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December 23, 2009

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COMMISSION
CLERK

Ms. Ann Cole, Commission Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Re: Docket No. 090258-TP: Complaint of dPi Teleconnect, L.L.C. against
BellSouth Telecommunications, Inc. d/b/a AT&T Florida for dispute
arising under interconnection agreement**

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Include Items in the Record, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

cc: All parties of record
Jerry Hendrix
Gregory R. Follensbee
E. Earl Edenfield, Jr.

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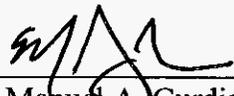
CERTIFICATE OF SERVICE
Docket No. 090258-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 23rd day of December, 2009 to the following:

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Manuel A. Gurdian

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re : Complaint of dPi Teleconnect, L.L.C.) Docket No. 090258-TP
against BellSouth Telecommunications, Inc.)
d/b/a AT&T Florida for dispute arising under)
interconnection agreement) Filed: December 23, 2009

AT&T FLORIDA’S MOTION TO INCLUDE ITEMS IN THE RECORD

BellSouth Telecommunications, Inc. d/b/a AT&T Florida (“AT&T Florida”) files this motion to include two items in the record of this case. Those items are:

1. the transcript of the deposition of dPi’s designated witness in this case (Mr. Thomas O’Roark); and
2. the transcript of the November 12, 2009 hearing before the North Carolina Utilities Commission (“NCUC”) of a case involving the same issues and parties.

Inclusion of these items will assist the Florida Public Service Commission (“Commission”) by enabling the parties to streamline and expedite cross-examination¹ as well as giving the Commission additional relevant information regarding the matters at issue in this docket. There can be no reasonable concern regarding the authenticity of these official transcripts, and dPi Teleconnect, L.L.C. (“dPi”) will not be prejudiced by inclusion of its own sworn prior testimony, which testimony was given in the presence of counsel for dPi. Neither item is voluminous. Finally, as discussed more fully below, inclusion of these items raises no evidentiary or procedural issues. For the following reasons, the Commission should include these two items in the record of this case.

¹ Rule 28-106.211 provides that the prehearing officer “before whom a case is pending may issue any orders necessary...to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case...”

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ARGUMENT

I. The Deposition Transcript

On August 25, 2009, Mr. Thomas O’Roark was deposed in the companion case in North Carolina where dPi has raised the same claims that are the subject of this case. The transcript of Mr. O’ Roark’s deposition is attached hereto as Exhibit “A”. As he was in the North Carolina case, Mr. O’Roark is the sole witness designated by dPi to present testimony in this case. The transcript of that deposition consists of 167 pages (or 43 pages in the four-page format) of testimony and contains nine exhibits. AT&T Florida anticipates that both parties to the case will benefit from citations to this testimony in briefing. Inclusion of the transcript in the record will assist the Commission in having a more complete record on which to evaluate the legal and factual arguments made by the parties. AT&T Florida has attempted to reach an agreement with counsel for dPi about inclusion of the deposition transcript (and the hearing transcript) in the record in this case, but dPi’s counsel has declined and indicated that dPi’s position is that the transcript constitutes inadmissible hearsay.

Florida Statutes § 90.803 plainly states those instances in which certain types of statements are not inadmissible as evidence, even though the declarant is available as a witness. Florida Statutes § 90.803(18)² includes among these many exceptions “admissions,” which are

²“The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

- (18) Admissions.** A statement that is offered against a party and is:
- (a) The party’s own statement in either an individual or a representative capacity;
 - (b) A statement of which the party has manifested an adoption or belief in its truth;
 - (c) A statement by a person specifically authorized by the party to make a statement concerning the subject;

statements offered against a party and are “the party’s own statement in either an individual or a representative capacity.” All of Mr. O’ Roark’s (as well as Mr. Malish’s) statements in the deposition transcript clearly fall within this hearsay exception. *See e.g., Castaneda, ex rel. Cardona v. Redlands Christian Migrant Ass’n, Inc.*, 884 So.2d 1087, 1090-91 (Fla. 4th DCA 2004)(“Because Castaneda was offering excerpts of the deposition testimony against Redlands as admissions, they were permitted by the Florida Evidence Code and thus admissible regardless of the availability of the witnesses”). *See also, LaTorre v. First Baptist Church of Ojus, Inc.*, 498 So.2d 455, 458 (Fla. 3d DCA 1986)(“The deposition of a party or of anyone who at the time of the deposition was officer, director, or managing agent [of a corporation that is a party] ... may be used by an adverse party for any purpose.”).³

II. The Hearing Transcript

Like the deposition transcript, the hearing transcript contains testimony from the same parties on the same issues that are raised in this case, and AT&T Florida anticipates that both parties to the case may benefit from citations to this testimony in briefing. The transcript of the hearing before the NCUC is attached hereto as Exhibit “B”. Inclusion of the transcript in the record will assist the Commission in having a more complete record on which to evaluate the legal and factual arguments made by the parties.

All of the statements in the transcript made by dPi’s counsel or witnesses are admissible as admission of a party opponent for the same reasons discussed above in connection with the

(d) A statement by the party’s agent or servant concerning a matter within the scope of the agency or employment thereof, made during the existence of the relationship; or

(e) a statement by a person who was a conspirator of the party during the course, and in furtherance of, the conspiracy...

³ Florida is not unusual in its rule allowing such evidence to be admitted. In fact, under the federal rules, such an “admissions by a party opponent” are specifically carved out of the hearsay definition and are not considered to be hearsay at all. *See Fed. R. Evid. 801(d)(2)*.

deposition transcript. AT&T Florida has no objection to including only the portion of the transcript in which Mr. O’Roark testified, if that will satisfy dPi, but AT&T Florida expects that the Commission and the parties would be better served by the inclusion of the entire transcript.

In addition, the entire transcript is the record of a “public agency” and sets forth matters observed by the agency in connection with a complaint filed by dPi. As such, the NCUC had a legal duty to conduct the hearing and to record it. For these reasons, the transcript also falls within yet another one of the many hearsay exceptions set forth in Florida Statutes § 90.803. Specifically, the transcript is a public record under the terms of § 90.803(8).⁴

Finally, like the deposition transcript, inclusion of the transcript will not create an unmanageable record because the transcript from the one-day hearing is not lengthy (281 pages).

CONCLUSION

As discussed above, the two items AT&T Florida seeks to include in the record are not inadmissible hearsay. It is worth noting, however, that even if the items were hearsay, they are nevertheless admissible in this proceeding.

The rules of evidence in administrative hearings are liberal. *See In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Docket No. 060635-EU, Order No. PSC-07-0033-PCO-EU (Issued January 9, 2007). The types of evidence that may be received in administrative proceedings are as follows:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied by reasonably prudent persons in the

⁴ “(8) PUBLIC RECORDS AND REPORTS. –Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exception shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial on the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

Florida Statutes § 120.569(2)(g). *See also, In re: Complaint by DPI-Teleconnect, L.L.C. against BellSouth Telecommunications, Inc. for dispute arising under interconnection agreement*, Docket No. 05083-TP, Order No. PSC-07-0820-PCO-TP (Issued October 12, 2007). Section 90.401, Florida Statutes, defines “[R]elevant evidence [as] evidence tending to prove or disprove a material fact.”

Thus, evidence admissible under the Florida Rules of Evidence is admissible in an administrative hearing, and evidence inadmissible in civil courts but “of a type commonly relied upon by reasonably prudent persons,” F.S. 120.569(2)(g), is also admissible in administrative hearings.

Based on the foregoing authority, even if the subject materials could be considered “hearsay” as dPi contends, the materials would still be admissible because “[i]n administrative hearings under Chapter 120, Florida Statutes, hearsay is admissible” and “hearsay evidence may be used for the purpose of supplementing or explaining other evidence but it shall not be sufficient to support a finding unless it would be admissible over objection in civil actions.” F.S. 120.57(1)(c). *See also* Rule 28-106.213(3), Florida Administrative Code (“Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule in Chapter 90, F.S.”).

WHEREFORE, for the foregoing reasons, AT&T Florida requests that the transcript of the deposition of dPi's witness, Mr. Thomas O'Roark, and the transcript of the November 12, 2009 hearing before the NCUC involving the same issues and parties be included in the record.

Respectfully submitted this 23rd day of December, 2009.

AT&T FLORIDA



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BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)
)
dPi Teleconnect, LLC,)
)
vs.) Docket No. P-55,
) Sub 1744
BellSouth)
Telecommunications, Inc.,)

ORAL DEPOSITION OF
THOMAS O'ROARK
August 25, 2009

ORAL DEPOSITION of THOMAS O'ROARK,
produced as a witness at the instance of the
Respondent, and duly sworn, was taken in the
above-styled and numbered cause on August 25, 2009,
from 9:01 a.m. to 2:11 p.m., before April L. Struck,
CSR in and for the State of Texas, reported by machine
shorthand, at the Hampton Inn, 4505 Belt Way Road in
Addison, Dallas County, Texas, pursuant to the Texas
Rules of Civil Procedure and the provisions stated on
the record or attached hereto.



DepoTexas
214.373.4977

DOCUMENT NUMBER-DATE
12188 DEC 23 8
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A P P E A R A N C E S

1
2
3
4 APPEARING FOR THE CLAIMANT:
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20
21
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23
24
25

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1 THOMAS O'ROARK,
2 having been first duly sworn, testified as follows:
3 EXAMINATION
4 BY MR. TURNER:
5 Q. Morning, Mr. O'Roark.
6 A. Morning.
7 Q. Before we get started, I need to put couple of
8 things on the record for housekeeping purposes, and
9 we'll get back to our discussion.
10 MR. TURNER: This deposition is being
11 taken pursuant to the notice of deposition dated August
12 14th, 2009, issue docket number P-55, Sub 1744 before
13 the North Carolina Public Utilities Commission. It is
14 being taken pursuant to the North Carolina Commission's
15 rules and to the extent not expressly modified by those
16 rules, the North Carolina Rules of Civil Procedure.
17 Parties have entered into no stipulations
18 or other agreements that would alter or affect the
19 application of those rules to this deposition.
20
21 Q. (By Mr. Turner) Mr. O'Roark, my name is
22 Patrick Turner. I represent BellSouth
23 Telecommunications, Inc., doing business as AT&T North
24 Carolina.
25 Today I will refer to that entity as AT&T

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I N D E X

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4 2. The Witness: Thomas O'Roark
5 Examination by Mr. Turner 4
6 3. Signature Page 162
7 4. Reporter's Certificate 164
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11 EXHIBITS
12 Ex # Description Pg Ln
13
14 1 Application for amendment 11 7
15 2 CV 19 20
16 3 dPi web page info 23 13
17 4 Service agreement 24 2
18 5 Plan services 25 20
19 6 Plan services basic lifetime 39 14
20 7 Hypothetical example 51 12
21 8 Lost Key B/2/04 letter 134 16
22 9 2nd supplemental responses 159 10
23
24
25

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09:02:48 1 North Carolina or AT&T or occasionally BellSouth,
09:02:50 2 unless you object to that.
09:02:52 3 A. That's fine.
09:02:52 4 Q. I also will refer to dPi Teleconnect as dPi,
09:03:00 5 unless you would like me to refer to it otherwise.
09:03:02 6 A. That's fine.
09:03:02 7 Q. Do you understand you're testifying under
09:03:04 8 oath, and you are required to testify truthfully?
09:03:06 9 A. Yes.
09:03:06 10 Q. Since our conversation is being recorded by a
09:03:10 11 court reporter, I need to ask you to be sure to respond
09:03:12 12 to my questions verbally, as you have been, rather than
09:03:14 13 by a head nod or gestures that cannot be taken down by
09:03:18 14 the court reporter.
09:03:20 15 A. I understand.
09:03:20 16 Q. Thank you.
09:03:20 17 For the same reason, it's important for
09:03:24 18 both of us not to talk over each other because it makes
09:03:26 19 it difficult for her to get down what's being said. So
09:03:28 20 I will commit to waiting until you finish your answers
09:03:32 21 before I begin my questions, and I'd ask you to wait
09:03:34 22 till I finish my questions in their entirety before
09:03:36 23 beginning your answer.
09:03:38 24 Unless you say otherwise, Mr. O'Roark,
09:03:40 25 I'm going to assume that you understand the question

09:03:42 1 I'm asking.
 09:03:44 2 So will you agree that you will let me
 09:03:46 3 know if you don't understand or are confused by a
 09:03:50 4 question that I ask?
 09:03:50 5 A. I agree.
 09:03:54 6 Q. Are you taking any medications today that
 09:03:56 7 might adversely impact your ability to concentrate and
 09:03:58 8 accurately answer my questions?
 09:04:00 9 A. No.
 09:04:00 10 Q. Is there anything else you're aware of that
 09:04:02 11 might adversely impact your ability to concentrate and
 09:04:06 12 accurately answer my questions?
 09:04:08 13 A. No.
 09:04:10 14 Q. Seated beside you today is attorney Chris
 09:04:12 15 Malish.
 09:04:12 16 Is he representing dPi for the purposes
 09:04:14 17 of today's deposition?
 09:04:16 18 A. Yes.
 09:04:18 19 Q. Have you reviewed any documents prior to this
 09:04:20 20 deposition in order to prepare for it, Mr. O'Roark?
 09:04:24 21 A. Yes.
 09:04:24 22 Q. Can you describe those documents for us?
 09:04:30 23 A. I reviewed the testimony that I had given
 09:04:32 24 previously in this case. And I reviewed some of the
 09:04:36 25 testimony that AT&T has given previously in this case.

09:06:02 1 be designated an eligible telephone communications
 09:06:08 2 carrier before the state commission?
 09:06:10 3 A. Not that I recall.
 09:06:24 4 Q. Mr. O'Roark, before I forget, if at any time
 09:06:26 5 you need to take a break -- I tend to forget. Just
 09:06:28 6 plow straight through.
 09:06:30 7 If you need a break, let me know, please.
 09:06:32 8 A. Okay.
 09:06:32 9 Q. Mr. O'Roark, for the next few minutes I just
 09:06:36 10 want to talk about your background so we can get a
 09:06:38 11 better idea of what you've done.
 09:06:42 12 Could you state your full name for the
 09:06:42 13 record?
 09:06:42 14 A. Thomas George O'Roark.
 09:06:48 15 Q. And by whom are you currently employed?
 09:06:50 16 A. DPi Teleconnect.
 09:06:54 17 Q. What is your title or capacity at dPi?
 09:06:58 18 A. Vice-president of finance.
 09:07:04 19 Q. Are you an officer of dPi Teleconnect?
 09:07:10 20 A. DPi Teleconnect is an LLC. It's managed by a
 09:07:16 21 board of managers. I'm not on that board. So I'm a
 09:07:20 22 manager of the company, but I'm not a board member.
 09:07:22 23 Q. Okay.
 09:07:24 24 A. So I'm not technically an officer of the
 09:07:26 25 company.

09:04:44 1 Q. Any other documents that you reviewed before
 09:04:46 2 coming in here today for the purpose of getting ready
 09:04:48 3 for this deposition?
 09:04:50 4 A. No.
 09:04:50 5 Q. Did you bring any notes or other documents
 09:04:52 6 with you to this deposition?
 09:04:54 7 A. I brought the documents that I've described.
 09:04:58 8 I brought a notepad that has a few notes on it.
 09:05:02 9 Q. Have you ever testified in any court
 09:05:04 10 proceedings before?
 09:05:08 11 A. I may have. To be honest, I don't recall.
 09:05:12 12 Q. Okay. And I'm not interested in any court
 09:05:20 13 proceedings you may have testified in in a personal
 09:05:24 14 capacity, like as a witness or in a personal matter.
 09:05:26 15 But do you recall testifying as a dPi
 09:05:28 16 representative in any court proceedings?
 09:05:30 17 A. I've -- never as a dPi representative.
 09:05:32 18 Q. Thank you. Have you ever testified before any
 09:05:36 19 state commissions as a dPi representative?
 09:05:40 20 A. No.
 09:05:42 21 Q. Have you ever filed written testimony with any
 09:05:48 22 state commissions as a dPi representative?
 09:05:52 23 A. Not that I recall.
 09:05:54 24 Q. Do you recall filing testimony before the
 09:05:58 25 Arkansas Public Service Commission in dPi's attempt to

09:07:28 1 Q. Have you referred to yourself as the chief
 09:07:42 2 financial officer of dPi Teleconnect in any settings?
 09:07:46 3 A. I've been referred to as that. Because we
 09:07:50 4 don't have a chief financial officer per se. So as
 09:07:56 5 vice-president of finance, I fill that capacity, but
 09:07:58 6 that's not my official title.
 09:08:00 7 Q. Today who -- in the same manner that you just
 09:08:04 8 described, as you're filling the capacity of CFO, who
 09:08:08 9 today fills the capacity of chief executive officer of
 09:08:10 10 dPi Teleconnect?
 09:08:14 11 A. Today I fill that capacity, although I don't
 09:08:16 12 have that official title.
 09:08:20 13 Q. Who filled that capacity immediately before
 09:08:22 14 you?
 09:08:24 15 A. David Dowart.
 09:08:26 16 Q. How do you spell that last name?
 09:08:28 17 A. D-O-W-A-R-T.
 09:08:34 18 Q. When did Mr. Dowart cease filing that
 09:08:36 19 capacity as CEO of dPi?
 09:08:42 20 A. I believe it was April.
 09:08:46 21 Q. Of this year?
 09:08:48 22 A. Yes.
 09:08:48 23 Q. 2009?
 09:08:48 24 A. Yes.
 09:08:52 25 Q. Did he cease -- is he still an employee of dPi?

THOMAS O'ROARK

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09:08:58 1 Teleconnect?
 09:09:00 2 A. No.
 09:09:02 3 Q. Did he leave voluntarily?
 09:09:02 4 A. Yes.
 09:09:02 5 Q. Do you know what he's doing now?
 09:09:04 6 A. No.
 09:09:06 7 Q. Do you know why he left?
 09:09:08 8 A. No.
 09:09:16 9 Q. Would you describe his leaving on good terms
 09:09:18 10 or bad terms or indifferent?
 09:09:22 11 A. I'm not aware of the terms under which he left
 09:09:30 12 the company, so I can't really describe those either
 09:09:34 13 way.
 09:09:36 14 Q. And did you ever have a conversation with him
 09:09:38 15 about why he was leaving?
 09:09:46 16 A. I may have. You know, I worked with Dave for
 09:09:54 17 a number of years.
 09:09:58 18 Q. Mr. O'Roark, it just strikes me as interesting
 09:10:04 19 that you would not have a conversation with him about
 09:10:06 20 why he left the company.
 09:10:08 21 That's why I'm asking if you know it was
 09:10:08 22 on good terms or not.
 09:10:12 23 A. I believe it was on good terms. I -- I don't
 09:10:14 24 -- I don't have -- I'm not privy to the details of his
 09:10:18 25 leaving the company. So --

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09:11:58 1 Q. Under education certifications there's an
 09:12:02 2 indication that you graduated in 1977 from Pittsburgh
 09:12:06 3 State University with a BS BA.
 09:12:08 4 Can you tell us what a BS BA is?
 09:12:10 5 A. Bachelor of Science in Business
 09:12:14 6 Administration.
 09:12:16 7 Q. In the summary portion of the CV, there's a
 09:12:20 8 statement about three lines down, Have won over
 09:12:26 9 75,000,000 in telecom cost recovery.
 09:12:30 10 Could you tell us what you mean by that?
 09:12:32 11 A. Basically auditing ILEC invoices, identifying
 09:12:44 12 over billing on ILEC invoices, filing disputes with
 09:12:50 13 ILECs and recovering settlements of those disputes.
 09:13:06 14 Q. For which of the entities listed on the CV
 09:13:10 15 were you involved in recovering telecom costs, as you
 09:13:14 16 just described?
 09:13:16 17 A. DPI Teleconnect, Co-Vista Communications,
 09:13:20 18 Nextel Telecom.
 09:13:48 19 Q. Based on what you said earlier about dPi being
 09:13:50 20 an LLC, I assume that dPi itself is not a publicly
 09:13:56 21 traded company?
 09:13:56 22 A. That's correct.
 09:13:58 23 Q. My understanding is that it is currently owned
 09:14:00 24 by a publically traded company. Is that accurate?
 09:14:04 25 A. Yes.

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09:10:20 1 Q. All right. What is your current business
 09:10:22 2 address?
 09:10:24 3 A. 2997 LBJ Freeway.
 09:10:30 4 Q. And that's in Dallas, Texas?
 09:10:30 5 A. Yes.
 09:10:42 6 Q. I'm going to ask the court reporter to mark
 09:10:46 7 this as Deposition Exhibit 1, please.
 09:11:04 8 (Exhibit 1 marked.)
 09:11:04 9 Q. Mr. O'Roark, the court reporter has handed you
 09:11:08 10 what has been marked as Deposition Exhibit 1. I'll ask
 09:11:10 11 you to take your time, flip through that document. And
 09:11:12 12 once you've reviewed it to your satisfaction, I'm going
 09:11:16 13 to ask you to let us know if you have ever seen it
 09:11:18 14 before.
 09:11:22 15 A. Yeah. Obviously I've seen it. I signed it.
 09:11:24 16 Q. Okay. What is that document?
 09:11:28 17 A. Application for amendment to a service
 09:11:30 18 provider certificate of operating authority.
 09:11:32 19 Q. Okay. Would you go with us to page 15 of that
 09:11:42 20 document. And I'm going by the Bates stamp number on
 09:11:46 21 the bottom right corner of the page.
 09:11:50 22 A. Yes.
 09:11:52 23 Q. I want to use that document you just
 09:11:56 24 referenced to ask questions about your background.
 09:11:58 25 A. Okay.

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09:14:04 1 Q. And what's the name of that publically traded
 09:14:06 2 company that currently owns dPi?
 09:14:08 3 A. Rent-a-Center.
 09:14:10 4 Q. How long has Rent-a-Center been the owner of
 09:14:14 5 dPi?
 09:14:14 6 A. I believe since November of '07.
 09:14:28 7 Q. Just in general could you describe what
 09:14:30 8 Rent-a-Center is?
 09:14:32 9 A. Rent-a-Center is a rent to own company.
 09:14:42 10 Q. Are you involved in any of the business of
 09:14:46 11 Rent-a-Center other than dPi Teleconnect?
 09:14:54 12 A. No.
 09:15:00 13 Q. With dPi Teleconnect do you have
 09:15:02 14 responsibilities that go any broader than the
 09:15:04 15 telecommunications industry itself?
 09:15:08 16 A. Well, I'm responsible for being vice-president
 09:15:12 17 of finance for dPi Teleconnect, and I'm acting in my
 09:15:18 18 current capacity as CEO briefly. And -- and its
 09:15:26 19 subsidiaries.
 09:15:28 20 Q. I guess what I'm asking is, in your daily
 09:15:30 21 operations are you limited to the field of
 09:15:32 22 telecommunications, or do you also get involved in
 09:15:36 23 dPi's activities in the electric markets and the other
 09:15:38 24 markets that it gets involved in?
 09:15:40 25 A. DPI has a subsidiary called dPi Energy that's

09:15:44 1 involved in the electric market of Texas.

09:15:48 2 Q. And do you have any responsibility for that

09:15:50 3 entity?

09:15:50 4 A. I'm vice-president of finance for that

09:15:54 5 company.

09:15:54 6 Q. Aside from that electric entity and the

09:15:58 7 telecom entity, are there any other aspects of dPi's

09:16:02 8 operations that you're responsible for?

09:16:06 9 A. That's -- that's the entire scope of dPi's

09:16:12 10 activities.

09:16:16 11 Q. I want to talk a little bit now about dPi

09:16:22 12 telecom operations in the State of North Carolina.

09:16:24 13 Mr. O'Roark, I'm just going to show you a

09:16:28 14 response to discovery that gives numbers of dPi

09:16:34 15 customers in the State of North Carolina. And I want

09:16:38 16 to talk to you about that for just a moment.

09:17:02 17 I don't have an extra copy of this, but

09:17:04 18 for the record this is dPi's first supplemental

09:17:08 19 response to AT&T North Carolina's first set of

09:17:10 20 interrogatories and requests for production of

09:17:12 21 documents. It is dated -- it's not dated. It's a

09:17:24 22 three-page document.

09:17:26 23 I'm going to hand it to Mr. Malish. It's

09:17:28 24 on file. I'm happy to make it a depo exhibit. But

09:17:32 25 that's the only copy I have.

09:19:20 1 you want.

09:19:12 2 Q. (By Mr. Turner) Mr. O'Roark, do you know

09:19:12 3 today how many customers dPi Teleconnect has in North

09:19:26 4 Carolina?

09:19:26 5 A. Well, again, I don't have access to those

09:19:28 6 databases. So I'd hate to commit to a number without

09:19:40 7 having access to the data.

09:19:42 8 Q. Understanding that and understanding that

09:19:44 9 we'll get a more accurate number, do you have a

09:19:48 10 ballpark figure in mind, or are you not even

09:19:50 11 comfortable doing that today?

