.[8]

The *Sanford* court further understood that state commissions can permit wholesale prices that exceed retail prices for even longer periods when doing so is "reasonable and nondiscriminatory." In discussing the North Carolina Commission Order it affirmed, the *Sanford* court favorably noted that:

> 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.").[9]

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[7] *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 446 (4th Cir. 2007).

[8] *See* Order, *dPi v. Finley*, at 7 ("Even if dPi's anomaly should occur, the effect of a cashback amount greater than the monthly retail price is appropriate and permitted for a period of 90 days or less . . . .").

[9] *Sanford* at 453.

Clearly, if a promotion lasting more than ninety days can be exempted from resale obligations, the wholesale price could be lower than the retail price for more than ninety days (and certainly for more than a single month). Far from suggesting that this result is prohibited by the federal Act, the *Sanford* court acknowledged that it is permissible.

We find that the cashback offerings at issue in this proceeding are the type of pro-competitive "enhance[d] marketing and sales-based competition" the FCC envisioned, and they clearly benefit Kentucky consumers. By making it more expensive for AT&T Kentucky to offer these promotions (by causing AT&T Kentucky to pay higher credits than is appropriate), the alternative methods dPi proposed in this proceeding would discourage these pro-competitive promotions that are beneficial to consumers in Kentucky. And nothing in the record suggests that dPi's alternative proposals would in any way benefit consumers who purchase services from dPi – to the contrary, during oral argument, dPi emphasized that it is not required to provide its end user customers any of the additional credits it seeks from AT&T Kentucky in this docket [10]

Finally, AT&T Kentucky demonstrates that at worst, AT&T Kentucky's methodology allows dPi to use the same cashback marketing tool that AT&T Kentucky uses to attract customers and to always experience a better first-month cash flow than AT&T Kentucky experiences.[11] Based on the evidence, it appears that the more likely outcome is that while AT&T Kentucky is out-of-pocket in the first month of a cashback promotional offering, the dPi actually makes money (from both AT&T Kentucky and its

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[10] *See, e.g.,* dPi's Oral Argument Slide 16.

[11] *See* AT&T Kentucky's Reply Brief at 12-16; AT&T Kentucky's Oral Argument Slide 19; AT&T Kentucky's Oral Argument Handouts 8-10.

own end users) in the first month.[12] Clearly, AT&T Kentucky's method does not impede dPi's ability to compete in the marketplace.

For the reasons set forth above, the Commission denies dPi's Motion for Reconsideration.

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[12] *See* Ferguson Direct at 23; Exhibit PLF-10 (evidence that dPi charges prices that are much higher than AT&T Kentucky's retail prices for similar services); AT&T Oral Argument Handouts 8-10.

CERTIFICATE OF SERVICE – PSC 2009-00127

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof, this 22nd day of February 2012.

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Mary K. Keyer

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

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, LLC d/b/a AT&T South Carolina ("AT&T") and that she has caused AT&T South Carolina's Notice of Subsequent Development in Docket Nos. 2010-14-C, 2010-15-C, 2010-16-C, 2010-17-C, 2010-18-C and 2010-19-C to be served upon the following on March 5, 2012:

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(Dialtone & More, Inc.)
(Tennessee Telephone Service, LLC d/b/a Freedom Communications)
(OneTone Telecom, Inc.)
(dPi Teleconnect, L.L.C.)
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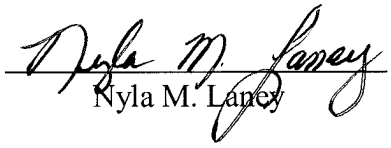

Nyla M. Laney

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