09:19:52 12 A. I -- I really need to look at my databases to

09:19:58 13 get you an accurate number. I'd rather not quote a

09:20:02 14 number under oath.

09:20:02 15 Q. Okay.

09:20:02 16 A. And have it not be accurate.

09:20:04 17 Q. Okay. What is -- is there a specific aspect

09:20:18 18 or segment of the market that dPi targets in North

09:20:28 19 Carolina?

09:20:28 20 A. Well, dPi focuses on -- is exclusively a

09:20:32 21 prepaid provider. Our customers are for the most part

09:20:42 22 the working poor of this country. They -- about

09:20:50 23 70 percent of our subscriber base are Lifetime

09:20:54 24 customers, meaning they're participating in some sort

09:20:56 25 of federally subsidized program, low income housing,

09:17:54 1 Mr. O'Roark, look at that document and

09:17:58 2 tell me when you're ready for me to ask my questions.

09:18:04 3 A. Okay.

09:18:04 4 Q. Mr. O'Roark, that document says that it gives

09:18:10 5 the number of dPi customers in North Carolina on two

09:18:16 6 specific dates.

09:18:18 7 First thing I need to ask you, do those

09:18:22 8 numbers seem accurate to you from just a perspective

09:18:24 9 from being only the North Carolina numbers as opposed

09:18:28 10 to dPi Teleconnect's overall customer numbers at that

09:18:32 11 point in time?

09:18:34 12 A. I -- I'd have to -- I'd have to go look. I

09:18:38 13 don't have that kind of information committed to

09:18:42 14 memory.

09:18:44 15 Q. Sure. If it is not something you can do

09:18:48 16 during a break, that's fine.

09:18:52 17 Is that something that might be able to

09:18:54 18 be done during a break in a deposition, or would it

09:18:56 19 take you longer to look it up?

09:18:58 20 A. I'd have to go back to my office and have

09:19:00 21 access to my databases.

09:19:04 22 Q. Okay.

09:19:04 23 MR. TURNER: Chris, is that something you

09:19:06 24 would work with us on?

09:19:08 25 MR. MALISH: Yeah. We can supplement, if

09:21:00 1 food stamps, independent children. They're basically

09:21:04 2 people that are at or below poverty level.

09:21:10 3 Our customers are basically cash

09:21:14 4 constraint customers or customers that need and require

09:21:20 5 access to services as cheaply as possible. And as --

09:21:28 6 and they need a dependable, reliable provider who can

09:21:32 7 offer them basically a flat rate service with no hidden

09:21:36 8 charges, hidden fees and no surprises in terms of post

09:21:42 9 billing for usage charges, that sort of thing.

09:21:48 10 Our customers are the kind of people that

09:21:50 11 oftentimes have to make decisions between having bread,

09:21:54 12 milk, medicine for their children or having home phone

09:21:56 13 service. They are -- basically they pay cash for the

09:22:06 14 most part, and they pay at agent locations throughout

09:22:10 15 the states.

09:22:12 16 In many cases our customers don't have

09:22:16 17 bank accounts. They don't -- they don't have debit

09:22:20 18 cards, credit cards. Like I say, they're the working

09:22:26 19 poor.

09:22:36 20 Q. Do you have a feel for what percentage of your

09:22:40 21 customers have been disconnected for nonpayment of

09:22:42 22 services provided by another local exchange company?

09:22:48 23 A. Well, obviously I don't have access to that

09:22:52 24 information.

09:22:54 25 Q. In your experience, do your customers often

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09:23:00 1 have a choice between going and getting service from a
 09:23:02 2 local exchange company and dPI, or is dPI the -- and
 09:23:10 3 other prepside, as a practical matter, the only choice
 09:23:12 4 available to them?
 09:23:14 5 A. Well, they have all the same choices that you
 09:23:16 6 and I have, as long as they can afford it. And as long
 09:23:20 7 as they can pay cash for those services.
 09:23:34 8 Q. With regard to what you have just spoken about
 09:23:38 9 as far as dPI's customers, would that information be
 09:23:42 10 notably different in any state other than North
 09:23:50 11 Carolina?
 09:23:50 12 A. Well, I'm not aware of, you know, how the
 09:23:54 13 demographics of North Carolina compare to other states.
 09:23:58 14 Like every state has percentage of their population
 09:24:04 15 that are working poor people that participate in
 09:24:08 16 federal subsidized housing, food stamps, elderly,
 09:24:10 17 retired people, fixed income people, single mothers.
 09:24:18 18 You know, working -- the working poor.
 09:24:22 19 I think those people are just in every
 09:24:24 20 state.
 09:24:26 21 Q. Do you know how your prices for the services
 09:24:30 22 you provide in North Carolina compare to the prices
 09:24:32 23 that AT&T would charge for similar services in North
 09:24:40 24 Carolina?
 09:24:40 25 A. No. I'm not aware of AT&T's prices. I think

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09:27:00 1 Q. Mr. O'Roark, I will tell you that that is
 09:27:04 2 Exhibit A to prefled testimony that has your name on
 09:27:08 3 it before the Arkansas Public Service Commission.
 09:27:12 4 If I'm remembering correctly, it's in the
 09:27:14 5 2007 time frame. And that certainly is subject to
 09:27:16 6 being reviewed and checked.
 09:27:20 7 A. Okay.
 09:27:22 8 Q. At the top of that version of your CV, there's
 09:27:26 9 an indication of a number of customers that dPI serves.
 09:27:30 10 Could you remind us how many that is?
 09:27:36 11 A. 25,000.
 09:27:38 12 Q. And I believe it indicates they're in 48
 09:27:42 13 states?
 09:27:46 14 A. Right.
 09:27:46 15 Q. So that's why I was asking if dPI has
 09:27:50 16 decreased the number of states it operates in in the
 09:27:54 17 past couple of years.
 09:27:54 18 Can you explain for us why it went from
 09:27:58 19 48 in the CV you provided in Arkansas to 30 in the
 09:28:02 20 information provided to the Texas Commission recently?
 09:28:08 21 A. Well, one, it says licensed. The other is
 09:28:14 22 talking about where we actually have customers.
 09:28:16 23 Q. Okay.
 09:28:16 24 A. And so we don't have customers in every state
 09:28:20 25 that we're licensed in.

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09:24:46 1 we -- we offer a heavily discounted product. We offer
 09:24:52 2 a product as cheaply as we can possibly afford. And we
 09:25:00 3 try to make products and services available to our
 09:25:02 4 customers at the lowest price possible.
 09:25:16 5 Q. Mr. O'Roark, would you go back to Exhibit 1
 09:25:20 6 for us. And I'm going to ask you to look at page 3.
 09:25:26 7 A. Exhibit 1. This item?
 09:25:30 8 Q. Yes.
 09:25:34 9 A. Okay.
 09:25:38 10 Q. Second paragraph in the introduction it says
 09:25:42 11 that dPI has over 50,000 customers across some 30
 09:25:46 12 states.
 09:25:46 13 Does that sound accurate to you?
 09:25:48 14 A. Approximately.
 09:25:50 15 Q. Has the number of states that dPI operates in
 09:25:58 16 decreased in the last several years?
 09:26:04 17 A. No.
 09:26:22 18 MR. TURNER: Again, I don't have an extra
 09:26:22 19 copy of this, but I'm going to ask the court reporter
 09:26:26 20 to mark that as Exhibit 2.
 09:26:48 21 (Exhibit 2 marked.)
 09:26:48 22 Q. (By Mr. Turner) Mr. O'Roark, I'm going to ask
 09:26:50 23 you to take a look at that. Let me know when you're
 09:26:54 24 ready to answer questions about that document.
 09:26:54 25 A. Okay.

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09:28:20 1 Q. Okay. Going back to Exhibit 1, under the
 09:28:34 2 introduction of the third paragraph, Mr. O'Roark, as I
 09:28:40 3 read this, it's intended to say that after the proposed
 09:28:48 4 business transaction that's described in this
 09:28:50 5 application, there are no plans for dPI to change its
 09:28:54 6 pricing, its business plans, names or any other aspects
 09:28:56 7 of the business.
 09:28:58 8 Do you see that?
 09:28:58 9 A. Yes, I do.
 09:29:00 10 Q. Would that be accurate in the State of North
 09:29:02 11 Carolina as well?
 09:29:02 12 A. As far as I know, yes.
 09:29:28 13 Q. Go with me to page 7 of that document.
 09:29:40 14 There's an indication there under section 2, item 4B
 09:29:44 15 that dPI provides plain, old telephone service to both
 09:29:50 16 business and residential subscribers.
 09:29:54 17 Do you see that?
 09:29:56 18 A. Yes.
 09:29:56 19 Q. Is that the same in North Carolina?
 09:30:00 20 In other words, in North Carolina does
 09:30:04 21 dPI serve both residential and business subscribers?
 09:30:08 22 A. We serve primarily residential. We have
 09:30:10 23 arrangements with third party providers where we can
 09:30:14 24 offer business services through a third party provider.
 09:30:18 25 But dPI itself does not offer -- does not -- is not a

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09:30:24 1 -- not -- is not in the business to offer business
 09:30:30 2 lines.
 09:30:32 3 Q. To the best of your knowledge, are any of the
 09:30:34 4 promotional credit disputes in this docket associated
 09:30:38 5 with business lines in North Carolina?
 09:30:42 6 A. No.
 09:31:10 7 Q. Mr. O'Roark, as I understand it, dPi is not
 09:31:12 8 required to and does not file tariffs or price lists
 09:31:18 9 for the services it offers in North Carolina.
 09:31:20 10 Is that accurate?
 09:31:24 11 A. I'm not a telecom attorney. I'm not sure what
 09:31:28 12 the rules and regulations are for North Carolina. I
 09:31:34 13 defer to Chris on that.
 09:31:36 14 Q. Okay. There is a dPi Teleconnect website
 09:31:38 15 though, isn't there?
 09:31:42 16 A. Yes.
 09:31:44 17 Q. And that website describes your services and
 09:31:46 18 prices for those services in various states. Is that
 09:31:48 19 correct?
 09:31:48 20 A. I believe that you can do price and product
 09:31:56 21 lookup on that website, yes.
 09:31:58 22 Q. To the best of your knowledge, is the pricing
 09:32:00 23 information on dPi Teleconnect's website accurate and
 09:32:04 24 up to date?
 09:32:08 25 A. To the best of my knowledge, it is. I -- I --

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09:32:14 1 I'd have to look at it.
 09:32:22 2 Q. As I understand it, dPi never requires a
 09:32:24 3 deposit of its customers. Is that accurate?
 09:32:28 4 A. That's accurate.
 09:32:30 5 Q. Does dPi need a customer's real name in order
 09:32:34 6 for that customer to sign up for home phone service?
 09:32:40 7 A. We require a name, yes.
 09:32:42 8 Q. Do you require the real name?
 09:32:46 9 A. Well, how would we know if it's the real name
 09:32:48 10 or not? We require a name. We don't require
 09:32:52 11 identification.
 09:33:42 12 (Exhibit 3 marked.)
 09:34:08 13 Q. Mr. O'Roark, on Exhibit 3 of your deposition,
 09:34:12 14 look to your right-hand column to the Q&As. There's a
 09:34:18 15 question that says, Do you need my real name to sign up
 09:34:20 16 for home service?
 09:34:22 17 What's the answer on dPi's website?
 09:34:28 18 A. Uh-huh.
 09:34:28 19 Q. Could you read the answer?
 09:34:30 20 A. Absolutely not. All we need is your address.
 09:34:52 21 Q. Now, your website allows a customer to enter a
 09:34:56 22 North Carolina zip code and see what services and
 09:34:58 23 prices dPi offers in that area. Correct?
 09:35:02 24 A. Yes.
 09:35:34 25 (Exhibit 4 marked.)

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09:35:40 1 Q. Mr. O'Roark, when you've had a chance to
 09:35:42 2 review Deposition Exhibit 4, let me know, and I'll ask
 09:35:46 3 you my questions.
 09:35:46 4 A. Okay.
 09:35:58 5 Okay.
 09:35:58 6 Q. On the first page of Deposition Exhibit 4, a
 09:36:02 7 zip code of 28202 has been entered.
 09:36:06 8 Do you see that?
 09:36:06 9 A. Yep.
 09:36:08 10 Q. I'll tell you that is a Charlotte, North
 09:36:10 11 Carolina zip code.
 09:36:10 12 A. Okay.
 09:36:12 13 Q. There is a question that says, Do you qualify
 09:36:12 14 for Lifeline assistance?
 09:36:16 15 And I believe you told us earlier that in
 09:36:18 16 North Carolina roughly 75 percent of your residential
 09:36:22 17 customers are Lifeline customers?
 09:36:26 18 A. I don't believe I said in North Carolina.
 09:36:28 19 Q. Okay.
 09:36:28 20 A. I said our customer base in general. About
 09:36:32 21 70 percent of our customer base is Lifeline customers.
 09:36:36 22 Q. Do you know whether that percentage is
 09:36:38 23 significantly different in North Carolina than it is
 09:36:40 24 in --
 09:36:40 25 A. I don't know.

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09:36:42 1 Q. And the last line on the left, it says,
 09:36:44 2 "Customers of North Carolina are required to complete a
 09:36:48 3 North Carolina service agreement. Please click here."
 09:36:50 4 Do you see that?
 09:36:52 5 A. Yep.
 09:36:52 6 Q. Now, that's not typical of dPi, as I
 09:36:56 7 understand it.
 09:36:56 8 As I understand Exhibit 3, usually no
 09:37:00 9 contracts are required.
 09:37:02 10 Can you explain to us why a contract is
 09:37:04 11 required in North Carolina where it's not required in
 09:37:06 12 most other states?
 09:37:08 13 A. No.
 09:37:12 14 Q. Before today were you aware that the contract
 09:37:14 15 was required in North Carolina?
 09:37:24 16 A. No. I suppose that that's a legal regulatory
 09:37:30 17 issue.
 09:38:06 18 (Exhibit 5 marked.)
 09:38:12 19 Q. Mr. O'Roark, tell me when you've had a chance
 09:38:14 20 to review Exhibit 5 and are ready for me to ask my
 09:38:16 21 questions.
 09:38:16 22 A. Okay.
 09:38:36 23 Q. Mr. O'Roark, I'll represent to you that this
 09:38:40 24 information is what's populated after you put in the
 09:38:46 25 Charlotte zip code that we looked at earlier.

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09:38:48 1 Have you seen this type of information
 09:38:50 2 before?
 09:38:58 3 A. Yes.
 09:39:02 4 Q. Based on your review of that document, do you
 09:39:06 5 see anything that would suggest that the prices that
 09:39:08 6 are quoted in this document are inaccurate?
 09:41:10 7 A. Well, without having my product catalog in
 09:41:12 8 front of me, it would be impossible for me to verify
 09:41:16 9 all these prices. But I don't see anything that jumps
 09:41:20 10 out at me as just obviously, glaringly inaccurate.
 09:41:44 11 But, again, I'd have to -- I'd have to go
 09:41:48 12 back to my office, pull up my product catalog, go
 09:41:50 13 through every one of these prices to verify whether or
 09:41:54 14 not it was 100 percent accurate or not.
 09:41:56 15 Q. Fair enough. And subject to that, let's go
 09:41:58 16 through this document, and I'll ask you some questions
 09:42:02 17 about it.
 09:42:02 18 A. Okay.
 09:42:04 19 Q. On the quote column on the left side of the
 09:42:08 20 first page of Exhibit 5, there's an upgrades section.
 09:42:14 21 Do you see that?
 09:42:16 22 A. Uh-huh.
 09:42:18 23 Q. And it appears to me that this web page
 09:42:22 24 automatically places the dPi Club Program on the
 09:42:26 25 customer's bill, unless that customer goes in and

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09:43:56 1 First of all, I take it given that you
 09:44:00 2 said that the business services were provided by a
 09:44:04 3 third party, that this page is addressing residential
 09:44:08 4 services in North Carolina.
 09:44:08 5 Is that correct?
 09:44:08 6 A. Uh-huh.
 09:44:10 7 Q. I'm sorry!
 09:44:10 8 A. Yes, it is.
 09:44:12 9 Q. Thank you. So in month one the basic service
 09:44:16 10 rate is 39.99. Correct?
 09:44:18 11 A. Correct.
 09:44:18 12 Q. There is a zero on the service activation
 09:44:26 13 charge.
 09:44:26 14 Do you see that?
 09:44:26 15 A. I do.
 09:44:28 16 Q. Does dPi charge any service connection charges
 09:44:32 17 to its customers in North Carolina?
 09:44:34 18 A. We pass through the LCCW waiver to our
 09:44:42 19 customers. So since we are able to qualify for that
 09:44:48 20 promotional credit from BellSouth, then we are able to
 09:44:54 21 not charge a customer activation fee. Were it not for
 09:45:10 22 the LCCW waiver, we would have to charge a customer
 09:45:14 23 activation fee.
 09:45:16 24 Q. What is -- would the customer activation fee
 09:45:20 25 be that you would charge but for the LCCW waiver?

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09:42:28 1 clicks remove.
 09:42:30 2 Is that right?
 09:42:32 3 A. I'm not sure. I'd have to -- I'd have to
 09:42:36 4 check --
 09:42:38 5 Q. Okay.
 09:42:46 6 A. -- if the person who prepared this checked the
 09:42:48 7 code program.
 09:42:52 8 Q. I'll tell you that is the way it populates
 09:42:56 9 when you initially go on the page. It populates as
 09:43:00 10 upgrade/remove, to where my understanding is you have
 09:43:02 11 to click the remove in order to not pay the \$3 a month.
 09:43:06 12 If that's inaccurate, I'd like you to
 09:43:08 13 supplement that with your attorney.
 09:43:10 14 A. All right. I will. We'd have to investigate
 09:43:16 15 that and respond back to you.
 09:43:18 16 Q. If you would go now to the third page of
 09:43:24 17 Exhibit 5. At the top left it's entitled "Order
 09:43:30 18 summary."
 09:43:34 19 A. Uh-huh.
 09:43:40 20 Q. And what I'd like to do is focus on the month
 09:43:46 21 -- one month, two month through nine month -- area
 09:43:48 22 right there in the middle of the page.
 09:43:50 23 Do you see where I am?
 09:43:50 24 A. Uh-huh.
 09:43:52 25 Q. And let's start with month one.

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09:45:24 1 A. I'd have to pull up my -- I'd have to go look
 09:45:28 2 at my cost sheets. We do cost-based pricing.
 09:45:36 3 Q. The North Carolina Commission recently decided
 09:45:40 4 a dispute between dPi North Carolina regarding -- I'm
 09:45:44 5 sorry -- between dPi and AT&T North Carolina regarding
 09:45:50 6 credit dPi had requested for that line charge waiver.
 09:45:54 7 Correct?
 09:46:00 8 Are you aware of that?
 09:46:00 9 A. That North Carolina has decided that case?
 09:46:04 10 Q. Yes, sir. The Commission.
 09:46:12 11 A. I'm not an attorney, and I'm not in a
 09:46:14 12 regulatory department. So I'm not necessarily aware of
 09:46:18 13 all of the rulings in North Carolina Commission.
 09:46:24 14 I don't understand what you're asking me.
 09:46:28 15 Q. Well, as I understand it, North Carolina
 09:46:34 16 Commission ruled against dPi in a dispute regarding its
 09:46:38 17 ability to get certain requested line connection waiver
 09:46:44 18 charges.
 09:46:44 19 A. You're an AT&T attorney, right?
 09:46:48 20 So you would be in a position to know
 09:46:48 21 that.
 09:46:48 22 Q. Well, I'm asking you if independent of what I
 09:46:52 23 just said you are in the position to know that.
 09:46:54 24 A. I can find out.
 09:46:56 25 Q. But today you don't know?

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09:46:58 1 A. No, today I don't know.
 09:47:02 2 Do you want me to get back to you on
 09:47:04 3 that?
 09:47:04 4 Q. No, sir.
 09:47:06 5 A. Okay.
 09:47:14 6 Q. I would like you to get back to us on the
 09:47:16 7 amount that dPi would charge for a service activation
 09:47:20 8 charge in North Carolina, if it were unable to get the
 09:47:26 9 line connection waiver charge.
 09:47:26 10 A. Okay.
 09:47:34 11 Q. Going back to the month one column in
 09:47:38 12 Exhibit 5 - and tell me when you're ready.
 09:48:10 13 A. Okay. Go ahead.
 09:48:12 14 Q. In month one the prompt pay discount does not
 09:48:18 15 apply yet, correct?
 09:48:20 16 A. That's correct.
 09:48:22 17 Q. Below that there is a first month promotional
 09:48:26 18 credit. And the credit amount of \$28.04.
 09:48:30 19 Can you explain what that is?
 09:48:32 20 A. No. Do you want me to get back to you on
 09:48:44 21 that?
 09:48:44 22 Q. Tell you what. We'll regroup at the end.
 09:48:46 23 A. Okay.
 09:48:50 24 Q. Below that there's an FCC subscriber charge of
 09:48:56 25 \$30. Below that there's a USOC order charge for \$1.69.

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09:51:10 1 Q. For the first month below that, the dPi Club
 09:51:12 2 Program is free.
 09:51:20 3 Down three lines from the top there you
 09:51:22 4 see sub total product is 25.147
 09:51:26 5 A. Yes.
 09:51:28 6 Q. And then your taxes are 6.87 for a -- so the
 09:51:32 7 total price for basic service in month one is \$32.01,
 09:51:38 8 correct?
 09:51:38 9 A. Yes.
 09:51:50 10 Q. All right. On the month two column,
 09:51:56 11 everything is basically the same until we get the first
 09:51:58 12 month promotional credit.
 09:52:00 13 There obviously is no credit in month two
 09:52:02 14 and beyond, right?
 09:52:04 15 A. Correct.
 09:52:10 16 Q. In month two the dPi Club Program fee of \$3
 09:52:14 17 also kicks in. Correct?
 09:52:18 18 A. That's the one that the customer opted not to
 09:52:20 19 remove?
 09:52:22 20 Q. I like the way you said that. That's the one
 09:52:26 21 the customer opted not to remove. Yes, sir.
 09:52:28 22 A. Okay. If the customer opted to retain that
 09:52:34 23 club program, it starts in at month two.
 09:52:38 24 Q. Got a little bit higher taxes now, right?
 09:52:40 25 A. Uh-huh.

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09:49:02 1 Do you know what that USOC order charge
 09:49:04 2 is?
 09:49:14 3 A. No. I'd have to get back to you on that as
 09:49:22 4 well.
 09:49:30 5 Q. There's another service activation charge
 09:49:32 6 line, but below that there's an AAM fee of \$5 a month.
 09:49:38 7 Do you know what that is?
 09:49:40 8 A. That's account administration and maintenance
 09:49:42 9 fee.
 09:49:52 10 Q. And why does dPi charge that fee?
 09:50:02 11 A. It's the nature of a prepay customer that we
 09:50:04 12 have to do an awful lot of account administration and
 09:50:10 13 maintenance work. We have to reach out to that
 09:50:16 14 customer, remind that customer of when their payments
 09:50:20 15 are due. We have to remind that customer to come in
 09:50:22 16 and make payments. We have to do an awful lot of reach
 09:50:26 17 out work to help manage that customer, make sure that
 09:50:32 18 customer doesn't lose service.
 09:50:34 19 We also have to be willing to make
 09:50:36 20 payment arrangements with that customer if needed and
 09:50:38 21 necessary. So that we can allow that working poor
 09:50:42 22 customer not to have their service interrupted. We do
 09:50:48 23 an awful lot of life management kind of activities with
 09:50:54 24 that customer for that customer. In exchange for that,
 09:50:58 25 we charge and collect an AAM fee.

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09:52:40 1 Q. So the customer in month two pays \$63.23 for
 09:52:48 2 basic service, right?
 09:52:50 3 A. Uh-huh.
 09:52:52 4 Q. Now, that's if he pays on time.
 09:52:56 5 What if this is one of those months that
 09:52:58 6 the customer falls behind and gets the payment late?
 09:53:02 7 Does dPi charge anything additional to
 09:53:04 8 that customer if he or she is late paying in month two?
 09:53:12 9 A. Is there a late fee? Is that what you're
 09:53:14 10 asking?
 09:53:16 11 Q. Well, is there any additional charge that that
 09:53:18 12 customer is going to pay if he does not pay on time in
 09:53:20 13 month two, regardless of what you call it?
 09:53:24 14 A. I'd have to get back to you on that. I
 09:53:26 15 understand that late fees vary by state. And I'd have
 09:53:34 16 to check into that.
 09:53:38 17 Q. Okay. The last column we're going to look at
 09:53:52 18 on this sheet is month three. It's basically the same
 09:53:56 19 as month two until we get to the prompt pay discount.
 09:54:02 20 A. Uh-huh.
 09:54:02 21 Q. As I understand it, if your customer has paid
 09:54:10 22 on time in the previous month, they get a \$10 credit on
 09:54:14 23 the next month's bill.
 09:54:16 24 Is that accurate?
 09:54:20 25 A. If the customer pays on time in month two, he

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09:54:24 1 gets a \$10 credit in month three, yes.

09:54:26 2 Q. And so if the customer had not paid on time in

09:54:32 3 month two, they would not get that \$10 credit in month

09:54:34 4 three. Right?

09:54:36 5 A. He has to pay promptly to get the prompt pay

09:54:40 6 discount. Yes.

09:54:42 7 Q. I'm not trying to be a smart aleck. I just

09:54:44 8 want to make the record clear.

09:54:46 9 A. It's called a prompt pay discount. Right? He

09:54:50 10 has to pay promptly to qualify for the prompt pay

09:54:52 11 discount.

09:54:52 12 Q. I understand.

09:54:54 13 A. Okay.

09:54:54 14 Q. So this customer paid promptly in month two,

09:54:56 15 so in month three he's paying a total of \$3.23 for the

09:55:02 16 basic service.

09:55:04 17 Right?

09:55:04 18 A. Uh-huh.

09:55:04 19 Q. You got to say yes.

09:55:06 20 A. Yes.

09:55:06 21 Q. But if that same customer had not paid

09:55:08 22 promptly in month two, that customer would pay \$3.23 in

09:55:14 23 month three. Correct?

09:55:16 24 A. Correct.

09:55:18 25 Q. Assume that a customer with an exemplary

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09:56:48 1 BellSouth for substantially less it can obtain it from

09:56:52 2 me, why would he do business with me?

09:56:56 3 Q. Let me ask my question again. Make sure you

09:57:00 4 heard it right.

09:57:00 5 My question was, is it accurate to say

09:57:04 6 that dP's success in the market that it has chosen to

09:57:08 7 compete in in North Carolina is not dependent on dP's

09:57:12 8 being able to meet the price that AT&T would offer for

09:57:16 9 basically the same service?

09:57:18 10 MR. MALISH: I'm going to object to the

09:57:20 11 form of the question.

09:57:22 12 Q. (By Mr. Turner) You can answer.

09:57:34 13 MR. TURNER: Chris, he's looking at you.

09:57:36 14 I heard your objection. I asked him to answer anyway.

09:57:40 15 MR. MALISH: You can answer.

09:57:40 16 A. Customers look for the best price. If

09:57:44 17 BellSouth's price is substantially lower than my price,

09:57:50 18 why would my customer do business with me?

09:57:54 19 My customer wants to get the best price

09:57:58 20 that he can get for the same service or for

09:58:02 21 approximately the same service. Of course my success

09:58:06 22 marketplace is going to depend on my being able to be

09:58:08 23 competitive with all of the various alternatives that

09:58:12 24 that customer has available to him.

09:58:16 25 Why would you think that my customer

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09:55:22 1 credit record, no issues at all with any other utility

09:55:26 2 company is in Charlotte, North Carolina and comes to

09:55:34 3 dP and wants to buy basic service.

09:55:36 4 Does that customer get better pricing, or

09:55:40 5 is this the pricing you offer across the board for

09:55:44 6 basic service?

09:55:44 7 A. This is the product we price -- we offer

09:55:46 8 across the board for basic service.

09:56:00 9 Q. And I believe you told us earlier that you

09:56:04 10 don't know what the ILEC might charge in the same area

09:56:08 11 in North Carolina for basic service.

09:56:12 12 Is that accurate?

09:56:12 13 A. That's accurate.

09:56:14 14 Q. So it's fair to say, isn't it, that dP's

09:56:16 15 success in the market in which it has chosen to compete

09:56:18 16 in North Carolina is not based on being able to compete

09:56:22 17 with the price that the ILEC charges for basically the

09:56:28 18 same service?

09:56:28 19 A. Why would you say that?

09:56:28 20 Q. I'm asking you the question, sir.

09:56:32 21 Is that accurate or not?

09:56:32 22 A. No. I don't think that's accurate.

09:56:38 23 Q. Okay. Could you tell me why that's not

09:56:42 24 accurate, in your view?

09:56:44 25 A. If my customer can obtain service from

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09:58:18 1 would not be sensitive to your price being

09:58:20 2 substantially lower than mine? That doesn't make any

09:58:24 3 sense to me. That doesn't make business sense. It

09:58:26 4 doesn't make economic sense.

09:58:28 5 I don't understand why you would ask me a

09:58:32 6 question like that. It seems to be a nonsensical

09:58:36 7 question. Of course my success in the marketplace is

09:58:38 8 going to depend upon my price being competitive.

09:59:26 9 Q. (By Mr. Turner) Mr. O'Roark, are you -- I

09:59:28 10 understand, as you said, you're not aware of the price

09:59:32 11 that AT&T in Charlotte may charge for similar services?

09:59:38 12 Let me ask this. Do you -- are you aware

09:59:42 13 of prices that other prepaid entities in the Charlotte,

09:59:46 14 North Carolina market charge for their basic service?

09:59:52 15 A. As a company, we do -- we shop the

09:59:58 16 marketplace. As a company, we do competitive shop. We

10:00:06 17 have distribution channels that involve local agents,

10:00:12 18 for example. And those local agents are acutely aware

10:00:14 19 of what other prices are available in the near local

10:00:18 20 marketplace.

10:00:20 21 You know, any town, North Carolina, a

10:00:24 22 small community in North Carolina, the agent that

10:00:26 23 operates in any town is going to be aware of what

10:00:32 24 prices and products are available to his customers in

10:00:34 25 his local marketplace. He's going to give us that

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10:00:38 1 information and say, you know, we're overpriced. My
 10:00:44 2 sales are suffering because we're not competitive. You
 10:00:46 3 know, that type of information is going to come back to
 10:00:48 4 us.
 10:00:52 5 We will also reach out and shop
 10:00:54 6 competitors periodically just to see whether or not our
 10:00:58 7 prices are competitive. If we see a downward trend in
 10:01:04 8 our sales, we'll take a look at price and product, see
 10:01:08 9 if that could be the cause of it.
 10:01:14 10 So, yes. We're familiar with what the
 10:01:18 11 prevailing prices are in our local marketplaces.
 10:01:22 12 Q. When dPi considers the prevailing price in the
 10:01:26 13 local marketplace, does the company look only at other
 10:01:28 14 prepaid companies prices, or do they look at all
 10:01:32 15 prices?
 10:01:42 16 A. Well, all is a big word. There's 8,000 CLECs
 10:01:48 17 operating in other states. I think in any given state
 10:01:52 18 there could be hundreds. We don't shop every one of
 10:01:56 19 them, no.
 10:01:58 20 Q. Do you shop AT&T's in North Carolina?
 10:02:04 21 Or do you know?
 10:02:04 22 A. Occasionally.
 10:02:06 23 Q. You mentioned that from time to time the local
 10:02:10 24 sales agent will come back and if it's accurate say,
 10:02:12 25 hey, we're overpriced.

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10:02:14 1 A. Right.
 10:02:14 2 Q. Have you ever received feedback from any local
 10:02:20 3 sales agent that you were overpriced in North Carolina
 10:02:22 4 when compared specifically to AT&T's prices in North
 10:02:28 5 Carolina?
 10:02:28 6 A. Yes. I received feedback like that before. I
 10:02:32 7 don't know specifically if I received it in North
 10:02:36 8 Carolina or not. But I have received feedback from
 10:02:38 9 agents saying, hey, you know, AT&T is -- is offering
 10:02:42 10 this price or running this promotion. And we're not
 10:02:46 11 competitive. You know, that type of information.
 10:03:18 12 (Exhibit 6 marked.)
 10:03:20 13 Q. Mr. O'Roark, when you've had a chance to look
 10:03:20 14 at Deposition Exhibit 6 and are ready for me to ask you
 10:03:26 15 questions, let me know.
 10:03:40 16 A. Okay.
 10:03:40 17 Q. This is a basic service just like we looked at
 10:03:56 18 a moment ago in Exhibit 5. The only difference being
 10:04:00 19 that this customer applies for and receives Lifeline
 10:04:04 20 credits.
 10:04:06 21 My question to you is simply, if you will
 10:04:10 22 look through this and let me know if you see anything
 10:04:12 23 that stands out to you as inaccurate about any of the
 10:04:16 24 pricing set out in Exhibit 6.
 10:04:24 25 A. My answer would be the same as before. That

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10:04:28 1 I'd have to go back to my office, compare these prices
 10:04:32 2 with my pricing catalog to give you an accurate answer
 10:04:36 3 to that question.
 10:04:40 4 Q. And understanding and accepting that, is there
 10:04:42 5 anything today that stands out as obviously inaccurate?
 10:05:48 6 A. Subject to the -- my earlier answer, no.
 10:05:50 7 Q. Okay. Let's take a break now.
 10:05:52 8 (Break taken from 10:05 a.m. to 10:21
 10:07:06 9 a.m.)
 10:21:52 10 Q. (By Mr. Turner) Mr. Bollinger --
 10:21:54 11 MR. MALISH: O'Roark.
 10:21:56 12 Q. (By Mr. Turner) I'm sorry. Mr. O'Roark?
 10:21:56 13 A. Yes.
 10:21:56 14 Q. You ready?
 10:22:00 15 Are you ready?
 10:22:02 16 Or do you need a minute?
 10:22:02 17 A. Yes.
 10:22:02 18 Q. Okay. Back from a short break. Mr. O'Roark,
 10:22:08 19 the testimony that dPi filed in this docket in North
 10:22:14 20 Carolina was originally submitted by Mr. Ron Bollinger,
 10:22:18 21 B-O-L-L-I-N-G-E-R.
 10:22:20 22 As I understand it, you are going to
 10:22:20 23 appear at the hearing in North Carolina as dPi's
 10:22:24 24 witness in this docket.
 10:22:26 25 Is that your understanding?

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10:22:36 1 A. I don't know that I've discussed that with
 10:22:40 2 Chris.
 10:22:46 3 MR. MALISH: You're taking over his
 10:22:46 4 testimony and sponsoring for dPi.
 10:22:52 5 A. Today? Yes.
 10:22:54 6 I thought he was referring to some future
 10:22:56 7 event.
 10:22:58 8 MR. TURNER: I am.
 10:22:58 9 Q. (By Mr. Turner) My understanding is that you
 10:22:58 10 will appear at the North Carolina Public Service
 10:23:02 11 Commission -- at the hearing on this matter in November
 10:23:04 12 and sponsor the testimony of Mr. Bollinger as though it
 10:23:08 13 were your own.
 10:23:08 14 Is that not your understanding?
 10:23:10 15 A. I don't know that that decision has been made.
 10:23:16 16 MR. TURNER: I guess y'all need to take a
 10:23:18 17 break.
 10:23:18 18 MR. MALISH: Yeah.
 10:23:20 19 MR. TURNER: Let's take a break.
 10:23:20 20 (Break taken from 10:23 a.m. to 10:28
 10:28:32 21 a.m.)
 10:28:32 22 MR. MALISH: So let me explain what our
 10:28:40 23 situation is here.
 10:28:42 24 Mr. O'Roark is here to testify on behalf
 10:28:44 25 of dPi on these promotion cases here and now. In

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10:28:54 1 November -- as you've seen from one of these exhibits,
 10:28:58 2 there is a sale of shares. It's theoretically possible
 10:29:06 3 that the new owner may choose to not stay with -- with
 10:29:18 4 Mr. O'Roark. Or may designate somebody else. And he
 10:29:22 5 doesn't have -- he wouldn't have control at that point.
 10:29:26 6 But the plan is for him to be the one.
 10:29:34 7 MR. TURNER: We'll continue the
 10:29:36 8 deposition without waiving my rights we have. I
 10:29:42 9 understand by the e-mail stream that we were here
 10:29:44 10 expressly and voluntarily, solely because we believed
 10:29:46 11 that he would be the witness --
 10:29:48 12 MR. MALISH: Right.
 10:29:48 13 MR. TURNER: -- that would be testifying
 10:29:50 14 live on the stand. So if it changes, we're reserving
 10:29:52 15 all rights we have.
 10:29:54 16 MR. MALISH: I understand.
 10:29:54 17 MR. TURNER: At that point.
 10:30:04 18 Q. (By Mr. Turner) Mr. O'Roark, if the new
 10:30:06 19 owners do not make a contrary decision, do you have any
 10:30:12 20 personal concerns with appearing and adopting this
 10:30:16 21 testimony at the hearing in North Carolina in this
 10:30:22 22 document?
 10:30:26 23 A. Well, again, just taking what Chris said, you
 10:30:30 24 presented a document that says the company is for sale.
 10:30:34 25 Obviously we're in a limbo stage right now, trying to

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10:32:44 1 today out of default. Right? Because there was no one
 10:32:48 2 else to come. That may well change by November. And
 10:32:52 3 there may be somebody back in Brian's position. There
 10:32:56 4 may be somebody else that -- that -- that would be --
 10:33:00 5 that this would more appropriately fall in their arena
 10:33:04 6 than in mine.
 10:33:06 7 So my personal concern about this is that
 10:33:10 8 in the past we always had the option of me being a
 10:33:14 9 witness. We opted for me not to be. In the future we
 10:33:16 10 would have the option of me being the witness, but we
 10:33:18 11 may well opt for me not to be.
 10:33:22 12 And I just don't want to go on record as
 10:33:24 13 committing to something in November when that could
 10:33:26 14 well be subject to change.
 10:33:30 15 Q. Okay.
 10:33:30 16 A. If -- if -- if we -- having our preference in
 10:33:34 17 the past between myself and Brian, for example, we
 10:33:38 18 chose Brian. Right?
 10:33:40 19 So having our preference in the future
 10:33:42 20 between myself and someone else that may or may not be
 10:33:46 21 employed with the company today, we might well choose
 10:33:50 22 somebody else.
 10:33:52 23 And I don't want to go on record as
 10:33:52 24 committing to something in November when that's -- when
 10:33:56 25 there's going to be potentially lots of changes between

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10:30:36 1 -- waiting for that sale to close.
 10:30:40 2 I have new ownership, new stockholders
 10:30:42 3 that I've never worked with before that I don't know
 10:30:44 4 much about. So I have no -- I cannot make any
 10:30:48 5 assurances about what's going to be going on with this
 10:30:52 6 company in November.
 10:30:54 7 And I -- and I don't want to go on record
 10:30:56 8 committing to something that I may or may not have any
 10:30:58 9 control over.
 10:31:00 10 Q. That's not my question.
 10:31:00 11 A. Okay.
 10:31:02 12 Q. I understand and accept that the new company
 10:31:06 13 made decide no, Tom O'Roark is not the person to do it.
 10:31:10 14 And we'll deal with that if it comes.
 10:31:12 15 My question is, if the new owners do not
 10:31:16 16 make that decision and if it's left to you, do you have
 10:31:18 17 any reservations about going to North Carolina in
 10:31:22 18 November and adopting this testimony and presenting it
 10:31:24 19 on behalf of dPi?
 10:32:18 20 A. Obviously in the past I worked for a big
 10:32:22 21 company, and I was not the witness you chose. Correct?
 10:32:26 22 It was Ron Bollinger. Right? Could have been me.
 10:32:30 23 Wasn't me. It was Brian Bollinger.
 10:32:34 24 I'm here today because Brian Bollinger
 10:32:36 25 doesn't work for the company any longer. I'm here

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10:34:00 1 now and then, and we are potentially going to have
 10:34:04 2 other options available to us that we don't have
 10:34:06 3 available today.
 10:34:06 4 Do you understand my concern?
 10:34:10 5 Q. My question to you simply is if you voiced it
 10:34:12 6 to the extent you need to and are you ready to move on.
 10:34:16 7 A. Okay.
 10:34:26 8 Q. For the purposes of today, I am operating
 10:34:30 9 under the assumption that you will, unless something
 10:34:32 10 changes, appear in North Carolina in November and adopt
 10:34:38 11 Mr. Bollinger's testimony.
 10:34:40 12 Is that -- do you understand that that's
 10:34:42 13 the assumption I'm working under today?
 10:34:44 14 A. I understand that's the assumption you're
 10:34:48 15 working under.
 10:34:48 16 Q. Did I hear you correctly to say that Mr.
 10:34:50 17 Bollinger is no longer with the company?
 10:34:52 18 A. Yes.
 10:34:54 19 Q. When did he depart the company?
 10:34:56 20 A. January.
 10:34:58 21 Q. Of 2009?
 10:35:00 22 A. Yes.
 10:35:04 23 Q. Was his departure voluntary?
 10:35:08 24 A. Yes.
 10:35:08 25 Q. To the best of your knowledge, did his

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10:35:10 1 departure have anything to do with the departure of the
 10:35:14 2 CEO?
 10:35:14 3 A. No.
 10:35:14 4 Q. Do you know why Mr. Bollinger left the
 10:35:16 5 company?
 10:35:20 6 A. You'd have to ask him.
 10:35:24 7 Q. Have you had any discussions with Mr.
 10:35:26 8 Bollinger regarding why he left the company?
 10:35:30 9 A. Yes.
 10:35:32 10 Q. I'm not asking you to make any inferences or
 10:35:36 11 assumptions, but what did Mr. Bollinger tell you was
 10:35:38 12 the reason he left the company?
 10:35:40 13 A. To accept other employment.
 10:35:42 14 Q. With whom?
 10:35:44 15 A. I don't know.
 10:35:52 16 Q. Does dPI currently have a vice-president of
 10:35:56 17 legal and regulatory affairs?
 10:35:56 18 A. No.
 10:36:02 19 Q. Who is -- is anyone today carrying on the
 10:36:10 20 duties and responsibilities that Mr. Bollinger did for
 10:36:12 21 the company when he was the vice-president of legal and
 10:36:16 22 regulatory affairs?
 10:36:18 23 A. Well, we've outsourced the legal work
 10:36:22 24 obviously. We don't have an attorney on our staff.
 10:36:30 25 And other duties that he performed have

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10:36:34 1 been allocated to other people.
 10:36:36 2 Q. Other people within the company?
 10:36:38 3 A. Yes.
 10:36:42 4 Q. Do you have a copy of the prefiled testimony
 10:36:48 5 of Mr. Bollinger with you?
 10:36:52 6 A. Is that this?
 10:36:54 7 MR. MALISH: Yeah.
 10:36:54 8 A. Yes.
 10:36:56 9 Q. (By Mr. Turner) And, Mr. O'Roark, I need to
 10:36:58 10 -- I'm going to explain to you why I'm about to do what
 10:37:02 11 I'm about to do.
 10:37:04 12 At least my view is that AT&T is entitled
 10:37:08 13 to understand what it is you will say on the stand,
 10:37:12 14 what it is you will not say on the stand so that we can
 10:37:16 15 come into the hearing room prepared. In order to do
 10:37:18 16 that, I'm going to ask us to go line -- not line by
 10:37:22 17 line, but paragraph by paragraph through this
 10:37:26 18 testimony.
 10:37:26 19 And I'm going to ask you one at a time to
 10:37:28 20 tell us if you will adopt the testimony exactly as is
 10:37:32 21 written, or are there any changes to the testimony that
 10:37:34 22 you would need to make in order for you to get on that
 10:37:38 23 stand under oath and give this testimony?
 10:37:40 24 So that's what we're going to be doing
 10:37:42 25 from here -- for a little while.

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10:37:46 1 We're looking at the direct testimony of
 10:37:48 2 Brian Bollinger that was filed November 5th, 2008. On
 10:37:56 3 lines 4 through -- well, on line 6, obviously, you
 10:38:02 4 would have to fill in your name and your position with
 10:38:04 5 dPI.
 10:38:06 6 Beyond that, could you state accurately
 10:38:08 7 that you were the one who took the lead with this
 10:38:12 8 dispute over promotional credit with BellSouth since
 10:38:14 9 its inception?
 10:38:22 10 A. How could I say that? I'm not Brian
 10:38:30 11 Bollinger. Brian Bollinger already testified that he
 10:38:32 12 was the one who took the lead, and that's not me. So
 10:38:36 13 how could I testify to that?
 10:38:36 14 Q. So I understand, you would not adopt that
 10:38:38 15 portion of the testimony that says that you were the
 10:38:40 16 one who took the lead in dealing with this dispute over
 10:38:44 17 promotional credit?
 10:38:44 18 A. No, I did not.
 10:38:46 19 Q. Okay. On lines 8 and 9, it indicates Steve
 10:38:54 20 Watson of Lott Key Telecom, Inc., which functions as
 10:39:00 21 dPI's billing and collection agent for promotion, also
 10:39:02 22 had -- was involved in dealing with this dispute.
 10:39:04 23 Is that accurate?
 10:39:04 24 A. I believe so.
 10:39:10 25 Q. Have you worked with Mr. Watson in dealing

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10:39:14 1 with the disputes that are the subject of this hearing
 10:39:18 2 in North Carolina?
 10:39:28 3 Let me strike that.
 10:39:32 4 Mr. O'Roark, are you aware of exactly
 10:39:34 5 which disputes are at issue in this hearing in North
 10:39:42 6 Carolina?
 10:39:42 7 A. I understand these to be the cash backs. I
 10:39:46 8 understand them to be the cash backs prior to a certain
 10:39:48 9 date. Prior to June 8, '07.
 10:40:02 10 Q. Have you spoken to Mr. Watson specifically
 10:40:04 11 about any of those promotional disputes?
 10:40:20 12 A. Possibly. I've had various conversations with
 10:40:24 13 Mr. Watson.
 10:40:32 14 Q. Okay. Tell you what. Let's talk about the
 10:40:34 15 nature of the disputes first. I just want to see if we
 10:40:38 16 have an agreement on what we are talking about in this
 10:40:40 17 proceeding.
 10:40:42 18 As I understand it, this dispute involves
 10:40:46 19 the three promotional offerings that are identified in
 10:40:50 20 footnote 1 of the prefiled testimony of Mr. Bollinger.
 10:40:54 21 That footnote appears on page 3.
 10:40:56 22 Is it your understanding those are the
 10:40:58 23 three disputes at issue?
 10:41:00 24 A. Yes.
 10:41:02 25 Q. Have you seen Mr. Scott Ferguson's testimony,

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10:41:06 1 the AT&T witness, that describes the nature of those
 10:41:10 2 three promotional offerings?
 10:41:16 3 A. Yes.
 10:41:16 4 Q. Specifically, at pages 6 through 8 of his
 10:41:22 5 testimony, Mr. Ferguson gives an overview of what is
 10:41:28 6 involved with each of those three promotional
 10:41:32 7 offerings.
 10:41:32 8 Sitting here today, do you have -- do you
 10:41:36 9 take issue with anything that he has said there in
 10:41:40 10 describing those three promotions?
 10:41:42 11 A. Do I take issue with anything he said on pages
 10:41:44 12 6 through 8?
 10:41:44 13 Q. Yes, sir. Just the way he described the
 10:41:48 14 retail offering itself.
 10:41:50 15 Do you believe he accurately described
 10:41:50 16 it, or do you have a concern with his description?
 10:43:30 17 A. No. I don't have an objection.
 10:43:32 18 Q. Okay. And as I understand it -- and I'm
 10:43:38 19 basing this on page 4, lines 11 through 13 of Mr.
 10:43:40 20 Bollinger's direct testimony.
 10:43:48 21 As I understand it, the complaint that is
 10:43:50 22 the subject of this docket in North Carolina only
 10:43:52 23 addresses promotional requests that dPi submitted up to
 10:43:58 24 June 8th, 2007. Is that accurate?
 10:44:02 25 A. That's correct.

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10:46:16 1 coupon that can be redeemed for a \$100 check.
 10:46:20 2 The hypothetical assumes that the
 10:46:22 3 tariff'd rate for that telecommunication service, A, is
 10:46:26 4 a hundred dollars a month and that Commission approved
 10:46:28 5 wholesale discount is 20 percent. Doesn't have
 10:46:32 6 anything to do with the actual numbers here. But it's
 10:46:34 7 just easy math, so we can walk through and see if we
 10:46:36 8 have an understanding of what we're arguing about.
 10:46:44 9 Now, as I understand it, if this were one
 10:46:46 10 of the promotions at issue here, dPi would order this
 10:46:52 11 promotion and AT&T -- I'm not saying this is all it
 10:46:56 12 should have done, in your view.
 10:46:58 13 But I understand that the first step that
 10:47:00 14 happened was that AT&T would sell telecommunication
 10:47:04 15 service A to dPi and charge dPi \$80, which is a hundred
 10:47:08 16 dollars a month less the 20 percent cash back amount.
 10:47:12 17 Is that your understanding of the first
 10:47:14 18 step in the process?
 10:47:16 19 A. Of how it's done or how it should be done?
 10:47:18 20 Q. Of how it actually was done.
 10:47:20 21 A. Yes. They overbilled me. They billed me \$80
 10:47:24 22 when they should have billed me zero. Right? They
 10:47:28 23 overbilled me. By admission they overbilled me.
 10:47:32 24 Overbilled me \$80. Because my customer qualifies for
 10:47:34 25 the cash back program. Should have received the cash

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10:44:08 1 Q. Each of the promotions that are at issue in
 10:44:12 2 this docket, as I understand it, provide that if an
 10:44:18 3 AT&T end user bought certain services, that end user
 10:44:22 4 would receive a coupon for a certain amount of cash
 10:44:24 5 back.
 10:44:24 6 Is that an accurate statement?
 10:44:56 7 A. That's what Scott Ferguson said. They e-mail
 10:45:04 8 you the coupon.
 10:45:04 9 Q. And that coupon when redeemed would entitle
 10:45:10 10 that to a certain amount of cash back?
 10:45:12 11 A. Yes.
 10:45:14 12 (Exhibit 7 marked.)
 10:45:36 13 Q. (By Mr. Turner) Mr. O'Roark, what I want to
 10:45:38 14 do now is use this hypothetical to make sure I
 10:45:40 15 understand exactly what is and is not in dispute.
 10:45:46 16 Now, I understand that there are legal
 10:45:46 17 arguments about what is a telecommunication service.
 10:45:50 18 I'm not asking you to get into that whatsoever. I'm
 10:45:52 19 just trying to make sure that I know whether there is a
 10:45:56 20 disagreement over what we're really arguing about here.
 10:46:00 21 A. Okay.
 10:46:00 22 Q. This is a hypothetical AT&T retail promotional
 10:46:04 23 offering. And I've got it there in Exhibit 7. Says a
 10:46:10 24 customer can purchase telecommunication service A
 10:46:12 25 between January 1st until June 30th and receive a

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10:47:36 1 back program. I should have been billed zero. So they
 10:47:40 2 overbilled me \$80.
 10:47:42 3 By their own admission. By the -- by the
 10:47:46 4 admission of your testimony. It's your -- it's your
 10:47:50 5 procedure and your process to overbill me. And to
 10:47:54 6 force me then to try to recover from you an accurate
 10:47:58 7 bill after the fact. That's what happens. That's what
 10:48:02 8 you do. That's what your client does. And they've
 10:48:06 9 admitted that's what they do.
 10:48:10 10 Q. Are you finished with your answer?
 10:48:10 11 A. Yes.
 10:48:12 12 Q. Let's go back to my question.
 10:48:14 13 Do we agree that the first step in the
 10:48:16 14 process was that AT&T would sell telecommunication A
 10:48:22 15 to dPi and charge dPi \$80 for that service?
 10:48:26 16 A. Less any available promotion. Any available
 10:48:30 17 promotion that I qualify for. Any available promotion
 10:48:32 18 that has the impact of reducing the retail price.
 10:48:36 19 Q. I'm not --
 10:48:36 20 A. In your example this promotion reduces the
 10:48:40 21 retail price to zero. So I should be billed zero.
 10:48:46 22 Q. I'm trying to see if we agree on what
 10:48:48 23 happened. I understand you are going to argue what
 10:48:50 24 should have happened. All I'm asking first is what
 10:48:54 25 happened.

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10:48:54 1 As I understand it --

10:48:56 2 A. And I've already answered that. Your client

10:49:00 3 overbilled me \$80. That's what happened.

10:49:02 4 Q. We're going to get facts, and you can

10:49:04 5 characterize them later.

10:49:06 6 The first step in the process, as I

10:49:06 7 understand it, is you get an \$80 bill. Then you

10:49:10 8 submitted a request for additional credit, and AT&T

10:49:16 9 denied that request.

10:49:18 10 Is that the way that it worked, in your

10:49:18 11 understanding?

10:49:20 12 A. Yes. I was overbilled. I disputed the bill.

10:49:24 13 Filed a claim for the -- for the additional credit.

10:49:28 14 And then AT&T refused to give me the additional credit.

10:49:32 15 That's what happened.

10:49:34 16 Q. In this process after AT&T billed you \$80, how

10:49:42 17 much of the credit would you have submitted a request

10:49:44 18 for?

10:49:44 19 A. A hundred dollars.

10:49:52 20 Q. AT&T had already billed you 80. All right?

10:49:56 21 A. Should have billed me zero. Right?

10:49:58 22 Q. Well, if you were billed 80 and you requested

10:50:04 23 a \$100 credit, wouldn't that net out to 20 back to you

10:50:08 24 instead of a zero?

10:50:08 25 A. AT&T offers the service to the customer -- to

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10:50:14 1 their customer, to the end user customer, at zero,

10:50:16 2 effectively reducing the tariff rate to zero,

10:50:20 3 effectively reducing the retail cost of that service to

10:50:22 4 zero.

10:50:24 5 For the -- if the effective promo is to

10:50:26 6 reduce the retail price to zero, then I should be

10:50:30 7 billed zero.

10:50:38 8 Q. Going back to the way it worked, after you got

10:50:42 9 billed for \$80 for this service in month one, what are

10:50:46 10 you saying is the amount of credit that A -- that dPi

10:50:50 11 was asking for?

10:50:54 12 A. The same promo that AT&T makes available to

10:50:58 13 its end user customers it has to make available to my

10:51:02 14 end user customers, a hundred dollars. Right?

10:51:04 15 Q. What is the dollar amount -- after being

10:51:06 16 billed \$80, what is the dollar amount of the credit

10:51:10 17 request that dPi would submit in this hypothetical?

10:51:22 18 A. In this hypothetical?

10:51:24 19 Q. In this hypothetical. After having received a

10:51:30 20 bill for \$80 in month one.

10:51:32 21 For month one, what amount of credit is

10:51:36 22 dPi requesting?

10:52:06 23 A. If the promotional offering is a hundred

10:52:10 24 dollars, then dPi would apply for the full promotion, a

10:52:14 25 hundred dollars.

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10:52:20 1 Q. In month two my understanding is AT&T would

10:52:28 2 charge dPi \$80 for telecommunication service A.

10:52:32 3 Correct?

10:52:42 4 I'm just trying to figure out

10:52:44 5 mechanically how you understand this to work. As I

10:52:48 6 understand you so far --

10:52:48 7 A. In month two AT&T would bill me the retail

10:52:56 8 tariff less my discount.

10:53:12 9 Q. And in month two would dPi submit a credit

10:53:16 10 request to AT&T?

10:53:18 11 MR. MALISH: Sorry. What? I didn't hear

10:53:20 12 you.

10:53:20 13 Q. (By Mr. Turner) In month two would dPi submit

10:53:24 14 a promotional credit request in this hypothetical to

10:53:28 15 AT&T?

10:53:28 16 A. It was a one-time \$100 credit?

10:53:30 17 Is that the promotion, the hypothetical

10:53:32 18 promotion?

10:53:34 19 Q. Yes. One time.

10:53:34 20 A. One time. So I would only apply for it one

10:53:38 21 time.

10:53:38 22 Q. So in month two would dPi apply for any

10:53:42 23 additional promotional credit?

10:53:44 24 A. Not under this hypothetical example. This is

10:53:48 25 a one-time \$100 credit. I would only apply for it

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10:53:52 1 once.

10:53:52 2 Q. All right. Is it your understanding during

10:53:58 3 the time frames actually involved in this dispute --

10:54:02 4 did dPi pay that \$80 pay in month one or not?

10:54:10 5 A. You're asking me about my accounts payable?

10:54:12 6 How my accounts payable functions?

10:54:14 7 Q. I'm asking you during the time period here --

10:54:18 8 I'm trying to understand exactly what happened. So

10:54:20 9 from month one, if this were the hypothetical involved

10:54:24 10 -- if this were the offering involved during this time

10:54:26 11 period, AT&T sent you a bill for \$80. And you sent

10:54:30 12 AT&T a credit request for a hundred dollars for month

10:54:36 13 one.

10:54:36 14 My question is simply in month one, did

10:54:38 15 dPi pay the \$80, or did it withhold the \$80?

10:54:48 16 A. It's a hypothetical?

10:54:50 17 Q. It's a hypothetical.

10:54:52 18 A. You're asking me hypothetically do I -- do I

10:54:54 19 pay my bills, hypothetically speaking?

10:54:56 20 Q. No, sir. What I'm asking is, during the time

10:55:00 21 period involved in this promotion --

10:55:02 22 A. Did I pay my bills?

10:55:04 23 Q. -- did you pay that first month bill and then

10:55:08 24 submit the credit request you believe you were entitled

10:55:10 25 to?

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10:55:10 1 Or did you withhold any payables to AT&T

10:55:14 2 saying you didn't give me my credit, I'm not paying you

10:55:18 3 for that?

10:55:24 4 A. You're asking me what was my accounts payable

10:55:26 5 practice in the period January '04 through June '07

10:55:34 6 was?

10:55:34 7 What was happening in accounts payable?

10:55:36 8 Q. No, sir.

10:55:38 9 A. Whether or not I was paying my bills?

10:55:40 10 Q. I'm not going to characterize it that way.

10:55:42 11 A. That's what you're asking me though. That's

10:55:44 12 effectively what you're asking me.

10:55:46 13 Q. I'm asking you, as a practice during this

10:55:48 14 promotional period, did dPI pay the billing that AT&T

10:55:52 15 submitted and then submit a request for these

10:55:54 16 promotional credits, or did dPI withhold payment in the

10:55:58 17 amount it claimed to be entitled to the promotional

10:56:02 18 credit that had been denied?

10:56:04 19 Or do you know?

10:56:06 20 A. I'd have to go back and investigate my

10:56:08 21 accounts payable processing during that period.

10:56:14 22 I don't think it's a reasonable question

10:56:16 23 to expect me to be able to sit here today and tell you

10:56:18 24 what my payment habits were between 2004 and 2007.

10:56:26 25 Q. If it's an accurate answer, "I don't know" is

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10:56:28 1 fine.

10:56:28 2 A. Okay.

10:56:28 3 Q. Is that the answer?

10:56:28 4 A. Okay.

10:56:30 5 Q. Is that the answer, "I don't know"?

10:56:32 6 A. I have to investigate.

10:56:34 7 Q. Okay.

10:56:34 8 A. Do you want me to get back to you on that?

10:56:38 9 Q. We'll deal with that at the end of the

10:56:40 10 deposition.

10:56:40 11 A. Okay.

10:56:44 12 Q. Prior to June 8th, 2007 what personal

10:56:48 13 involvement did you have with the promotional credit

10:56:52 14 disputes that are the subject of this document?

10:56:56 15 A. June 8th, 2007.

10:56:58 16 Q. Prior to June 8, 2007. That's my

10:57:02 17 understanding of the time frame involved in this

10:57:02 18 dispute.

10:57:40 19 A. My personal involvement with these particular

10:57:42 20 disputes was limited to communication with Brian

10:57:46 21 Bollinger and communication with Steve Watson.

10:58:00 22 Q. Would you characterize those communications

10:58:02 23 for us?

10:58:04 24 And where I'm going with this, were they

10:58:06 25 communications over here's what we're dealing with;

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10:58:10 1 what should we do?

10:58:12 2 Or were they more communications where

10:58:12 3 they were trying to keep you abreast of what was

10:58:14 4 happening?

10:58:14 5 A. They were communications where they were

10:58:16 6 keeping my abreast what was happening.

10:58:18 7 Q. Is it fair to say then you were not personally

10:58:20 8 involved in the inner details about how these

10:58:22 9 promotions were -- actually worked between dPI and

10:58:26 10 AT&T?

10:58:38 11 A. That was being managed by Brian Bollinger and

10:58:42 12 Steve Watson. Right. I was not involved in that.

10:59:04 13 Q. Back to Mr. Bollinger's direct testimony at

10:59:08 14 pages 2, lines 10 through 16. Would you adopt that

10:59:16 15 exactly as written, or is there anything you would

10:59:18 16 change in order to make that accurate for you to come

10:59:22 17 to hearing date?

10:59:22 18 A. We don't provide service to business

10:59:24 19 customers.

10:59:34 20 Q. Is there anything else about that paragraph

10:59:36 21 that you would want to change?

10:59:40 22 A. You know, first facilities based only in the

10:59:44 23 sense of UNE-P. Correct? If that UNE-P -- we were

10:59:50 24 doing some UNE-P and therefore considered to be

10:59:54 25 facilities based. We don't actually own or operate any

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10:59:58 1 facilities in those states.

11:00:04 2 Q. And when you just qualified that paragraph

11:00:08 3 only UNE-P and you don't serve business customers, is

11:00:16 4 that the case on which AT&T is an ILEC?

11:00:22 5 A. Yes.

11:00:22 6 Q. Anything else you want to change about that

11:00:28 7 paragraph on page 2?

11:00:30 8 A. No.

11:00:30 9 Q. Beginning at line 17 on page 2 going through

11:00:32 10 the line 2 on page 3, would you adopt that testimony

11:00:36 11 exactly as written?

11:00:48 12 A. Through which line on page 3?

11:00:50 13 Q. Line 2.

11:00:56 14 A. Yes.

11:00:56 15 Q. Okay. Were you personally involved in

11:01:04 16 negotiating the inner connection agreements on which

11:01:06 17 this language appears?

11:01:08 18 A. I don't -- it's my understanding that there is

11:01:10 19 no negotiation. It's dictated to us by BellSouth, and

11:01:12 20 we're given the choice to sign it or not sign it. And

11:01:16 21 that we're not allowed to make any changes to it.

11:01:18 22 Q. Were you personally involved in the process by

11:01:22 23 which these inner connection agreements were entered

11:01:24 24 into between dPI and AT&T?

11:01:30 25 A. No.

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11:01:32 1 Q. Do you know whether dPi suggested any changes
 11:01:38 2 to the language in the contract before it signed it
 11:01:40 3 with AT&T?
 11:01:40 4 A. Brian Bollinger told me that we were not
 11:01:42 5 allowed to make changes to that agreement and that we
 11:01:46 6 were compelled to sign it as is.
 11:01:50 7 Q. And that was the attorney that said that?
 11:01:52 8 A. Brian Bollinger said that.
 11:01:52 9 Q. He was the attorney at the time?
 11:01:54 10 A. Yes.
 11:02:04 11 Q. Other than what is set out here in this
 11:02:06 12 testimony, have you read any of those inner connection
 11:02:08 13 agreements?
 11:02:10 14 A. No.
 11:02:14 15 Q. On page 3, lines 4 through 23, would you adopt
 11:02:22 16 that exactly as written?
 11:02:54 17 A. Yes.
 11:02:56 18 Q. You feel you have the experience and expertise
 11:02:58 19 to testify regarding the retail provisions of federal
 11:03:02 20 law?
 11:03:04 21 A. No.
 11:03:10 22 Q. Lines 25 through 30 on page 3.
 11:03:14 23 Are you adopting that exactly as written?
 11:04:12 24 A. Well, on line 29 where it says "then being
 11:04:28 25 credited the difference," we hadn't been credited the

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11:08:32 1 users." You made reference earlier to the line
 11:08:36 2 connections aren't waived.
 11:08:40 3 There was litigation and there still is
 11:08:44 4 in some states between dPi and BellSouth about that
 11:08:48 5 line connection charge waiver promotion. Correct?
 11:08:52 6 A. Correct.
 11:08:52 7 Q. In that litigation dPi has taken the position
 11:08:54 8 that it met the qualifications that BellSouth's retail
 11:08:58 9 end users would have to meet and, therefore, was
 11:09:00 10 entitled to those line connection charge waiver
 11:09:04 11 promotional credits, right?
 11:09:08 12 A. Right.
 11:09:12 13 Q. The North Carolina Commission has ruled that
 11:09:16 14 dPi was wrong and AT&T was right.
 11:09:18 15 Are you aware of that?
 11:09:22 16 A. I already told you, I was not aware of North
 11:09:24 17 Carolina ruling.
 11:09:26 18 Q. Were you aware that the Florida Commission has
 11:09:28 19 also ruled that AT&T was right and dPi was wrong on the
 11:09:34 20 issue?
 11:09:48 21 A. On that specific issue, I don't know. I'd
 11:09:52 22 have to go look. I'd have to go look at the
 11:09:54 23 correspondence. I've seen various pieces of
 11:09:56 24 correspondence concerning Florida.
 11:09:58 25 Q. Very briefly, are you aware the district

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11:04:36 1 difference. That's why we're here.
 11:04:40 2 Q. Anything else you would change in lines 25
 11:04:42 3 through 30 of page 3 of the direct?
 11:04:44 4 A. No.
 11:04:54 5 Q. On page 3, lines 31 through 33 and footnote 1,
 11:04:58 6 would you adopt those lines exactly as written?
 11:05:08 7 A. Yes.
 11:05:16 8 Q. On page 4 of the direct, lines 9 through 8 --
 11:05:22 9 I'm sorry. I misspoke.
 11:05:28 10 Lines (sic) 4 of the direct, lines 1
 11:05:30 11 through 8, would you adopt those lines exactly as
 11:05:32 12 written?
 11:05:48 13 A. Yes.
 11:05:52 14 Q. On page 4 of the direct, lines 9 through 18,
 11:05:58 15 would you adopt those lines exactly as written?
 11:06:02 16 A. Well, I don't see how I can adopt where it
 11:08:08 17 says we haven't been notified one way or the other.
 11:08:12 18 I've had reams of communication where you said you're
 11:08:16 19 not going to pay it, and you don't think you're
 11:08:18 20 obligated to pay it.
 11:08:18 21 Q. Any other changes you would make to lines 11
 11:08:22 22 through 18?
 11:08:24 23 A. No.
 11:08:24 24 Q. On line 11 there you said, "Although dPi met
 11:08:28 25 the same qualifications as BellSouth's retail end

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11:10:00 1 courts in both Florida and North Carolina have affirmed
 11:10:04 2 those respective Commission decisions?
 11:10:06 3 A. I'm sorry?
 11:10:06 4 Q. Were you aware the federal district courts in
 11:10:10 5 Florida and North Carolina have reviewed and affirmed
 11:10:14 6 those decisions by the North Carolina and Florida
 11:10:16 7 Commissions?
 11:10:16 8 A. Regarding LCCW?
 11:10:20 9 Q. Yes, sir.
 11:10:22 10 A. Okay.
 11:10:24 11 Q. Were you aware of that?
 11:10:24 12 A. Again, I've seen various pieces of
 11:10:26 13 documentation. I have to go review it.
 11:10:28 14 Q. All right.
 11:10:30 15 A. Whether it pertains specifically to LCCW or
 11:10:32 16 not, I'm not sure.
 11:10:36 17 Q. Does dPi have copies, either in paper or
 11:10:38 18 electronic or other form, of the actual service orders
 11:10:44 19 that it submitted to BellSouth or AT&T that are
 11:10:48 20 associated with each credit it's seeking in this
 11:10:52 21 docket?
 11:10:52 22 A. I don't know. You want me to check on that?
 11:10:56 23 Q. We'll come back to that.
 11:10:58 24 A. Okay.
 11:10:58 25 Q. Are you aware of any records that are

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11:11:00 1 currently in dPi's possession that could confirm for
 11:11:06 2 each credit dPi is requesting in this docket whether
 11:11:10 3 its end users actually met the same terms and
 11:11:12 4 conditions the BellSouth end user would have to meet
 11:11:16 5 under these promotions?
 11:11:18 6 A. Well, I've seen documentation or read
 11:11:24 7 documentation that said in about 40 percent of the
 11:11:26 8 cases you gave your customers LCCW waivers where they
 11:11:30 9 only had the blocks and did not have any other
 11:11:34 10 features. And I know that, you know, that was the
 11:11:38 11 issue. That we ordered these lines with the blocks,
 11:11:40 12 because the blocks were called touch-tone blocking
 11:11:46 13 features. Touch-tone blocking features.
 11:11:48 14 Is about 40 percent of the cases we
 11:11:50 15 looked at, you gave your clients those credit. And so
 11:11:56 16 that's -- and they are called features in your tariff.
 11:12:00 17 Right?
 11:12:00 18 Q. I'm not talking about line connection. I
 11:12:02 19 apologize.
 11:12:02 20 A. I'm sorry. You're jumping back and forth
 11:12:06 21 between the two.
 11:12:06 22 Q. Okay.
 11:12:06 23 A. You've got me confused.
 11:12:08 24 Q. Okay.
 11:12:08 25 A. Okay.

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11:13:42 1 testifies that she told Mr. Watson -- Mr. Watson in
 11:13:46 2 that meeting the cash back promotions are not available
 11:13:48 3 for resale.
 11:13:50 4 To your knowledge, did Mr. Watson ever
 11:13:52 5 convey that information to dPi?
 11:13:58 6 A. Not to my knowledge.
 11:14:02 7 Q. On page 7 Ms. Seagle testifies that she sent
 11:14:06 8 Mr. Watson an e-mail on August 26, 2004 confirming that
 11:14:12 9 BellSouth would not resale cash back offers.
 11:14:16 10 To your knowledge, did Mr. Watson ever
 11:14:18 11 convey that information to dPi?
 11:14:20 12 A. I don't know.
 11:14:22 13 Q. On page 8 through 9, Mr. Watson -- I'm sorry,
 11:14:28 14 Ms. Seagle testifies that Mr. Watson submitted
 11:14:30 15 promotional credit requests for North Carolina cash
 11:14:32 16 back promotion on July 2005, and she sent him back an
 11:14:38 17 e-mail saying that's not available for resale.
 11:14:42 18 She also testifies that Mr. Watson sent a
 11:14:44 19 reply e-mail saying that he would let dPi know.
 11:14:48 20 To your knowledge, did Mr. Watson ever
 11:14:50 21 let dPi know about that e-mail?
 11:14:52 22 A. I don't know.
 11:14:58 23 Q. And just to be clear for the record, have you
 11:15:00 24 had any conversations with Mr. Watson about any of the
 11:15:04 25 matters we just discussed in Ms. Seagle's testimony?

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11:12:08 1 Q. I'm going back now to the promotional credit
 11:12:12 2 request involved in this docket in North Carolina.
 11:12:16 3 A. Cash backs.
 11:12:16 4 Q. Yes.
 11:12:16 5 My question is, does dPi have records in
 11:12:20 6 its possession today that would show what specific
 11:12:24 7 services it provided to each one of the end users for
 11:12:28 8 which it is seeking a promotional credit request?
 11:12:34 9 A. I don't know the answer to that. I'd have to
 11:12:36 10 check on that.
 11:12:44 11 Q. Do you have AT&T witness Kristy Seagle's
 11:12:48 12 testimony in front of you?
 11:12:54 13 I'm looking at her direct testimony
 11:12:58 14 specifically.
 11:13:02 15 A. Kristy Seagle? Is this it?
 11:13:08 16 Okay. Yes, I do.
 11:13:12 17 Q. Okay. On the direct testimony of Ms. Seagle
 11:13:16 18 on pages 4 and 5, she discusses an in-person meeting
 11:13:22 19 per Mr. Watson in Birmingham, Alabama on August 2004.
 11:13:30 20 Were you in that meeting?
 11:13:32 21 A. No.
 11:13:32 22 Q. Have you discussed with Mr. Watson whether he
 11:13:34 23 was in that meeting?
 11:13:36 24 A. No.
 11:13:38 25 Q. On page 6 of Ms. Seagle's testimony, she

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11:15:08 1 A. No, I haven't.
 11:15:08 2 Q. The face-to-face meeting or the e-mails?
 11:15:10 3 A. No, I haven't.
 11:15:14 4 Q. Let's go back to Mr. Bollinger's direct
 11:15:16 5 testimony at page 4. Lines 19 through 22.
 11:15:36 6 Would you adopt those lines exactly as
 11:15:38 7 written?
 11:16:08 8 A. Well, I would say that BellSouth has denied
 11:16:10 9 our request.
 11:16:12 10 Q. Okay. Any other changes you would make?
 11:16:24 11 A. No.
 11:16:24 12 Q. On lines 19 through 20 there, you reference
 11:16:28 13 multiple inquiries by dPi about these promotional
 11:16:30 14 credit requests.
 11:16:34 15 What were those multiple inquiries that
 11:16:36 16 dPi made?
 11:16:48 17 A. Mr. Bollinger said that he -- in his testimony
 11:16:50 18 that I read said that he had sent a record of e-mails
 11:16:56 19 had gone back and forth.
 11:17:00 20 Q. Aside from that, can you tell us anything
 11:17:02 21 about the multiple inquiries by dPi?
 11:17:06 22 A. No.
 11:17:10 23 Q. Were you personally involved in making those
 11:17:12 24 multiple inquiries?
 11:17:12 25 A. No.

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11:17:18 1 Q. Back to the direct, page 4. Lines 22 going
 11:17:24 2 through page 5, line 3.
 11:17:28 3 Would you be able to adopt that exactly
 11:17:30 4 as written?
 11:17:52 5 A. That Brian escalated and attempted to resolve
 11:17:56 6 this with Pam Tipton?
 11:18:00 7 You want me to take Brian at his word
 11:18:02 8 that he did that?
 11:18:04 9 Q. Well, we'll start with this.
 11:18:06 10 A. I don't have any direct knowledge he did that.
 11:18:08 11 He said he did that.
 11:18:14 12 Q. Other than reading this testimony with his
 11:18:16 13 name on it, have you had conversations with Mr.
 11:18:22 14 Bollinger about what is set forth on this page?
 11:18:24 15 A. No.
 11:18:26 16 Q. I take it you did not personally speak with
 11:18:30 17 Ms. Tipton?
 11:18:30 18 A. No.
 11:18:30 19 Q. Were you there when Mr. Bollinger spoke to Ms.
 11:18:36 20 Tipton?
 11:18:36 21 A. No.
 11:18:42 22 Q. Page 5 of the direct, lines 4 through 9.
 11:18:46 23 Would you be able to adopt that exactly
 11:18:48 24 as written?
 11:19:00 25 A. It's referring to an exhibit that I did not

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11:19:02 1 prepare and that I was not involved in the preparation
 11:19:06 2 of. It's -- it's an exhibit that I assume was prepared
 11:19:16 3 by Steve Watson.
 11:19:34 4 But I don't have any reason to doubt the
 11:19:36 5 accuracy of it or to question the accuracy of it.
 11:19:48 6 Q. So the total amount dPI is seeking in this
 11:19:52 7 proceeding is \$156,500. Right?
 11:19:58 8 A. That's the total amount that's on this dPI
 11:20:02 9 Exhibit 1.
 11:20:08 10 Q. Well, I mean, what is the total amount that
 11:20:10 11 dPI is seeking to have the Commission order AT&T pay
 11:20:18 12 back to dPI?
 11:20:20 13 A. The amount on the exhibit, 156,500 cash back
 11:20:28 14 promotions.
 11:20:30 15 Q. On page 5 of the direct, lines 11 through 18,
 11:20:34 16 would you adopt those exactly as written?
 11:20:56 17 A. Again, BellSouth accepted or denied. I think
 11:21:00 18 it's clear that BellSouth denied.
 11:21:10 19 Q. When did you first become aware that BellSouth
 11:21:14 20 would not pay these promotional credit requests?
 11:21:20 21 A. I'm not sure.
 11:21:24 22 Q. Was it before this testimony was filed by Mr.
 11:21:28 23 Bollinger in 2008?
 11:21:38 24 A. No. I believe it -- I mean -- no.
 11:21:48 25 MR. TURNER: Chris, it's 12:25. Need to

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11:21:52 1 go through a couple other things.
 11:21:54 2 You want to take a break for lunch, or do
 11:21:56 3 you want to keep plowing through? Totally up to you
 11:21:58 4 all.
 11:22:00 5 MR. MALISH: That's just there the end of
 11:22:06 6 direct. So we just have rebuttal to that.
 11:22:10 7 MR. TURNER: I've got a few things after
 11:22:12 8 rebuttal.
 11:22:14 9 MR. MALISH: I think -- I'm just speaking
 11:22:16 10 for myself, I would rather -- sounds like you have
 11:22:18 11 about another hour.
 11:22:20 12 MR. TURNER: Maybe hour and a half, two.
 11:22:22 13 MR. MALISH: I mean, I would rather clear
 11:22:24 14 the decks and then go -- go to the airport and get
 11:22:28 15 something to eat there rather than --
 11:22:32 16 MR. TURNER: Mr. O'Roark, you're the
 11:22:34 17 witness. We'll take a break.
 11:22:38 18 A. I don't need a break.
 11:22:38 19 MR. MALISH: I think we should take a
 11:22:40 20 quick break right here.
 11:22:42 21 MR. TURNER: That's fine.
 11:22:42 22 (Break taken from 11:22 a.m. to 11:39
 11:22:44 23 a.m.)
 11:39:22 24 Q. (By Mr. Turner) Mr. O'Roark, do you have
 11:39:26 25 before you the rebuttal testimony of Brian Bollinger

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11:39:30 1 filed November 19th, 2008?
 11:39:32 2 A. Yes.
 11:39:32 3 Q. On page 2, lines 1 through 6, would you adopt
 11:39:38 4 that as written?
 11:39:46 5 A. Yes.
 11:39:48 6 Q. On the rebuttal, page 2, line 7 through 13,
 11:39:52 7 would you adopt that exactly as written?
 11:40:06 8 A. Yes. That's dPI's position.
 11:40:10 9 Q. I'm sorry. You --
 11:40:12 10 A. Yes. That's dPI's position.
 11:40:14 11 Q. Okay. Thank you.
 11:40:16 12 On the rebuttal, page 2, line 14 through
 11:40:20 13 page 3, line 15, would you adopt that exactly as
 11:40:24 14 written?
 11:40:28 15 A. Again, subject to your earlier clarification
 11:40:32 16 that I'm not an attorney and don't consider myself to
 11:40:36 17 be expert on federal law, but that is dPI's position.
 11:40:40 18 Q. Okay. Fair enough.
 11:40:44 19 On page 3 of the rebuttal, line 16
 11:40:48 20 through page 4, line 16, would you adopt that exactly
 11:40:54 21 as written?
 11:41:08 22 A. 16 through 21 on 3?
 11:41:12 23 Q. Yes, sir. And then lines 1 through 16 on 4.
 11:41:24 24 A. Yes. Subject to your earlier clarification
 11:41:28 25 that I haven't read the interconnection agreements, and

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11:41:34 1 I'm not an attorney. But that is dPI's position.
 11:41:36 2 Q. Okay. The rebuttal, page 4, lines 18 through
 11:41:40 3 23, would you adopt that exactly as written?
 11:42:00 4 A. I guess I -- I need a clarification there.
 11:42:06 5 We've had two different interconnection
 11:42:08 6 -- interconnection agreements with BellSouth. Which
 11:42:12 7 one of those agreements was Ferguson referring to? Do
 11:42:16 8 you know?
 11:42:18 9 Because the Sections 2.2 are different
 11:42:22 10 between the two agreements. In the letter agreement
 11:42:24 11 that was executed in April of '07 2.2 does talk about a
 11:42:34 12 12-month submission period. In the earlier agreement
 11:42:38 13 there is no such reference. And this earlier agreement
 11:42:40 14 is the agreement that was in effect for almost all of
 11:42:44 15 this period. Correct? Up until April of '07. When
 11:42:50 16 the second agreement took place.
 11:42:52 17 So when Ferguson refers to Section 2.2
 11:42:56 18 having a limitation period of 12 months, which
 11:42:58 19 agreement is he referring to? The one that was in
 11:43:02 20 effect for just a few months or the one that was in
 11:43:06 21 effect for most of the period?
 11:43:08 22 Q. All I can do at this point is refer you back
 11:43:10 23 to his testimony.
 11:43:12 24 A. Okay.
 11:43:12 25 Q. I understand your position.

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11:44:38 1 period, doesn't mention any 12-month limitation at all.
 11:44:44 2 There's no reference to it.
 11:44:46 3 And so I guess my response would be -- to
 11:44:56 4 that question would be exactly that. The first
 11:45:00 5 agreement Section 2.2 doesn't have any reference to any
 11:45:04 6 limitation at all, any time period for any limitation
 11:45:08 7 at all. The second agreement that took effect I think
 11:45:12 8 in April of '07 was only in effect for two months of
 11:45:16 9 this period. Brian is saying that from a legal
 11:45:20 10 perspective a closer reading of it doesn't actually
 11:45:24 11 impose a 12-month limitation.
 11:45:28 12 I'd have to defer to an attorney on that.
 11:45:30 13 But I guess my response would be different.
 11:45:36 14 Q. And as I understand it, your response would be
 11:45:38 15 consistent with what you just stated here in this
 11:45:40 16 deposition?
 11:45:40 17 A. Yes. That's right.
 11:45:42 18 Q. On the rebuttal, page 4, lines 24 through 30,
 11:45:48 19 would you adopt that exactly as written?
 11:45:58 20 A. Right. Again, that is dPI's position.
 11:46:04 21 I'm not an expert on Georgia law. But my
 11:46:08 22 understanding is based on Brian's testimony that the
 11:46:14 23 Georgia law is the governing law for this agreement and
 11:46:16 24 that under Georgia law the limitation is six years.
 11:46:24 25 I would adopt that as dPI's position.

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11:43:14 1 A. Two different agreements in Section 2.2, and
 11:43:18 2 both agreements have a Section 2.2. Both are roughly
 11:43:22 3 in the same section of the agreement. But -- billing
 11:43:24 4 disputes.
 11:43:24 5 But the earlier agreement that was in
 11:43:26 6 effect for most of this period doesn't have any
 11:43:30 7 12-month limitation in it. Doesn't mention any type of
 11:43:34 8 limitation in terms of months. The second agreement
 11:43:36 9 that took effect, as I understand it, April of '07 --
 11:43:40 10 so it was only in effect for a few months over this
 11:43:44 11 period -- is the one that talks about a 12-month
 11:43:48 12 submission.
 11:43:50 13 So the contract -- the first contract,
 11:43:58 14 the one that was in effect for most of this period,
 11:44:00 15 doesn't provide any limitation. There is no admission
 11:44:02 16 of any limitation.
 11:44:04 17 So -- and then Ferguson talks about 2.2
 11:44:12 18 having 12 months. That's the one that was only -- took
 11:44:16 19 effect April of '07, and that's the one Brian is saying
 11:44:22 20 a closer reading of doesn't actually include the
 11:44:24 21 12-month limitation he talks about.
 11:44:26 22 So I'm -- not being an attorney, I can't
 11:44:30 23 explain why Brian took that position. But the first
 11:44:34 24 one that was in effect for most of this time period,
 11:44:36 25 was the governing agreement for most of this time

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11:46:26 1 Q. Is it fair to say that you would adopt it as
 11:46:30 2 dPI's position, but when it comes to defending or
 11:46:34 3 discussing that position, you're not comfortable doing
 11:46:36 4 that?
 11:46:36 5 A. When it comes to discussing -- Brian was a
 11:46:42 6 lawyer. I'm not. So when it comes to discussing
 11:46:46 7 matters of law, I would have to defer to an attorney.
 11:46:48 8 Q. On rebuttal, page 4, lines 31 through page 5,
 11:46:54 9 lines 12, would you adopt those lines as written?
 11:47:38 10 A. That is dPI's position.
 11:47:44 11 Q. I take it, however, that you would not be
 11:47:46 12 comfortable opining on the application of the legal
 11:47:48 13 principles on unjust enrichment on the facts of this
 11:47:52 14 cases?
 11:47:54 15 A. Would not.
 11:48:02 16 Q. Rebuttal lines on page 5, lines 13 through 19.
 11:48:06 17 Would you adopt that exactly as written?
 11:48:20 18 A. Whether or not the discount -- this could be
 11:48:50 19 applied to a promotion. This seems to suggest that the
 11:49:00 20 discount should be applied to the promotion.
 11:49:02 21 I'm not sure if that's true or not. And
 11:49:04 22 I -- and I think that's a matter of some dispute. I
 11:49:10 23 think that's a matter of debate and dispute, and it's a
 11:49:14 24 matter of contention.
 11:49:22 25 So I'm not -- I'm not willing to adopt a

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11:49:28 1 position that yes, the discount should be applied to
 11:49:30 2 the promotion. I'm not -- that depends upon the nature
 11:49:36 3 of the promotion. It depends upon the wording of the
 11:49:38 4 promotion. It depends upon what the circuit -- the
 11:49:42 5 Fourth Circuit ordered.
 11:49:44 6 And, again, I'm not an attorney. I don't
 11:49:46 7 know exactly what the Fourth Circuit's order was. But
 11:49:50 8 my understanding is is that that's -- that's a matter
 11:49:54 9 of some discussion and some dispute.
 11:49:56 10 Whether or not the Fourth Circuit ordered
 11:49:58 11 the discount to be made available to the CLEC after
 11:50:04 12 discount, I'm not clear on that.
 11:50:10 13 Q. I am not trying to argue with you. I'm just
 11:50:12 14 trying to understand. I'm not sure what you mean when
 11:50:16 15 you say "after discount."
 11:50:18 16 Can you help me understand what you're
 11:50:18 17 talking about there?
 11:50:22 18 A. If -- if you offer \$50 promotion to your
 11:50:28 19 customer and you give your -- and you give your direct
 11:50:32 20 retail customer a \$50 promotion, the retail customer
 11:50:36 21 that comes to you through the CLEC sales channel -- you
 11:50:40 22 have two different sales channels. You have direct
 11:50:44 23 channel and CLECs. Both are selling BellSouth
 11:50:48 24 services. You're reselling. You're reselling them
 11:50:52 25 through us.

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11:50:52 1 If a customer comes to you through your
 11:50:54 2 direct sales channel, gets a \$50 promotion credit, then
 11:50:58 3 the customer that comes through through the dPI sales
 11:51:00 4 channel should also be eligible for a \$50 promotion of
 11:51:04 5 credit.
 11:51:04 6 I'm not sure if the discount applies.
 11:51:06 7 Q. When you say discount, are you talking about
 11:51:08 8 the state commission --
 11:51:10 9 A. The host. The interconnection agreement. The
 11:51:14 10 discount in the interconnection agreement.
 11:51:16 11 Q. Okay. So --
 11:51:16 12 A. In other words, in your theoretical example,
 11:51:20 13 you're saying a 20 percent wholesale discount. I'm not
 11:51:26 14 sure that my customer wouldn't be eligible for the same
 11:51:30 15 promotional discount as your customer is eligible for.
 11:51:36 16 As -- that -- the customer that comes through the CLEC
 11:51:38 17 sales channel to you would be eligible, I believe, for
 11:51:42 18 any less discount than the customer that comes
 11:51:44 19 directly.
 11:51:46 20 They're -- both channels feed to you.
 11:51:48 21 We're both selling BellSouth products. BellSouth
 11:51:50 22 benefits from both sales. So that promotion that's
 11:51:54 23 offered to attract those customers, whether it comes
 11:51:56 24 through your direct sales channel or the CLEC sales
 11:52:00 25 channel, I'm not sure that customer wouldn't be

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11:52:02 1 eligible for the full promotion, irrespective of which
 11:52:06 2 sales channel he came through.
 11:52:06 3 Q. Okay.
 11:52:08 4 A. And so -- and I think -- I think there's some
 11:52:14 5 discussion about that. I think there's some dispute
 11:52:16 6 and debate about that, about what the Fourth Circuit
 11:52:20 7 ordered, whether or not the Fourth Circuit ordered you
 11:52:22 8 to give the full promotional credit to the ILEC or
 11:52:26 9 whether the Fourth Circuit ordered you to give it less
 11:52:30 10 the wholesale discount.
 11:52:30 11 I know it's your practice and your policy
 11:52:32 12 to give it less the discount, but I don't know that
 11:52:36 13 CLEC community as a whole is accepting of that position
 11:52:40 14 and believes that that's in keeping with what the
 11:52:42 15 Fourth Circuit ordered.
 11:52:44 16 Q. But before we explore the merits of that --
 11:52:46 17 A. Okay.
 11:52:46 18 Q. -- I want to tell you what I think the
 11:52:52 19 rebuttal at page 5, lines 13 through 19 is addressing.
 11:52:56 20 Just describe the issue. And I want you to tell me if
 11:53:00 21 I've correctly described the issue that it's
 11:53:02 22 addressing.
 11:53:02 23 As I understand it, the issue is -- when
 11:53:04 24 there is a cash back component of the promotion, the
 11:53:08 25 issue is whether the CLEC is entitled to entire cash

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11:53:12 1 back amount in my hypothetical hundred dollars.
 11:53:16 2 A. Right.
 11:53:16 3 Q. Or is a CLEC entitled to the entire amount of
 11:53:18 4 the promotion less the wholesale discount.
 11:53:22 5 Have I accurately described what the
 11:53:24 6 issue is that is being addressed here?
 11:53:26 7 A. That's the issue. Right.
 11:53:28 8 Is it -- is the wholesale discount
 11:53:30 9 applicable to only the retail tariff, or is it also
 11:53:34 10 applicable to the promotion?
 11:53:36 11 And since the promotion flows through to
 11:53:38 12 the end user customer and since the promotion has an
 11:53:46 13 effect of reducing retail price, then I don't know that
 11:53:52 14 it's -- it is an issue. If -- that's what we're trying
 11:53:56 15 to say here, that there's an issue, that there's a
 11:54:00 16 debate. There's a contention about that.
 11:54:02 17 Yes, I agree there's a contention about
 11:54:04 18 that. That is an issue. But it's not an issue that
 11:54:08 19 has been decided and is still debated and is still
 11:54:12 20 contested.
 11:54:12 21 So I just want to make sure -- in reading
 11:54:18 22 this, he says, "Thus, if the discount is applied before
 11:54:22 23 the promotion, then the promotion should be
 11:54:24 24 discounted." That's not necessarily true.
 11:54:28 25 And so what I do agree with, he says,

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11:54:34 1 Here's -- the party should be able to come to some
 11:54:38 2 applicable agreement about what the two numbers are. I
 11:54:40 3 think that would be -- I think that would be absolutely
 11:54:44 4 true.
 11:54:44 5 But I don't want to adopt the position
 11:54:50 6 that the discount should be applied to the promotion.
 11:54:52 7 Because I don't think that's true. I don't know if
 11:54:54 8 that's true. I'm not -- that's -- that's up for
 11:54:58 9 debate.
 11:55:00 10 Q. Okay.
 11:55:00 11 A. Okay?
 11:55:04 12 Q. And in a nutshell, in the hypothetical, the
 11:55:06 13 issue is whether the CLEC is entitled to \$100 or
 11:55:12 14 whether the CLEC in the hypothetical is entitled to
 11:55:16 15 \$80. Right?
 11:55:16 16 A. That's right, yeah.
 11:55:18 17 Q. And --
 11:55:18 18 A. The customer that comes through the CLEC
 11:55:22 19 channel. Right?
 11:55:24 20 Whether that customer is entitled to a
 11:55:24 21 promotion, a \$100 promotion, or that customer is only
 11:55:28 22 entitled to \$80 of a promotion.
 11:55:30 23 Q. One thing I do want to clarify -- and don't
 11:55:34 24 take this as me trying to pitch something now and then
 11:55:40 25 trying to trap you. Not that at all. I want to make

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11:57:16 1 will pay the -- they would pay the promotion less the
 11:57:18 2 wholesale discount.
 11:57:20 3 But the CLEC community, as a whole,
 11:57:22 4 hasn't been -- isn't accepting of that and has in its
 11:57:26 5 -- and is disputing that difference and is contending
 11:57:28 6 that the circuit court, the Fourth Circuit, order
 11:57:32 7 requires you to pass through 100 percent of that
 11:57:34 8 promotion.
 11:57:34 9 Q. So in these dockets is it fair to say that
 11:57:38 10 dPI's position is that for that hundred-dollar
 11:57:40 11 hypothetical, dPI is seeking the Commission to say,
 11:57:44 12 BellSouth, you owe the entire 100, not the 80?
 11:57:48 13 Is that your position of this docket?
 11:57:56 14 A. My position is that that \$20 difference that
 11:58:04 15 we're talking about is still an undecided issue.
 11:58:08 16 Q. I understand that.
 11:58:10 17 A. And that it's up for debate and that I'm not
 11:58:12 18 willing to -- that I don't know what the final outcome
 11:58:14 19 of that -- that's a separate dispute. And I'm not sure
 11:58:18 20 what the outcome of that dispute would be.
 11:58:20 21 But for the purposes of this proceeding,
 11:58:24 22 for the purposes of this resolution, would I be content
 11:58:28 23 to receive the \$80?
 11:58:28 24 Is that what you're asking me?
 11:58:30 25 Q. No, sir. No, sir.

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11:55:42 1 sure I understand what your testimony is today.
 11:55:44 2 I thought earlier I understood you to say
 11:55:46 3 that dPI's position was that the full hundred dollars
 11:55:50 4 should be given to dPI. I thought I may have heard you
 11:55:54 5 say here that it's a debate, and you haven't yet taken
 11:55:58 6 a position on the issue.
 11:55:58 7 My question simply is, speaking for dPI,
 11:56:02 8 can you or can you not state the position dPI takes on
 11:56:06 9 that issue, 100 versus 80?
 11:56:12 10 A. DPI is taking the position, and I believe the
 11:56:16 11 CLEC community as a whole has taken the position --
 11:56:20 12 it's not -- this is not a position unique to dPI --
 11:56:24 13 that the Fourth Circuit ordered you to pass through
 11:56:28 14 100 percent of the promotion to the CLEC and that --
 11:56:32 15 that -- that we're seeking some resolution and
 11:56:36 16 clarification on that.
 11:56:38 17 And so I believe that that issue, that
 11:56:40 18 \$20 that you're describing, is -- is up for dispute.
 11:56:46 19 And is -- and is -- and so, you know, if -- in this
 11:56:52 20 case if you're suggesting that AT&T would be willing to
 11:56:58 21 pay -- that BellSouth would be willing to pay the \$80
 11:57:00 22 but would be unwilling to pay the \$20, that's
 11:57:04 23 consistent with what you've been doing since July
 11:57:08 24 of '07. That's consistent with what AT&T's practice
 11:57:12 25 and position has been since July of '07. That they

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11:58:32 1 What I'm asking here is -- assume that
 11:58:34 2 the parties do not agree. And assume that the
 11:58:36 3 Commission in North Carolina is asked to decide this
 11:58:40 4 case.
 11:58:40 5 My question to you is, if that's where we
 11:58:44 6 are, is dPI going to be saying, Commission, you should
 11:58:46 7 order BellSouth to pay the entire \$100, or are you
 11:58:50 8 going to be saying, Commission, you should order
 11:58:52 9 BellSouth to pay the \$80, which is the cash back less
 11:58:56 10 the wholesale discount?
 11:58:58 11 Which will you be asking the Commission
 11:59:00 12 to do in this docket?
 11:59:04 13 A. I would be asking the Commission to comply
 11:59:06 14 with the Fourth Circuit court order. And -- and I
 11:59:12 15 don't know -- not being an attorney, I don't want to
 11:59:14 16 try to interpret that Fourth Circuit reading -- ruling.
 11:59:18 17 But I know that that is an issue that's
 11:59:20 18 up for debate. And so if the Commission looked at that
 11:59:26 19 Fourth Circuit ruling and said -- here's what I
 11:59:28 20 understood the Fourth Circuit to say. That if you make
 11:59:30 21 a promotion available to your customer, you have to
 11:59:32 22 give that promotion to the CLEC. And that if that
 11:59:38 23 promotion had -- is -- has any length of life to it,
 11:59:42 24 which I believe is 90 days or more and has the effect
 11:59:44 25 of and effectively reduces the retail price the

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11:59:50 1 customer pays, that you have to make that promotion
 11:59:52 2 available to the CLEC.
 11:59:54 3 That it's opinion, your interpretation,
 11:59:56 4 that you would make it available less the wholesale
 11:59:58 5 discount. Well, in your example of the 80 and the 100,
 12:00:08 6 it would be tough to argue that you would have to take
 12:00:10 7 a \$20 loss on that. Right? It would be a tough
 12:00:14 8 argument to make.
 12:00:14 9 And certainly in that example, in your
 12:00:16 10 hypothetical example, all we paid was 80. Then -- then
 12:00:22 11 you would -- if you would credit back the 80, get us to
 12:00:24 12 effectively the same net retail price that your
 12:00:28 13 customer paid, which in that example would be zero,
 12:00:30 14 then would that be fair and equitable? Yes, it would
 12:00:34 15 be.
 12:00:34 16 Q. Okay.
 12:00:34 17 A. Does that answer your question?
 12:00:38 18 Q. (Nods head.)
 12:00:40 19 A. Okay.
 12:00:52 20 Q. Go with me to Exhibit 1 of the deposition
 12:00:54 21 again. This is the filing in Texas. On page 2 there's
 12:00:58 22 an affidavit of yours that's dated July 30th, 2009.
 12:01:02 23 Do you see that?
 12:01:06 24 It's right here, sir.
 12:01:10 25 A. Oh, this is the change of ownership document?

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12:01:12 1 Q. Yes, sir.
 12:01:12 2 A. Okay.
 12:01:34 3 Q. So obviously you knew of this potential change
 12:01:36 4 in ownership as of July 30th, 2009, right?
 12:01:38 5 A. Right.
 12:01:38 6 Q. When did you first learn of the potential
 12:01:40 7 change in ownership?
 12:01:44 8 A. Oh, my gosh. Sometime in the fall of 2008 I
 12:02:02 9 became aware that there might -- that our present
 12:02:04 10 stockholder, Rent-a-Center was maybe aware -- maybe
 12:02:10 11 interested in or might be open to the idea of someone
 12:02:14 12 acquiring the ownership interest in the company.
 12:02:20 13 If you're asking about this particular
 12:02:22 14 purchaser, Amveway, I only became aware of them, you
 12:02:32 15 know, 60 to 90 days ago.
 12:02:34 16 Q. Okay. So, as of the beginning of July, you
 12:02:40 17 were aware of the potential change in ownership of
 12:02:42 18 these specific entities, right?
 12:02:48 19 A. Yes.
 12:02:54 20 Q. I am going to ask -- actually, I'm not going
 12:02:58 21 to make this an exhibit, Chris, unless you --
 12:03:00 22 A. That -- you understand this is a potential
 12:03:02 23 change in ownership.
 12:03:02 24 Q. I do.
 12:03:04 25 A. Hasn't happened.

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12:03:06 1 Q. Right.
 12:03:06 2 A. Right. Okay.
 12:03:06 3 Q. I'm going to hand out two pages from the
 12:03:10 4 discovery responses dPi submitted in this docket in
 12:03:14 5 North Carolina.
 12:03:16 6 MR. TURNER: Chris, since they're in the
 12:03:18 7 record, I don't want to tend to make them a deposition
 12:03:20 8 exhibit. But if you would like me to, I'm certainly
 12:03:24 9 happy to do that.
 12:03:26 10 Q. (By Mr. Turner) And, Mr. O'Roark, I have the
 12:03:26 11 entire set of discovery if you feel the need to look
 12:03:30 12 through it.
 12:03:30 13 A. Okay.
 12:03:30 14 Q. My questions are going to be specifically
 12:03:32 15 about items 7 and then item 8.
 12:03:38 16 So once you've had a chance to review
 12:03:40 17 that and are ready for me to ask my questions, please
 12:03:42 18 let me know.
 12:03:48 19 A. What's the date of this document?
 12:03:58 20 MR. MALISH: Sometime this year.
 12:04:10 21 Q. (By Mr. Turner) Mr. O'Roark, on my copy it
 12:04:12 22 says these were filed on October the 29th, 2008.
 12:04:18 23 MR. MALISH: Didn't we supplement since
 12:04:20 24 then?
 12:04:20 25 A. October of 2008.

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12:04:22 1 MR. TURNER: They have been supplemented,
 12:04:24 2 but the questions I'm asking about are not the
 12:04:26 3 supplemented answers.
 12:04:26 4 A. Okay. And. And who signed this document?
 12:04:54 5 (Discussion off the record.)
 12:05:26 6 MR. TURNER: This is a document that was
 12:05:26 7 prepared and filed by Brian.
 12:05:28 8 MR. MALISH: Prepared by me.
 12:05:30 9 A. Prepared by you.
 12:05:32 10 MR. MALISH: They asked the questions of
 12:05:34 11 me. You put together these responses and sent them
 12:05:38 12 back.
 12:05:40 13 A. Okay. All right.
 12:05:44 14 Q. (By Mr. Turner) On page 4 under item 7,
 12:05:48 15 responses, the first paragraph reflects discussions
 12:05:54 16 between Mr. Brian Bollinger and Pam Tipton?
 12:05:58 17 A. Right.
 12:06:00 18 Q. Were you involved in these discussions?
 12:06:00 19 A. No, I wasn't.
 12:06:02 20 Q. Have you had any conversations with Ms.
 12:06:04 21 Tipton?
 12:06:06 22 A. No. Not -- not to the best of my knowledge.
 12:06:08 23 I've been involved in various
 12:06:10 24 conversations with people from AT&T. I don't -- I
 12:06:14 25 don't remember necessarily who was on all of those

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12:06:18 1 calls and I -- I don't remember any specific
 12:06:20 2 conversation with Pam Tipton specifically.
 12:06:26 3 Q. Just to be clear, you don't have knowledge
 12:06:28 4 personally of Ms. Tipton saying the things that are
 12:06:32 5 attributed to her in this first paragraph.
 12:06:34 6 Is that accurate?
 12:06:36 7 A. That's correct.
 12:06:36 8 Q. Did you discuss with Mr. Bollinger the
 12:06:40 9 specifics of any conversation that's reflected in this
 12:06:42 10 first paragraph?
 12:06:44 11 A. No, I did not.
 12:06:48 12 Q. The second paragraph reflects conversations
 12:06:50 13 between Steve Watson, Kristy Seagle, Keith Deason,
 12:06:58 14 D-E-A-S-O-N.
 12:07:00 15 A. Right.
 12:07:00 16 Q. Were you involved in any of those
 12:07:02 17 conversations?
 12:07:06 18 A. No, I wasn't.
 12:07:08 19 Q. Have you had any specific conversations, to
 12:07:10 20 the best of your recollection, with either Ms. Seagle
 12:07:16 21 or Mr. Deason?
 12:07:16 22 A. No.
 12:07:18 23 Q. Have you discussed with Mr. Watson any
 12:07:20 24 conversations that are reflected in this paragraph?
 12:07:20 25 A. No.

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12:08:58 1 M-U-R-P-H-Y, and Caitlyn C-A-I-T-L-Y-N, Murphy of Lost
 12:09:06 2 Key CGM with Nicole Bracy, B-R-A-C-Y.
 12:09:10 3 A. Right.
 12:09:12 4 Q. Of AT&T?
 12:09:12 5 A. Right.
 12:09:12 6 Q. Were you involved in any of those
 12:09:14 7 conversations?
 12:09:14 8 A. I may have been.
 12:09:14 9 Q. What do you recall about any of those
 12:09:16 10 conversations you may have been involved in?
 12:09:18 11 A. Well, Beth Murphy and Caitlin Murphy have been
 12:09:22 12 involved in various conversations I've had. Some of
 12:09:28 13 which AT&T people have been involved in.
 12:09:30 14 And I -- if I'm not mistaken, Nicole
 12:09:34 15 Bracy has been on the phone on some of those
 12:09:36 16 conversations that I've had with AT&T.
 12:09:40 17 Q. Do you recall Mr. Bracy saying anything in
 12:09:44 18 those conversations that you believe would either
 12:09:50 19 support dP's position or be contrary to AT&T's
 12:09:54 20 positions in this docket?
 12:10:18 21 A. Let me think about that.
 12:10:20 22 We've had a number of conversations.
 12:10:24 23 Some of the things that have come up in those
 12:10:28 24 conversations that may support our position, for
 12:10:32 25 example, is that -- the feeling that this particular

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12:07:22 1 Q. The third paragraph under item 7 on page 4
 12:07:32 2 discusses conversations between Mr. Steve Watson, Keith
 12:07:38 3 Deason and Jim Maziarz, M-A-Z-I-A-R-Z, with AT&T.
 12:07:44 4 Were you involved personally in any of
 12:07:46 5 those conversations?
 12:07:48 6 A. No.
 12:07:50 7 Q. Do you recall any specific conversations that
 12:07:56 8 you may have had with either Mr. Deason or Mr. Maziarz?
 12:08:00 9 A. No, I don't.
 12:08:00 10 Q. Do you recall having any specific
 12:08:02 11 conversations with Mr. Watson regarding the
 12:08:06 12 conversations that are reflected in this third
 12:08:08 13 paragraph of page 4?
 12:08:10 14 A. I've had a number of conversations with Mr.
 12:08:12 15 Watson over the last four or five years. But I don't
 12:08:20 16 recall having any conversation with him about these
 12:08:22 17 specific conversations.
 12:08:24 18 Q. Okay. The fifth paragraph discusses similar
 12:08:30 19 conversations with Sandra Harris.
 12:08:34 20 A. Uh-huh.
 12:08:34 21 Q. Have you ever had any conversations that you
 12:08:36 22 recall with Ms. Harris?
 12:08:38 23 A. Not that I recall.
 12:08:48 24 Q. The last paragraph on page 4 leading over to
 12:08:52 25 page 5 references discussions between Beth Murphy,

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12:10:38 1 group within AT&T was understaffed and was somewhat
 12:10:44 2 overwhelmed by the volume of transactions that they
 12:10:46 3 were being required to process. They were doing the
 12:10:50 4 very best job they could.
 12:10:52 5 Kind of feedback we got from them. But
 12:10:54 6 there just weren't enough hours in the day, and they
 12:10:58 7 were understaffed. At one point in some of those
 12:11:00 8 conversations about various items that was talked
 12:11:02 9 about, you know, different issues than this particular
 12:11:06 10 issue we're talking about today and whether or not we
 12:11:08 11 would need to escalate those issues to the PUC.
 12:11:12 12 And in some of those conversations came
 12:11:14 13 up feedback from that group -- I don't know if it was
 12:11:18 14 Nicole specifically or people within that group that
 12:11:20 15 said that might actually help us because if you did
 12:11:22 16 that, then we'd get the resources we need.
 12:11:26 17 Also in those conversations there have
 12:11:28 18 been issues that have come up where they've said yes,
 12:11:32 19 we haven't paid these particular promotional credits
 12:11:34 20 yet. And they date back for months and months and
 12:11:38 21 months. In some cases over a year. And why haven't
 12:11:40 22 you paid them. Because we haven't yet set up the
 12:11:44 23 programming to process those particular credits. Our
 12:11:48 24 -- our programming department, our application
 12:11:50 25 development department, hasn't set up the application

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12:11:56 1 to process those particular credits.
 12:11:58 2 In one conversation I remember
 12:12:00 3 specifically I said, Wait a minute, you're telling me
 12:12:02 4 your customer gets those credits month one on their
 12:12:06 5 bill, and my customer has been waiting for eight, nine
 12:12:08 6 months for those credits, and it's because you haven't
 12:12:10 7 set up the application to process those credits? And
 12:12:12 8 they said yes.
 12:12:14 9 And we have over \$10 million in dispute
 12:12:18 10 credit pending with BellSouth. And about 6,000,000 of
 12:12:22 11 those are dealing with promotional credit of one sort
 12:12:26 12 or another. We're a little, tiny, small company. We
 12:12:30 13 don't have resources to be able to fund \$6,000,000
 12:12:34 14 worth of promotional credit while waiting for AT&T to
 12:12:38 15 get adequate staff in there, get systems in there to
 12:12:40 16 process those claims.
 12:12:42 17 Best case we wait 90 to 120 days before
 12:12:46 18 we get those credits. Give the customer the credit in
 12:12:48 19 month one, and then we wait 90 to 120 days to get those
 12:12:52 20 credits back from BellSouth. And we don't -- up until
 12:12:56 21 just recently, we didn't know whether or not at a level
 12:13:02 22 detail a particular line was going to qualify for the
 12:13:04 23 credit or not.
 12:13:06 24 We knew that we had provisioned it
 12:13:08 25 correctly. We knew that we had provisioned it

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12:13:10 1 according to the promotion. But then when we didn't
 12:13:12 2 receive 100 percent of the credit, we were unable to
 12:13:16 3 get out of AT&T the specifics at a line item level of
 12:13:18 4 detail as to which lines qualified, which lines didn't
 12:13:22 5 qualify and why did they deny the credit on some of
 12:13:24 6 those lines when they were all provisioned exactly the
 12:13:26 7 same.
 12:13:26 8 It's only been recently, for the last few
 12:13:28 9 months, that we've been able to start receiving from
 12:13:32 10 BellSouth any type of line item detail on the denied
 12:13:36 11 credit. And reasons for those denials. And in almost
 12:13:40 12 every case we've disagreed with reasons for those
 12:13:44 13 denials, and we've -- and we've escalated those
 12:13:46 14 disputes.
 12:13:48 15 So we've had lengthy discussions with
 12:13:54 16 this group that Nicole was part of. And Beth Murphy
 12:13:58 17 and Caitlin Murphy have taken the lead in that. And
 12:14:02 18 they've escalated it. And they've involved my team, my
 12:14:04 19 staff, people that work for dPi. They've involved me
 12:14:08 20 on various occasions. And there's been lots and lots
 12:14:12 21 of conversations going back and forth.
 12:14:14 22 But it's clear to us that this group is
 12:14:22 23 under water, overstaff -- understaffed, overwhelmed.
 12:14:26 24 It's clear to us they don't have adequate systems.
 12:14:30 25 It's clear to us BellSouth has not devoted adequate

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12:14:32 1 resources to this process. It's clear to us that, you
 12:14:36 2 know, unless we're a squeaky wheel, our credits go
 12:14:40 3 unprocessed.
 12:14:40 4 We might get a million dollars in credit
 12:14:42 5 one month and then nothing the next month. Tell me
 12:14:46 6 where the sense in that could be. Go back to them.
 12:14:48 7 Why not? Why didn't you process ours? How come our --
 12:14:52 8 well, we were processing somebody else's. And then
 12:14:54 9 we'll -- you know, we'll raise the issue. We'll --
 12:14:56 10 we'll demand action. And then we'll get our -- and
 12:15:00 11 then our disputes will get work.
 12:15:02 12 It's just that constant process. There's
 12:15:04 13 no reliably consistent ability to expect these credits
 12:15:10 14 to come to us on any type of reliable or consistent
 12:15:14 15 basis. We get a big number one month, zero the next
 12:15:16 16 month.
 12:15:18 17 We sign up in BellSouth territory about
 12:15:20 18 10,000 customers a month. Even if I gave you the
 12:15:24 19 20 percent discount off of the promo that are out
 12:15:28 20 there right now -- there's the cash back promo that's
 12:15:32 21 worth \$50. Even if I gave you 20 percent off that, it
 12:15:36 22 would be worth \$40 to me today. Right now today I'm
 12:15:38 23 talking about. And there's the LCCW waiver, which,
 12:15:42 24 let's say, is worth, just for discussion purposes,
 12:15:46 25 another \$40. It's worth whatever the line of charge

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12:15:48 1 is. But let's say it's another \$40. That's \$80.
 12:15:54 2 Times roughly 2000 lines a month. 800,000 a month.
 12:15:58 3 I have to wait 90 to 120 days to get
 12:16:02 4 credit. By the time the first credit rolls off the
 12:16:04 5 assembly line, a 120 days, I'm owed 4.8 -- I'm owed
 12:16:08 6 800,000 times four months. \$3.2 million. And that --
 12:16:12 7 and I've got promo credit disputes that are outstanding
 12:16:18 8 back for months and months and months, including those
 12:16:20 9 we're talking about today that are outstanding all the
 12:16:22 10 way back to January of '04.
 12:16:26 11 So when you ask me has Nicole Bracy or
 12:16:32 12 anybody in that department ever said anything to me
 12:16:34 13 that supports our position, yes. They have. And it's
 12:16:42 14 clear to us that this is not being managed properly
 12:16:46 15 within BellSouth. It's clear to us.
 12:16:48 16 And here's the other issue, just while,
 12:16:50 17 you know, we're talking about this. AT&T owns SBC.
 12:16:54 18 Correct? AT&T owns Ameritech. AT&T owns Pac Bell.
 12:16:58 19 All of those former AT&T entities. Those other 13
 12:17:02 20 states. In those states we don't have to wait 90 to
 12:17:06 21 120 days. In those states we get our credit exactly
 12:17:08 22 like the end user customer gets their credit.
 12:17:12 23 The CLEC gets his credit exactly like the
 12:17:16 24 real -- the direct customer gets his credit. We supply
 12:17:20 25 for the credit at the time we order the service. We

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12:17:24 1 put a promo code on that order. We make sure that we
 12:17:26 2 provision that customer on the LSR in a way that he
 12:17:30 3 qualifies for that promo, and we're billed the correct
 12:17:34 4 amount on the invoice. We're not overbilled. Forced
 12:17:38 5 to audit. Forced to dispute. Forced to apply. Forced
 12:17:40 6 to wait 90 days. They bill us correctly.
 12:17:44 7 Verizon does it exactly the same way.
 12:17:48 8 Verizon does it exactly the same way. They put a promo
 12:17:50 9 out there. They put a product out there. You can
 12:17:52 10 order that product and avoid the LCCW. If you order
 12:17:56 11 this product. If you provision that product correctly,
 12:17:58 12 you aren't charged the LCCW. You get billed the
 12:18:02 13 correct amount.
 12:18:04 14 So, AT&T in your other 13 states does it
 12:18:06 15 correctly. They bill us the correct amount. Verizon
 12:18:10 16 does it correctly. They bill us the correct amount.
 12:18:14 17 The only ILEC that does it incorrectly is BellSouth.
 12:18:18 18 And the only ILEC that we have these huge dollar
 12:18:22 19 amounts outstanding in terms of disputes is BellSouth.
 12:18:24 20 None of the other ILECs do it that way.
 12:18:28 21 We don't have that point of contention with any of the
 12:18:32 22 other ILECs that we do business with. So it's only
 12:18:34 23 BellSouth that's out of step with the rest of the
 12:18:38 24 industry and out of step with the rest of AT&T.
 12:18:40 25 It's clear to us that BellSouth has the

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12:20:00 1 for BellSouth that you have adopted for the rest of
 12:20:04 2 AT&T for the other 13 AT&T states. You could do it the
 12:20:08 3 same way that you do it in SBC territory. I'm given a
 12:20:12 4 promo code, get the promo code on the order. I receive
 12:20:16 5 a bill with the correct amount on it, and I get billed
 12:20:20 6 the correct amount.
 12:20:22 7 You could do it the same way Verizon does
 12:20:26 8 it. The way the other ILECs do it. BellSouth is the
 12:20:28 9 only ILEC that does it this way, that puts us through
 12:20:32 10 this process. And it's the only ILEC that we have this
 12:20:36 11 huge substantial dollar amounts of disputes
 12:20:40 12 outstanding.
 12:20:48 13 And this payment -- I mean, management
 12:20:50 14 experience of a customer. Here comes a customer. He
 12:20:52 15 lives in BellSouth territory. He's a Bell -- therefore
 12:20:56 16 he's a BellSouth customer, captive BellSouth customer.
 12:20:58 17 Lives in BellSouth region, BellSouth territory.
 12:21:02 18 BellSouth is the underlying ILEC.
 12:21:04 19 He comes to BellSouth through the
 12:21:06 20 directive sales channel, gets his credit immediately,
 12:21:08 21 doesn't have to wait for it, apply for it. BellSouth
 12:21:12 22 looks at the order, says, yes, this order qualifies.
 12:21:14 23 They give it to him directly. He doesn't have to ask
 12:21:16 24 for a dime, apply for it. He gets it.
 12:21:18 25 He comes to BellSouth through the CLEC

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12:18:42 1 ability to bill a customer correctly. Because you do
 12:18:46 2 it for your direct customers. They don't get
 12:18:50 3 overbilled and have to apply for the credit after the
 12:18:52 4 fact and wait to get it. They receive it.
 12:18:56 5 It's clear to us that AT&T has the
 12:18:58 6 ability to do it because you do it in the other 13
 12:19:00 7 states. You bill it correctly. You don't overbill us,
 12:19:04 8 force us to audit the bill, force us to apply for
 12:19:06 9 disputes and then wait to receive those credits. It's
 12:19:10 10 clear that AT&T has the ability to do this correctly.
 12:19:14 11 But BellSouth has refused to do it
 12:19:16 12 correctly. BellSouth insists on overbilling, insists
 12:19:20 13 on putting the onus on us to audit those bills, dispute
 12:19:24 14 those bills, to file applications for these credits.
 12:19:28 15 And then we have to wait 90 to 120 days before we
 12:19:32 16 receive our credit. And in some cases we have to wait
 12:19:34 17 years, and we still haven't received our credit.
 12:19:38 18 And so does that support my position?
 12:19:42 19 Yes, I think it does. I think it supports my position
 12:19:46 20 that BellSouth is engaged in anti-competitive
 12:19:50 21 practices. I think it supports my position that
 12:19:52 22 BellSouth has refused to bill correctly when they
 12:19:54 23 clearly would have the ability to do it. When the rest
 12:19:58 24 of AT&T does it.
 12:19:58 25 You could adopt the same billing practice

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12:21:20 1 sales channel. What's his experience? We give him the
 12:21:26 2 credit upfront, and then we have to go -- we get
 12:21:30 3 overbilled by BellSouth. Then we have to audit that
 12:21:34 4 bill and apply for that credit and wait 90 to 120 days
 12:21:40 5 to receive that credit.
 12:21:42 6 Completely separate treatment. There's
 12:21:46 7 no rhyme or reason for it.
 12:21:54 8 Q. Just to be -- let's go back and address a few
 12:21:58 9 of those things. Can we agree that dPI does not flow
 12:22:04 10 any promotional credit it may get from AT&T on a
 12:22:08 11 dollar-per-dollar basis throughout dPI's end user bill?
 12:22:12 12 A. We do least cost provisioning, and we do cost
 12:22:16 13 based pricing. So if there's a promo credit available
 12:22:22 14 to us, we -- we select that as a reduction of our cost.
 12:22:26 15 And we roll that reduction in cost into our pricing.
 12:22:30 16 For example, today in most BellSouth
 12:22:32 17 states a customer can receive service with zero
 12:22:34 18 activation fee. In fact, I think that's true in all of
 12:22:38 19 BellSouth. And I think it's true in all of SBC. A
 12:22:42 20 customer can receive service with a zero activation
 12:22:44 21 fee. That's a direct pass through of the line cost
 12:22:48 22 waiver.
 12:22:52 23 In most states within BellSouth and most
 12:22:56 24 states within SBC, a basic service customer who
 12:23:00 25 converts to my service and/or a life-long customer who

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12:23:02 1 comes to me can receive first month of service for
 12:23:06 2 free, zero. That's a direct reflection of a cash back
 12:23:10 3 promo. It's been passed through the customer. Shows
 12:23:12 4 up in the form of a zero first month cost.
 12:23:18 5 Any customer that converts to me from
 12:23:20 6 another CLEC, any customer that -- any Lifeline
 12:23:24 7 customer comes to me, basically pays a zero first month
 12:23:26 8 fee, no activation fee, reflection of the LCCW and zero
 12:23:32 9 first month cost reflected in the cash back.
 12:23:36 10 That's basically true throughout all of
 12:23:38 11 SBC and throughout all of BellSouth. Those are direct
 12:23:42 12 reflections of those promos, and I wait to see if
 12:23:46 13 BellSouth is going to issue me that credit or not. And
 12:23:48 14 I wait to see what percentage, if any, of that
 12:23:52 15 BellSouth is going to deny. And then I fight with
 12:23:56 16 BellSouth to get the details at a line level of detail.
 12:23:58 17 It's only been in recent months I've been
 12:24:00 18 able to receive that information about what department
 12:24:02 19 denied and why it got denied.
 12:24:04 20 Q. Do you have Deposition Exhibit 6?
 12:24:36 21 A. This is the Lifeline customer --
 12:24:38 22 Q. Yes, sir.
 12:24:40 23 A. -- that gets zero in the first month.
 12:24:40 24 Q. Yes, sir.
 12:24:40 25 A. No activation fee. No charge. Month cost.

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12:24:46 1 Q. What does that Lifeline customer pay for basic
 12:24:48 2 service in month two?
 12:24:54 3 A. This says \$49.73.
 12:24:58 4 Q. This being the DPi Teleconnect web page?
 12:25:00 5 A. This being this exhibit that you handed me.
 12:25:04 6 Q. And that exhibit -- look at the bottom. It
 12:25:06 7 does say that it comes from secure.DPiteleconnect.com.
 12:25:12 8 Correct?
 12:25:12 9 A. Right.
 12:25:12 10 Q. So according to this DPi Teleconnect website,
 12:25:16 11 this Lifeline customer that gets zero a month is then
 12:25:20 12 paying 49.73 for basic service in North Carolina.
 12:25:24 13 Correct?
 12:25:24 14 A. Well, this -- that's what this web page says,
 12:25:28 15 yes.
 12:25:30 16 I don't know -- I've already said I'd
 12:25:30 17 have to check this against my product catalog to tell
 12:25:34 18 you if it's accurate or not.
 12:25:36 19 Q. Do you have any clue how that relates to the
 12:25:38 20 providers that a Lifeline customer will pay for basic
 12:25:42 21 service from AT&T in North Carolina?
 12:25:44 22 A. In month two? No. I don't have any idea.
 12:25:54 23 Q. You mentioned that early in the discussion
 12:25:56 24 about --
 12:25:58 25 A. But let me -- let me comment on that.

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12:26:00 1 You said that -- earlier in one of your
 12:26:04 2 questions you said to me that do I compete with AT&T
 12:26:08 3 and does it matter to me what AT&T price charges? You
 12:26:12 4 know, I'm a very small company. Right? I've got
 12:26:16 5 50,000 subscribers total. How many billions of
 12:26:18 6 customers does AT&T have?
 12:26:22 7 I have a measurable share of the margin.
 12:26:28 8 Right? I am measurable. Very small. Very small
 12:26:32 9 company. I struggle. I struggle to survive. I
 12:26:34 10 struggle to grow. I struggle to make a profit. It's
 12:26:38 11 not as if I'm a highly successful company that just
 12:26:42 12 captured a huge market share.
 12:26:44 13 So how could you imply that I don't --
 12:26:46 14 that your pricing doesn't affect my ability to survive,
 12:26:48 15 my ability to grow? If it didn't, wouldn't I have a
 12:26:50 16 much bigger market share? Wouldn't I have a much
 12:26:52 17 higher customer base?
 12:26:54 18 Obviously it affects me. Obviously I
 12:26:58 19 struggle. Obviously I'm up against stiff competition
 12:27:04 20 in the marketplace. And obviously if I weren't, I'd be
 12:27:06 21 much larger than I am.
 12:27:08 22 I am a little, tiny company that has very
 12:27:10 23 few subscribers. And I struggle to make a profit every
 12:27:14 24 single month. And so why in the world would you
 12:27:20 25 suggest that your pricing and that your effect on the

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12:27:24 1 marketplace, the dominant ZLEC in that marketplace,
 12:27:28 2 that that pricing doesn't affect my ability to survive,
 12:27:32 3 my ability to grow? It doesn't make any sense.
 12:27:36 4 Why would you suggest that? It's not as
 12:27:38 5 if I'm a hugely successful company. I've got 50,000
 12:27:42 6 subscribers nationwide. In all of the 30 plus states
 12:27:46 7 that I have customers in, I've got a grand total of
 12:27:50 8 50,000. You have more than that in Birmingham,
 12:28:00 9 Alabama, I would suspect.
 12:28:00 10 It's ridiculous for you to suggest that
 12:28:02 11 it hasn't impacted me. That your pricing hasn't
 12:28:06 12 impacted my profitability, my ability to grow, my
 12:28:08 13 ability to attract and retain customers. That these
 12:28:12 14 promos that you offer haven't affected my ability to
 12:28:14 15 attract customers and/or my ability to retain
 12:28:18 16 customers.
 12:28:18 17 Clearly it's impacted me. If it hadn't
 12:28:22 18 impacted me, I'd be much larger, much more successful.
 12:28:24 19 I'd be growing much more rapidly than I am, and I would
 12:28:28 20 be a much more profitable company than I am.
 12:28:32 21 I mean, it's clear.
 12:28:36 22 Q. You've got 50,000 customers.
 12:28:38 23 A. Nationwide. All 30 plus states. Right?
 12:28:42 24 Q. And you just stated that you sign up 10,000
 12:28:44 25 customers a month.

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12:28:48 1 A. Roughly, yeah. Yeah.

12:28:50 2 Q. If you sign up 10,000 a month, how is it you

12:28:54 3 only got 50,000 customers nationwide?

12:28:56 4 A. Because I'm in a highly competitive market.

12:29:00 5 And customers churn.

12:29:00 6 Q. Where do they churn to, in your experience?

12:29:04 7 A. How would I know that?

12:29:08 8 Q. Have you not done any market analysis to

12:29:10 9 determine where your customers churn to?

12:29:12 10 When I say you, I mean dPi.

12:29:14 11 A. How would I know that?

12:29:14 12 Q. I'm asking you. Has dPi ever attempted to do

12:29:18 13 any analysis --

12:29:18 14 A. No, no, no. I don't have any way of knowing

12:29:22 15 where those customers churn to. My suspicion is they

12:29:24 16 go to BellSouth directly. They go to other CLECs.

12:29:30 17 They go to wireless. They do without. You know, in

12:29:32 18 some cases they do without home phone service.

12:29:36 19 I don't know. I don't know where they

12:29:40 20 go. I don't have any way of knowing where they go.

12:29:42 21 You would know where they go because you're the

12:29:44 22 underlying ILEC.

12:29:50 23 Q. Going back to these credits that you're

12:29:52 24 seeking and whether you pass them through to your

12:29:56 25 customers, is it fair to say that there is no direct

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12:31:22 1 we look at AT&T. Particularly if our agent base is

12:31:26 2 saying AT&T is out there offering this. Then we look

12:31:30 3 at that.

12:31:30 4 Q. Do you remember what my question was?

12:31:34 5 A. Do we pass through those promotions. And my

12:31:36 6 answer is we do cost based pricing.

12:31:40 7 If there's promotions available, take

12:31:42 8 those into account as cost reductions.

12:31:44 9 Q. My question was, does dPi pass through the

12:31:48 10 promotional credit it seeks on a direct pass through

12:31:54 11 basis on a customer-by-customer basis?

12:31:58 12 Yes or no?

12:31:58 13 A. If there's promotions available, those are

12:32:00 14 reflected in our price to every single customer. We

12:32:04 15 don't charge different prices to different customers

12:32:06 16 depending upon whether or not 90 to 120 days from now

12:32:10 17 BellSouth is going to be gracious enough to give me the

12:32:14 18 promotional credit that I've earned and that I've

12:32:16 19 applied for.

12:32:18 20 We don't know that for 90 to 120 days on

12:32:20 21 a line-by-line basis. So we have to give it to the

12:32:24 22 customer upfront day one, and then we have to wait to

12:32:26 23 see if perhaps BellSouth will ever give us that credit.

12:32:32 24 So we only have one set of prices. Every

12:32:34 25 customer gets that same price. It's -- it's not a

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12:29:58 1 pass through on a customer-by-customer basis of the

12:30:02 2 credit that you're seeking in the docket?

12:30:04 3 A. We do our prices based on cost based pricing.

12:30:10 4 If there are ILEC promotions available to us, we take

12:30:12 5 those into account in determining what our net cost is

12:30:16 6 after the promotion. And then we determine our price

12:30:18 7 based on a couple of things.

12:30:20 8 One, we have targeted margins that we try

12:30:22 9 to hit at a gross margin level. And, two, we look at

12:30:26 10 the marketplace, and we look at what we can market

12:30:28 11 bigger in terms of what could we possibly charge a

12:30:32 12 customer and still remain somewhat competitive.

12:30:36 13 We don't have to be the least or lowest

12:30:38 14 provider. We certainly can't be the highest provider.

12:30:40 15 We have to have a competitive price. And so we do. We

12:30:46 16 look at what can we afford to charge and make a

12:30:50 17 reasonable margin. And basically what we target within

12:30:54 18 our -- in our customer base is a very narrow gross

12:30:58 19 margin that allows us to make a -- enough of a gross

12:31:04 20 margin to cover our operating cost, including our

12:31:08 21 customer acquisition cost, aging commissions that we

12:31:12 22 have to pay, that sort of thing.

12:31:14 23 And we look at what the market will bear.

12:31:18 24 We look at what competition is charging out there.

12:31:20 25 I've already told you that yes, sometimes

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12:32:38 1 different set of prices for different customers. You

12:32:40 2 saw an example. You showed it. 39.99. Every customer

12:32:44 3 paying the same, 39.99. Doesn't matter. We don't --

12:32:50 4 we aren't able to determine whether that particular

12:32:52 5 customer is going to be one that BellSouth agrees to

12:32:56 6 issue the credit on or whether that particular customer

12:32:58 7 is one that doesn't.

12:33:00 8 I've already told you it's only been

12:33:02 9 recently -- because, you know, we've asked for it and

12:33:04 10 asked for it and asked for it -- that BellSouth has

12:33:06 11 begun to provide us with files that show us which lines

12:33:10 12 they denied the credit on and why. And in almost every

12:33:14 13 case we've disagreed with that denial, and we've

12:33:16 14 disputed it.

12:33:18 15 Q. I'm going to show you dPi Teleconnect's second

12:33:20 16 supplemental responses to AT&T North Carolina's first

12:33:24 17 set of interrogatories and request for production of

12:33:28 18 documents in this docket. Specifically question No.

12:33:30 19 14.

12:33:32 20 It says, "Please provide all documents

12:33:34 21 that demonstrate that dPi passed the promotional

12:33:38 22 discount on the end user."

12:33:40 23 I'd like you to read into the record the

12:33:42 24 answer dPi provided, please.

12:34:08 25 A. Well, what time frame was that addressing?

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12:34:10 1 And what was it -- was this relative to back in 2004
 12:34:16 2 through 2007?
 12:34:18 3 Is that what he was talking about in that
 12:34:20 4 response?
 12:34:20 5 MR. MALISH: You can just read the
 12:34:22 6 answer.
 12:34:22 7 A. On one hand you're pulling out what's going on
 12:34:26 8 today in today's marketplace. On the other hand you're
 12:34:28 9 talking about what's going on 2004 through 2007.
 12:34:32 10 Q. (By Mr. Turner) Could you read the answer?
 12:34:40 11 A. The answer is, "As there is no direct pass
 12:34:42 12 through on a customer-by-customer basis, there is no
 12:34:44 13 documents responsive to this request."
 12:34:46 14 Q. Today is there a pass through on a
 12:34:50 15 customer-by-customer basis? Yes or no?
 12:34:52 16 A. Every customer gets the -- gets the same
 12:34:54 17 price. And that price reflects a reduction in cost for
 12:34:58 18 any promotional discounts that are available to us. We
 12:35:04 19 do cost based pricing.
 12:35:04 20 Q. At the hearing I'll be entitled to a yes or no
 12:35:08 21 answer.
 12:35:08 22 Will you give me a yes or no answer to
 12:35:10 23 that question today?
 12:35:30 24 A. Today's customer is charged zero activation
 12:35:36 25 fee. That's a direct pass through of the LCCW.

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12:35:38 1 So yes, there is direct pass through of
 12:35:42 2 the LCCW. We charge zero activation fee. That's a
 12:35:44 3 direct pass through of the LCCW.
 12:35:50 4 Today's customer is -- is being charged a
 12:35:52 5 discount in price in month one. You see here zero.
 12:35:58 6 And that's true for any life-long customer. Any
 12:36:02 7 customer that converts to my service from another C --
 12:36:06 8 from another CLEC gets a zero-month long price. That's
 12:36:10 9 a direct pass through.
 12:36:12 10 So yes. Today customers are being passed
 12:36:16 11 through those promotions directly. Customer by
 12:36:18 12 customer. Every customer that qualifies gets that
 12:36:22 13 price.
 12:36:22 14 Q. When did that start?
 12:36:26 15 A. I'd have to get you the answer to that.
 12:36:28 16 Q. Why did that start?
 12:36:32 17 A. Because BellSouth began to reliably and
 12:36:36 18 dependably pay us the credit. As soon as we were able
 12:36:40 19 to establish BellSouth was reliably paying the credit,
 12:36:42 20 we immediately began to pass them through to our
 12:36:44 21 subscribers.
 12:36:46 22 Q. Today do your end user customers ask for a
 12:36:50 23 specific promotional credit?
 12:36:50 24 A. Our new customers who are paying \$0 in month
 12:36:56 25 one? Is that what you're saying?

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12:36:58 1 Do they want an additional discount
 12:37:00 2 below zero?
 12:37:02 3 Q. No, sir. Let me see those answers again,
 12:37:04 4 please, the supplemental ones.
 12:37:06 5 A. This one? Yeah.
 12:37:12 6 Surely you -- surely you understand and
 12:37:14 7 agree that we couldn't be charging zero in month one
 12:37:18 8 unless we were receiving -- passing through those
 12:37:20 9 promotional credits. You don't have any product that
 12:37:24 10 you sell us at a zero cost. Correct?
 12:37:30 11 Q. Today does dPI submit any request for
 12:37:34 12 promotional credit in response to a dPI end user
 12:37:38 13 request for cash back promotional credit?
 12:37:44 14 A. We provision all of our customers to qualify
 12:37:46 15 for the promotional credits.
 12:37:50 16 Q. That's not the question. The question is,
 12:37:52 17 today does dPI submit any request in response to an end
 12:37:56 18 user request for a specific cash back promotional
 12:37:58 19 credit?
 12:37:58 20 A. We reflect those promotional credits in the
 12:38:02 21 price we charge our end users.
 12:38:02 22 Q. I'm going to show you question 9. The answer
 12:38:06 23 to question 9. And I want you to tell me if that is
 12:38:08 24 still accurate today or not.
 12:38:28 25 A. Well, it's a word -- you're playing a word

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12:38:30 1 game. You're trying to say that unless an end user
 12:38:34 2 walks up to my counter and says, I want the cash back
 12:38:36 3 promotion. But that's not what happens. End user
 12:38:40 4 walks up to my counter, what's your price? I say my
 12:38:42 5 price is zero in month one. You say, great, I'll take
 12:38:46 6 that product.
 12:38:46 7 That zero price reflects the cash back
 12:38:50 8 promotion. Customer doesn't have to ask for -- for the
 12:38:54 9 cash back promotion. I give it to him right away.
 12:38:56 10 Doesn't have to ask for it. It's already reflected in
 12:38:58 11 the zero price. There's no reason for a customer to
 12:39:00 12 ask for it. Plus, we're not obligated to -- to
 12:39:06 13 rearginate the cash back promotion to a user customer.
 12:39:12 14 What we do do is reflect that in a
 12:39:16 15 reduction in cost to a end user in month one. The
 12:39:20 16 reduction in cost that a end user customer pays in
 12:39:22 17 month one. And we reduce the price. And in this case,
 12:39:24 18 as you've shown from our website, we're charging zero
 12:39:30 19 in month one.
 12:39:30 20 Q. Mr. O'Roark, today is the answer to question 9
 12:39:34 21 different than the answer that is on that paper in
 12:39:36 22 front of you that dPI supplied?
 12:39:38 23 A. It's just a bad question. It's -- it's a word
 12:39:42 24 game question.
 12:39:42 25 Does the customer walk up to my counter

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12:39:44 1 and ask for a cash back promo? He doesn't have to.
 12:39:48 2 It's already reflected in my price.
 12:39:50 3 Q. So is the answer different?
 12:39:50 4 MR. TURNER: Chris, I will move for an
 12:39:52 5 answer on this. I'm entitled to know if the answer is
 12:39:56 6 different today than it was when it was answered.
 12:39:58 7 MR. MALISE: Why don't you give me some
 12:39:58 8 time to confer with my client.
 12:40:00 9 A. Okay.
 12:40:02 10 MR. TURNER: Why don't you do that.
 12:40:04 11 (Break taken from 12:40 p.m. to 12:51
 12:40:04 12 p.m.)
 12:51:34 13 Q. (By Mr. Turner) Back on the record. Mr.
 12:51:36 14 O'Roark, since you've had a chance to confer with your
 12:51:40 15 attorney, I will ask you the same question, which is,
 12:51:44 16 is the response to item No. 9, the second supplemental
 12:51:50 17 responses to the first set of interrogatories, the same
 12:51:54 18 today, or is it different today than that which appears
 12:51:56 19 on the written document in your hand?
 12:52:26 20 A. It's not a direct response to a dPI end user
 12:52:32 21 request. It's an indirect response to a dPI end user
 12:52:36 22 request.
 12:52:36 23 So it's true it's not a direct response
 12:52:38 24 to dPI's end user response. It's an indirect response
 12:52:42 25 to dPI's end user request, because a dPI end user

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12:54:12 1 Q. So your end user is receiving whatever credit
 12:54:14 2 you want to give them?
 12:54:16 3 A. That's exactly right. Month one. As you
 12:54:20 4 demonstrated when you pulled up my website and saw that
 12:54:22 5 I'm charging a customer zero in month one, and I'm
 12:54:26 6 waiting to see if I ever get that credit from AT&T or
 12:54:30 7 not.
 12:54:40 8 I'm also waiting to see if AT&T will ever
 12:54:42 9 give me the details as to which customers they issued
 12:54:46 10 the credit for and which customers they didn't. Some
 12:54:48 11 of the responses I read for AT&T, your folks, imply
 12:54:50 12 that they did a sample and came up with a 50 percent
 12:54:54 13 error rate. That sample applied that 50 percent to the
 12:54:56 14 entire claim. So they don't -- they couldn't even tell
 12:55:00 15 me which customers qualify and which ones don't because
 12:55:04 16 you're using some sort of sampling technique.
 12:55:08 17 I think since then in recent months that
 12:55:10 18 has changed. And I think reasonably today, like in the
 12:55:12 19 last few months, we've begun receiving specific TN
 12:55:18 20 level denials with an explanation for each TN that got
 12:55:24 21 denied. But that's only been in recent months.
 12:55:28 22 Q. Going back to the sampling rate, that's why I
 12:55:30 23 asked earlier does dPI have records that reflect the
 12:55:34 24 three specific services that any customers ordered that
 12:55:38 25 are associated with the promotional discount request

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12:52:46 1 request was to take a price that's dependent upon us
 12:52:50 2 receiving those cost reductions that are reflected in
 12:52:52 3 the promos.
 12:52:54 4 So it's not a direct request. That's
 12:52:56 5 true. It's an indirect request based on a customer
 12:53:00 6 selecting a product that reflects the cost reductions
 12:53:04 7 that those promos represent. So the answer here did
 12:53:08 8 not submit a direct response to end user request is
 12:53:14 9 true. It's an indirect response to an end user
 12:53:16 10 request.
 12:53:18 11 Q. Okay.
 12:53:18 12 A. Okay?
 12:53:42 13 Q. When you were answering my question about
 12:53:44 14 anything that Ms. Bracy or others may have said, you
 12:53:48 15 made a statement along the lines of the AT&T retail
 12:53:54 16 customer gets a credit immediately where your customer
 12:53:58 17 has been waiting eight or nine months because we
 12:54:00 18 haven't set up an application yet.
 12:54:02 19 I just wanted to clarify make sure I
 12:54:06 20 understand the way it works.
 12:54:06 21 Does your customer get the credit on the
 12:54:08 22 front end?
 12:54:08 23 A. Yes.
 12:54:08 24 Q. And dPI waits eight or nine months?
 12:54:12 25 A. Yes.

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12:55:42 1 that are involved in this docket.
 12:55:44 2 A. And I said -- I don't know, and I'll have to
 12:55:46 3 get back to you.
 12:55:48 4 Q. Okay.
 12:55:48 5 A. And the only reason that I don't know is
 12:55:50 6 because of the age of those orders.
 12:55:54 7 I saw in some of your responses that the
 12:55:56 8 age of the order had a lot to do with whether or not
 12:55:58 9 AT&T could provide details. I think it's reasonable
 12:56:02 10 that that same issue may apply to dPI.
 12:56:10 11 So, given the age of these orders, I'm
 12:56:12 12 not sure. I'll have to look. I'll have to investigate
 12:56:16 13 and see if we do. I think we do. I'll have to verify
 12:56:20 14 that.
 12:56:20 15 MR. MALISE: I'm going to object to your
 12:56:22 16 response as being nonresponsive.
 12:56:24 17 Can you try to make an effort to listen
 12:56:26 18 to precisely what Mr. Turner is asking you and
 12:56:30 19 confirming your response to specifically what he's
 12:56:32 20 asking? Because it will shorten this considerably if
 12:56:36 21 you do that.
 12:56:36 22 A. Okay. All right.
 12:56:38 23 Q. (By Mr. Turner) Mr. O'Roark, given what
 12:56:40 24 you've just said about the age of the claims and the
 12:56:44 25 impact it has on the ability to find documents, why is

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12:56:50 1 it that dPi waited so long to file a claim with the
 12:56:54 2 Public Service Commission about credit requests that it
 12:56:58 3 says it submitted way back in 2003 or earlier?
 12:57:12 4 A. Well, it seems to me that filing a complaint
 12:57:22 5 with the UPC would be an escalation technique only
 12:57:26 6 after you felt like you had exhausted all efforts to
 12:57:30 7 receive those credits on an applicable basis working
 12:57:34 8 directly with BellSouth. Right?
 12:57:38 9 And so that takes time. That takes time.
 12:57:40 10 There's an escalation process within BellSouth.
 12:57:44 11 There's -- there's a give and take. There's a back and
 12:57:48 12 forth. There's a lot of conversations. There's a lot
 12:57:50 13 of discussions that go back and forth. We need
 12:57:54 14 additional explanations. You need additional
 12:57:56 15 explanations. Back and forth.
 12:57:58 16 And at some point obviously you get to
 12:58:00 17 the point where you feel like you've exhausted all
 12:58:06 18 prospects at resolving dispute within BellSouth, by and
 12:58:10 19 between BellSouth and dPi, and at that point then you
 12:58:14 20 would -- there would be a natural escalation to the
 12:58:16 21 next level.
 12:58:16 22 If you've exhausted the escalation
 12:58:18 23 process within BellSouth, then you would naturally
 12:58:22 24 either give up on the dispute, or you would escalate it
 12:58:26 25 to the next level, which in this case is the DPC.

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12:58:32 1 That takes time, right? That's a normal
 12:58:36 2 dispute resolution process. It takes time to work
 12:58:40 3 through that process.
 12:58:40 4 And also, whether you can appreciate this
 12:58:44 5 or not, we're a very small company. We don't undertake
 12:59:00 6 escalating things until you see. It's not something we
 12:59:06 7 can do routinely or capriciously. We can only do it in
 12:59:10 8 those circumstances where we feel like we have a very
 12:59:12 9 strong case and where we feel like there's enough
 12:59:14 10 dollars involved that it justifies the legal expense.
 12:59:18 11 We're a very small company. We don't
 12:59:20 12 have offices full of attorneys that have been on our
 12:59:22 13 staff for years and years and years. We don't have
 12:59:26 14 that. Now, we have -- we're a very small company.
 12:59:30 15 Very limited resources.
 12:59:32 16 So the decision to escalate to the PUC is
 12:59:36 17 not one we take lightly. Takes some time to work
 12:59:40 18 through the process to get to that point.
 12:59:42 19 Q. At any point that dPi was working through that
 12:59:46 20 process, did any AT&T representative do or say anything
 12:59:52 21 to make dPi believe that AT&T would voluntarily provide
 12:59:58 22 credit for these cash back promotional offerings for
 13:00:02 23 the time period we're talking about?
 13:00:04 24 A. It's very common in this dispute process for
 13:00:08 25 disputes to get denied and then later to be won. It's

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13:00:12 1 very common for disputes to go through multiple
 13:00:14 2 iterations back and forth, discussions, escalations,
 13:00:20 3 conferences, trading information back and forth and for
 13:00:24 4 the answer to go from no to yes.
 13:00:26 5 Simply because AT&T says no to a dispute
 13:00:30 6 doesn't mean that the ultimate outcome of that dispute
 13:00:32 7 is going to be no. And so it would be only after you
 13:00:42 8 had gotten no at every level and after you had gotten
 13:00:44 9 nowhere, there was -- there was no further process, no
 13:00:48 10 further discussion that could be had, that you would
 13:00:50 11 then escalate to the next level.
 13:00:54 12 There's always a good faith discussion
 13:00:58 13 that takes place, hopefully a good faith discussion
 13:01:02 14 that takes place, and oftentimes in our experience,
 13:01:06 15 BellSouth will say no initially and change their mind
 13:01:08 16 later. It's not uncommon that disputes get denied the
 13:01:12 17 first time they're filed and later get approved.
 13:01:16 18 Q. Understanding what you just said --
 13:01:18 19 A. Okay.
 13:01:18 20 Q. -- at any point during that process did anyone
 13:01:20 21 at BellSouth say anything to suggest that BellSouth
 13:01:24 22 would, in fact, provide the promotional credit that
 13:01:28 23 you're seeking in this docket?
 13:01:32 24 A. I'm trying to remember all of this testimony
 13:01:36 25 that I read. Whether there was anything in the

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13:01:40 1 testimony that any of our folks gave that says that
 13:01:44 2 yes, BellSouth at some point indicated that they would
 13:01:48 3 Q. Are you aware of any personally, sitting here
 13:01:52 4 today?
 13:02:00 5 A. I'm not aware of any point at which anybody at
 13:02:08 6 BellSouth said they would pay these cash backs. No.
 13:02:14 7 Q. Do you know when the escalation process began?
 13:02:22 8 You're claiming that dPi went through
 13:02:24 9 these layers of escalation.
 13:02:26 10 Do you have personal knowledge of when
 13:02:28 11 that escalation process began with regard to the
 13:02:30 12 promotions that are at issue in this docket?
 13:02:34 13 A. Other than those contained in the testimony,
 13:02:36 14 no.
 13:02:42 15 Q. You, in your discussion about things Mr. Bracy
 13:02:48 16 and her team had said, referenced a process by which we
 13:02:52 17 overbill you, and then you apply for a credit.
 13:02:56 18 A. That's right.
 13:02:56 19 Q. Do you have Mr. Sangle's direct testimony in
 13:03:00 20 front of you?
 13:03:16 21 A. Yes.
 13:03:16 22 Q. On pages 2 through 4 of the testimony under
 13:03:20 23 the heading "Overview of promotional credit request
 13:03:26 24 processed," she describes the process by which AT&T
 13:03:28 25 makes promotional offerings available to CLECs. When I

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13:03:32 1 say AT&T, I mean a BellSouth entity.
 13:03:36 2 Is that the process that you were
 13:03:38 3 referring to when you were saying we overbill you and
 13:03:40 4 then make you file for credit?
 13:03:46 5 A. Yes. Yes. That's the process. Yes. You
 13:03:54 6 bill us the full charge even though you know that that
 13:03:58 7 order qualifies for the promo.
 13:04:06 8 Q. Earlier I handed you a two-page document that
 13:04:10 9 was a response to question 7 and 8.
 13:04:14 10 Do you still have that document in front
 13:04:14 11 of you?
 13:04:18 12 A. Yes.
 13:04:22 13 Q. Let's now look at the answers to item No. 8.
 13:04:26 14 I'm going to ask you to read that first paragraph to
 13:04:30 15 yourself, and then I'll ask you questions about it when
 13:04:32 16 you've read it.
 13:04:38 17 MR. MALISH: Just read all of it.
 13:04:46 18 A. Okay.
 13:04:46 19 Q. (By Mr. Turner) In response to item 8, not
 13:04:50 20 SA, B, C or D but 8, there's a description of a
 13:04:54 21 process.
 13:04:54 22 Was this process in place during the
 13:04:56 23 entire time period covered by the disputes in this
 13:04:58 24 docket?
 13:05:06 25 A. I think there's testimony given by Steve

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13:06:24 1 process apply to the promotional credit request for all
 13:06:28 2 of the AT&T offerings that you see?
 13:06:32 3 A. All of the BellSouth offerings.
 13:06:34 4 Q. Yes.
 13:06:34 5 A. Yeah. This is the process for BellSouth.
 13:06:38 6 Q. Is it the same process that was used to
 13:06:38 7 identify the line connection charge waiver promotional
 13:06:42 8 request that dPi submitted to AT&T while BellSouth?
 13:06:48 9 A. Yes.
 13:06:52 10 Q. The first line of that response says Lost Key
 13:06:56 11 slash CGI.
 13:06:58 12 What is CGI?
 13:07:02 13 A. Lost Key is -- slash CGI, as I understand, is
 13:07:08 14 Steve Watson's operation.
 13:07:14 15 Q. Says that operation reviews the promotion to
 13:07:16 16 ascertain the necessary qualification steps.
 13:07:22 17 If you don't know, tell me. But do you
 13:07:22 18 know what that means?
 13:07:26 19 A. I'm sorry?
 13:07:28 20 Q. I don't understand what that sentence is
 13:07:30 21 supposed to mean. I'm asking you, can you help us
 13:07:32 22 understand that?
 13:07:32 23 And if you don't know, that's fine.
 13:07:34 24 A. We used a promotion to ascertain necessary
 13:07:38 25 qualifications steps.

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13:05:10 1 Watson that describes how this process was developed
 13:05:14 2 and the time frame under which he developed this
 13:05:16 3 process.
 13:05:18 4 Q. Mr. O'Roark, I'll tell you there is no
 13:05:20 5 testimony in this docket by Mr. Watson at all. If you
 13:05:26 6 can show me what you're referring to --
 13:05:30 7 A. It's not. Let's -- in the -- similar to the
 13:05:34 8 SCC cases.
 13:05:36 9 Q. Okay.
 13:05:36 10 MR. MALISH: If you don't know --
 13:05:38 11 A. Yeah. I have to defer to Steve on that. He
 13:05:42 12 developed this process over time.
 13:05:46 13 Q. (By Mr. Turner) And please don't take this as
 13:05:48 14 me being smart. I just need an answer for the
 13:05:52 15 deposition.
 13:05:52 16 Is the answer that you don't know if this
 13:05:52 17 process is in place the entire time?
 13:05:58 18 A. I don't know if this process was in place
 13:06:00 19 during the entire time. I believe this process was
 13:06:04 20 being developed during that time.
 13:06:08 21 Q. Is the process -- and if you don't know,
 13:06:10 22 simply tell me you don't know.
 13:06:12 23 But is the process described in response
 13:06:18 24 to item 8 there, is that process unique to the cash
 13:06:22 25 back promotions in this docket, or does that same

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13:07:38 1 Q. Yes, sir.
 13:07:42 2 A. Well, a promotion within its four corners will
 13:07:52 3 define what orders qualify for that promotion and what
 13:07:54 4 orders don't. And so what this in essence is saying to
 13:08:04 5 me in this sentence is that I review the promotion to
 13:08:08 6 see under what terms and conditions does this qualify
 13:08:12 7 for a promotion.
 13:08:12 8 For example, SBC is usually very clear.
 13:08:16 9 Has to have caller ID, call forwarding. Has to have
 13:08:20 10 call waiting. That's how SBC does it. All right?
 13:08:24 11 If the user doesn't have caller ID on it,
 13:08:26 12 it doesn't qualify. SBC is usually very specific about
 13:08:32 13 that. Has to have this feature or these two features
 13:08:36 14 on it or it doesn't qualify.
 13:08:36 15 And so you read the four corners of the
 13:08:38 16 document. You read the promotion. It's very clear
 13:08:42 17 about how that order has to be provisioned, what
 13:08:46 18 features, if any, have to be on that order in order for
 13:08:50 19 it to qualify.
 13:08:50 20 And I believe that's what this sentence
 13:08:52 21 says. Read the document to see what the terms and
 13:08:56 22 conditions of the promotion are and what -- how an
 13:09:00 23 order has to be provisioned in order to qualify.
 13:09:04 24 Q. Does dPi have any involvement in that first
 13:09:06 25 step?

13:09:10 1 I mean in response to 8A it says, "dPI
 13:09:16 2 helps identify the promotions to be applied for."
 13:09:18 3 My question is, does it help Lost Key/CGI
 13:09:22 4 review it and determine what the qualifications are, or
 13:09:26 5 does it rely solely on Lost Key to do all that?
 13:09:30 6 A. It's -- it's a cooperative teamwork effort
 13:09:34 7 between us and Lost Key. And usually what happens is
 13:09:40 8 Lost Key will come to us and say there's these three
 13:09:44 9 different promotions that are available right now
 13:09:46 10 today. In some cases those promotions are exclusive of
 13:09:50 11 one another. And you have to make decisions about,
 13:09:52 12 okay, we want to go for this promotion or we don't, but
 13:09:56 13 we don't want to go for this promotion. Right?
 13:10:00 14 You have to make choices. And in some
 13:10:02 15 cases the promotion is not cost effective. The
 13:10:08 16 customer has to be a certain way. The promotion is X
 13:10:12 17 dollars. The cost of provisioning the customer that
 13:10:16 18 way versus the savings that would result from the
 13:10:18 19 promotion are not offsetting or not sufficient. The
 13:10:20 20 economics are not sufficient to justify the additional
 13:10:24 21 effort to change our provision order so that it would
 13:10:26 22 qualify. So we have to make decisions.
 13:10:28 23 So when it says dPI helps identify the
 13:10:32 24 promotions to be applied for, that's basically what
 13:10:34 25 it's talking about are those decisions.

13:11:58 1 between product development and activations to make
 13:12:02 2 sure that the activations provisioning the product in
 13:12:06 3 such a manner that it complies with the promo and that
 13:12:08 4 the order will qualify for the promo. We've already
 13:12:10 5 reflected the reduction in cost in the product price
 13:12:14 6 through the product development process. Now we're on
 13:12:18 7 the backside, making sure that we order the product
 13:12:20 8 correctly so that it qualifies.
 13:12:22 9 If that order rejects for any reason, is
 13:12:26 10 unacceptable to the ILEC for any reason, won't go
 13:12:30 11 through the system for any reason, there's a closed
 13:12:32 12 loop process for that feedback to come back to product
 13:12:34 13 development. Product development will change its cost
 13:12:36 14 structure and change the LSR format so that it will now
 13:12:40 15 qualify. And it will go back to that testing process.
 13:12:44 16 Once the order had been tested and
 13:12:46 17 we're assured that it works and we can order the
 13:12:48 18 product that way, then the next step is to review the
 13:12:50 19 invoice when it comes in to make sure the cost gets
 13:12:54 20 reflected on the invoice, is what was expected based on
 13:12:56 21 how we developed the product, how we provision the
 13:13:00 22 product and the cost is the same, the cost -- the
 13:13:06 23 actual audit of that invoice, reveals the actual cost
 13:13:10 24 we received from BellSouth matches the anticipated cost
 13:13:14 25 that we build the product based upon -- which is not of

13:10:36 1 Q. The second sentence in response 8 says that
 13:10:40 2 Lost Key/CGI writes a program to identify those orders
 13:10:44 3 placed by dPI that meet those qualifying criteria.
 13:10:48 4 A. Right. Because we have to audit the bills.
 13:10:52 5 And determine which orders we got overbilled on and
 13:10:56 6 which orders we're due credit on. And Lost Key
 13:10:58 7 develops the programs that do that.
 13:11:02 8 Q. Let me ask this. Is that a pure after the --
 13:11:08 9 after the order has been submitted by dPI's order
 13:11:12 10 taken, for lack of a better term, the program looks
 13:11:14 11 and figures out which ones are subject to which
 13:11:18 12 promotions.
 13:11:18 13 Is that the way it works?
 13:11:20 14 Or on the front end would dPI --
 13:11:22 15 A. Here's how we do it. We develop a product
 13:11:26 16 based on the assumption that the product is going to
 13:11:28 17 qualify for the promotion. We identify what our net
 13:11:34 18 cost is going to be on that product after the
 13:11:36 19 promotional credit. We set our prices. Based on that
 13:11:38 20 net cost after the promotional credit.
 13:11:42 21 That product development process leads to
 13:11:44 22 -- to developing and defining the LSR, how the LSR
 13:11:48 23 needs to read in order for that order to qualify for
 13:11:50 24 this promotion. Okay?
 13:11:54 25 And then there's a -- there's a process

13:13:18 1 the promotional credit. Okay?
 13:13:20 2 So we're already passing through those
 13:13:22 3 promotional credit reflected in the price. The
 13:13:26 4 backside audit when we get the actual ILEC invoice is
 13:13:30 5 to see if the actual cost matched the theoretical or
 13:13:32 6 product development cost that was developed during the
 13:13:36 7 product development process. If it doesn't, then
 13:13:40 8 there's another close to the process.
 13:13:42 9 Did we provision it wrong, or did we bill
 13:13:44 10 the product wrong? Why did that order not qualify?
 13:13:48 11 What's wrong? And then we'll go back through that
 13:13:50 12 product. We'll go back through -- we'll audit that
 13:13:54 13 bill to see what's wrong. Did we order it wrong? Did
 13:13:56 14 activations order it wrong? Did product development
 13:14:00 15 bill it wrong? Why didn't it qualify?
 13:14:02 16 If the answer comes back activations
 13:14:04 17 built it correctly or product development built it
 13:14:06 18 exactly or activations ordered it correctly, the ILEC
 13:14:08 19 just didn't give us the credit, that then leads to the
 13:14:12 20 dispute. Right?
 13:14:14 21 Now, Steve Watson because -- because
 13:14:18 22 BellSouth refuses to issue the credit unless we file
 13:14:20 23 disputes, Steve Watson developed a program to go
 13:14:24 24 through the ILEC bills and identify to go through the
 13:14:28 25 -- the billing data we get from the ILEC and identify

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13:14:30 1 these orders that we should have gotten credit on but
 13:14:34 2 we didn't. That we ordered it correctly. We built it
 13:14:36 3 correctly, provisioned it correctly, should have gotten
 13:14:40 4 a credit but didn't. So we've got a mismatch between
 13:14:42 5 our expected cost and actual cost.
 13:14:44 6 He identifies those orders, and he files
 13:14:46 7 those promotional disputes. To say, hey, wait a
 13:14:50 8 minute, you owed us a credit. You didn't give it to
 13:14:52 9 us. You overbilled us. So we need a credit on this.
 13:14:56 10 That's what Steve does.
 13:15:02 11 Q. On item Exhibit 5, your basic service
 13:15:04 12 offering, tell me if I understood you correctly.
 13:15:10 13 This basic service offering is designed,
 13:15:12 14 if you will, to qualify for one or more existing AT&T
 13:15:20 15 North Carolina promotions.
 13:15:20 16 Did I hear you right?
 13:15:26 17 A. If there are conflicting promotions where we
 13:15:28 18 have to pick and choose between them which is the one
 13:15:32 19 that's most advantageous and we built the product and
 13:15:36 20 provision a product so that it will qualify for that
 13:15:38 21 promotion, that's correct.
 13:15:38 22 Q. Okay. If I heard you correctly, the basic
 13:15:42 23 service offering reflected on Exhibit 5 is built to
 13:15:48 24 qualify for at least the line connection charge waiver.
 13:15:52 25 Right?

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13:17:02 1 development process, and we'd have to adjust our price
 13:17:06 2 accordingly.
 13:17:06 3 Q. Does dPI offer anything to its end users in
 13:17:10 4 the way of a promotional -- some type of sales
 13:17:12 5 incentives that is not directly related to the offering
 13:17:16 6 that AT&T is making to its retail end users?
 13:17:30 7 A. Let me think about that.
 13:17:32 8 Certainly the prompt pay discount would
 13:17:34 9 be an example of something that we do that's not
 13:17:38 10 directly related to anything that AT&T does. There may
 13:17:40 11 be other examples. I just can't think of right now.
 13:17:44 12 Q. Perhaps a waiver of the first mobile tariff?
 13:17:46 13 A. Different term times -- different times during
 13:17:52 14 the history of the company there may have been
 13:17:54 15 promotions that we created and offered that didn't have
 13:17:56 16 anything to do with underlying AT&T promotion. But --
 13:18:04 17 Q. Can we agree that the first month free for the
 13:18:06 18 dPI Club Program is another example of an offering that
 13:18:10 19 dPI makes to incent customers to buy its services --
 13:18:14 20 A. First month free is a direct reflection of the
 13:18:16 21 cash back promotion.
 13:18:18 22 Q. Let me finish my question.
 13:18:20 23 MR. MALISH: He's asking about something
 13:18:22 24 else.
 13:18:22 25 A. Okay.

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13:15:54 1 A. Right. That's why it doesn't have any
 13:15:56 2 activation fee.
 13:15:58 3 Q. And AT&T is not required to offer its retail
 13:16:02 4 customers a line connection charge waiver, is it?
 13:16:04 5 A. Required to offer?
 13:16:06 6 Q. We're not required to, are we?
 13:16:10 7 A. No. You're not required to offer any
 13:16:12 8 promotions at all.
 13:16:12 9 Q. So if AT&T were to stop the line charge
 13:16:16 10 connection, that line connection waiver --
 13:16:18 11 A. We'd immediately have to start charging an
 13:16:22 12 activation fee.
 13:16:22 13 Q. Okay. Can we agree that AT&T is not required
 13:16:26 14 to provide cash back offers to its retail end users?
 13:16:30 15 A. You're not required to offer them. That's
 13:16:32 16 true.
 13:16:32 17 Q. So if AT&T stopped providing cash back offers
 13:16:36 18 to its retail end users, I take it that dPI will have
 13:16:38 19 to go in and change its offerings?
 13:16:42 20 A. That's exactly right. That's exactly right.
 13:16:46 21 Particularly in the case of the zero based offering
 13:16:48 22 that you're talking about here. We really have to
 13:16:52 23 adjust all of our pricing. If either the LOCW or the
 13:16:56 24 cash back offer went away, we'd have to immediately
 13:16:58 25 reflect that as a change in our cost, in our product

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13:18:24 1 Q. (By Mr. Turner) Go to Exhibit 5. The dPI
 13:18:28 2 Club Program. You see that which is described as
 13:18:32 3 involuntary employment insurance, grocery coupon
 13:18:36 4 savings book and DEC credit counseling services?
 13:18:40 5 A. That's non-telecom service. That's a
 13:18:42 6 non-regulated service.
 13:18:44 7 Q. That is something that AT&T does not provide
 13:18:46 8 to its end users, right?
 13:18:50 9 A. I don't know.
 13:18:52 10 Q. But you're offering that to your end user has
 13:18:56 11 nothing to do with anything you get from AT&T on a
 13:18:58 12 resale basis. Right?
 13:19:00 13 A. No. It's -- it's a different product. It's
 13:19:02 14 -- it's --
 13:19:04 15 Q. Okay.
 13:19:04 16 A. It's a non-regulated product that we make
 13:19:08 17 available to our customers. They can opt to take it or
 13:19:10 18 not take it.
 13:19:10 19 Q. So it's fair to say, isn't it, that dPI does,
 13:19:14 20 in fact, offer incentives and things to its customers
 13:19:18 21 that are unrelated to anything that AT&T is offering
 13:19:20 22 dPI?
 13:19:30 23 A. We do buy products and services from other
 13:19:34 24 providers than AT&T. So yes, some of our offerings are
 13:19:38 25 unrelated to AT&T.

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13:19:42 1 For example, the Club Program you
 13:19:44 2 mentioned that comes from a third party provider,
 13:19:46 3 unrelated to AT&T. Our issue not offering comes from a
 13:19:52 4 third party provider, unrelated to AT&T. Our long
 13:19:56 5 distance offer comes from a third party provider,
 13:19:58 6 unrelated to AT&T.
 13:20:00 7 So we do offer products and services
 13:20:04 8 where AT&T is not the underlying provider. But that's
 13:20:16 9 not true with regards to telephone service.
 13:20:20 10 MR. MALISH: Hold on. I'm going to
 13:20:20 11 object. Listen to his question. If he asks you a yes
 13:20:26 12 or no, answer with a yes or no.
 13:20:28 13 A. Okay.
 13:21:22 14 (Exhibit 8 marked.)
 13:21:22 15 Q. Mr. O'Roark, when you've had a chance to take
 13:21:26 16 a look at Deposition Exhibit 8, please let me know.
 13:21:28 17 A. Okay.
 13:22:06 18 Q. Mr. O'Roark, have you ever seen what we've
 13:22:08 19 marked as Deposition Exhibit 8 before?
 13:22:12 20 A. I may have. I don't recall.
 13:22:20 21 Q. On its face it appears to be a -- an
 13:22:22 22 engagement letter between Lost Key Telecom and dPi.
 13:22:28 23 Are you familiar with the workings or the
 13:22:32 24 relationship between dPi and the Lost Key Telecom?
 13:22:36 25 A. Yes.

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13:22:38 1 Q. Does this letter appear to accurately reflect
 13:22:42 2 the way that relationship works?
 13:23:06 3 A. Appears to be.
 13:23:08 4 Q. Do you -- do you know whether there is a
 13:23:12 5 signed version of this agreement in effect anywhere?
 13:23:14 6 A. I don't.
 13:23:16 7 Q. Okay. Were you involved in negotiating this
 13:23:20 8 agreement?
 13:23:20 9 A. No, I wasn't.
 13:23:52 10 Q. On the first page under product objectives,
 13:23:56 11 the last sentence under that paragraph says, "LKT,"
 13:24:02 12 which is Lost Key Telecom, "will also strategically
 13:24:06 13 develop" is the way it reads, "a strategy to send all
 13:24:10 14 back data starting with 2004, 2003, 2002, 2001 and
 13:24:16 15 2000."
 13:24:16 16 What does that mean, if you know?
 13:24:20 17 A. What's your question?
 13:24:22 18 Q. What does that sentence mean, if you know?
 13:24:28 19 A. It says LKT will submit all qualified data
 13:24:36 20 from nonrecurring recurring promotions and will also
 13:24:40 21 develop strategy to do the same for back data starting
 13:24:44 22 with 2004 back through 2000.
 13:24:48 23 Q. Well, help me understand.
 13:24:48 24 Does that mean that dPi had not submitted
 13:24:52 25 promotional credit requests for 2000, 2001, 2002, 2003

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13:24:58 1 and 2004?
 13:25:00 2 A. I believe in the -- well, my understanding is
 13:25:06 3 that Steve Watson developed this process on how to do
 13:25:12 4 it in conjunction -- working with BellSouth, that he
 13:25:16 5 was going through the process and developing the
 13:25:18 6 methodology, the technology, how to do it, writing
 13:25:22 7 software programs on how to do it, developing the
 13:25:24 8 process, testing that with the BellSouth people
 13:25:28 9 directly and that once he got that process working
 13:25:34 10 where he had the ability to do it, which was a very
 13:25:38 11 difficult process, by design a very difficult process,
 13:25:42 12 then he was able to run through all of the prior data
 13:25:46 13 through that process.
 13:25:48 14 Q. Okay. But --
 13:25:50 15 A. And see if -- whether or not we had received
 13:25:52 16 the credit that we were due and whether or not
 13:25:56 17 BellSouth had overbilled. And, in fact, it turned out
 13:26:00 18 BellSouth had overbilled us, and we were due credit for
 13:26:02 19 those prior years.
 13:26:04 20 Q. Here's my question. For those prior years
 13:26:06 21 that you just described, had dPi already submitted
 13:26:10 22 promotional credit requests to BellSouth, or for those
 13:26:16 23 prior years were those credit requests submitted only
 13:26:20 24 after that program had been implemented in 2004?
 13:26:44 25 A. I don't think -- I think the answer to that is

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13:26:48 1 I wasn't directly involved when. You're talking about
 13:26:50 2 a time prior to my employment with the company.
 13:26:54 3 But I don't believe they have been filed
 13:27:00 4 prior to Lost Key filing them.
 13:27:00 5 Q. When you say "filed," submitted to AT&T?
 13:27:04 6 A. Submitted to AT&T, right.
 13:27:08 7 Nor do I believe we had any ability or
 13:27:10 8 any method to do that. It was only after Lost Key was
 13:27:16 9 able to work with AT&T to develop that process that we
 13:27:18 10 had the ability to do it. And then we had the ability
 13:27:22 11 to submit our data, run our data through that process
 13:27:26 12 and determine whether or not we had been overbilled by
 13:27:30 13 AT&T.
 13:27:30 14 And it turned out we had been overbilled
 13:27:32 15 by AT&T and were due credit that we never received.
 13:27:36 16 Q. On the first page under "Method," last
 13:27:40 17 sentence in that first paragraph says, "Specifically
 13:27:42 18 dPi will provide the following information, access and
 13:27:46 19 support to LKT."
 13:27:48 20 The first item there is the monthly
 13:27:50 21 BellSouth slash SBC resale data. What does that mean?
 13:28:00 22 A. I think that means any billing data that we
 13:28:06 23 receive from BellSouth or SBC. In whatever format it's
 13:28:14 24 received. Whether that's billing data, tape or a PDF
 13:28:18 25 file or whatever format that's received, it was

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13:28:22 1 received.

13:28:22 2 Q. Okay. So that's the monthly bill, if you

13:28:28 3 will, that BellSouth will send to dPi?

13:28:32 4 A. I think it's what's commonly called the DAM.

13:28:36 5 Q. Yeah. The second bullet point is one point of

13:28:42 6 contact within dPi who has end to end knowledge of

13:28:46 7 current dPi processes to drive any identified issues

13:28:50 8 and/or designate findings and results internally within

13:28:54 9 the organization."

13:28:56 10 What does that mean?

13:29:04 11 A. One point of contact. It means that they

13:29:06 12 wanted to deal with one person. They wanted to have

13:29:08 13 one person to deal with.

13:29:12 14 Q. To the extent that you know, could you tell us

13:29:14 15 who that one point of contact has been?

13:29:16 16 A. Brian Bollinger.

13:29:22 17 Q. After Mr. Bollinger left, who is the primary

13:29:26 18 point of contact now?

13:29:26 19 A. Me.

13:29:40 20 Q. Let me understand the contractual relationship

13:29:42 21 here.

13:29:44 22 When Ms. Seagle sent the e-mail to Mr.

13:29:48 23 Watson saying we will not provide a credit for cash

13:29:52 24 back promotions, could you expect Mr. Watson to convey

13:29:56 25 that information to dPi?

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13:32:20 1 Q. Go with us to the next page. It's the third

13:32:22 2 page under fees and expenses.

13:32:28 3 A. Yes.

13:32:30 4 Q. Under the heading "Current promotional and

13:32:36 5 dispute fees," it says everything from July 1st, 2004

13:32:42 6 forward for 2004 and 2005 is 5 percent and for 2006 is

13:32:50 7 3 percent.

13:32:52 8 Tell me, in your understanding, what that

13:32:54 9 means.

13:32:56 10 A. That the credit we receive on our invoices

13:33:02 11 from BellSouth that Stove would then get, bill us a fee

13:33:10 12 for the 3 percent. Effectively a success fee.

13:33:16 13 Q. Okay. The next heading down it says "Back

13:33:22 14 promotional and dispute fees." "Duration of agreement

13:33:26 15 will be 10 percent of promotional and disputes paid."

13:33:30 16 I take it that means to the extent that

13:33:32 17 any promotional credits are provided for services

13:33:38 18 rendered before 2004, that 10 percent number applies?

13:33:44 19 A. That's the way I would read it.

13:33:48 20 Q. Do you know how much Lost Key stands to gain

13:33:50 21 if dPi is successful in this docket in North Carolina?

13:33:58 22 A. No.

13:34:02 23 Q. Back up one paragraph above the back

13:34:06 24 promotional and dispute fees line. Paragraph begins,

13:34:10 25 "All rates schedules will change on anniversary date of

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13:30:00 1 A. Yes.

13:30:26 2 Q. On the second page -- and it's numbered on the

13:30:30 3 second page recurring promotional credit line. In the

13:30:32 4 first bullet point under objectives reads, Primary

13:30:36 5 objective of the recurring promotional credit is to

13:30:38 6 identify BTN-WTINs and features that are qualified to

13:30:48 7 receive credit based on promotional specifications

13:30:52 8 within the BellSouth/SBC?

13:30:54 9 Is that basically the same as they're

13:30:58 10 going to develop this computer program that you

13:31:00 11 described earlier?

13:31:04 12 A. They'll take the billing data and determine

13:31:08 13 whether or not we received the credit that we're

13:31:10 14 entitled to receive. And if we didn't, we were

13:31:12 15 overbilled, to apply for the file dispute, generate a

13:31:16 16 file dispute.

13:31:40 17 Q. Based on this contract -- let me just ask it

13:31:44 18 this way.

13:31:46 19 Is it fair to say most of the supporting

13:31:48 20 documents in the testimony of Mr. Bollinger were

13:31:52 21 actually prepared by Lost Key Telecom?

13:32:00 22 A. I don't -- I don't know that. But, for

13:32:06 23 example, I think I've already testified that the dollar

13:32:10 24 amounts were developed by Lost Key Telecom. I believe.

13:32:12 25 It's my belief.

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13:34:14 1 the agreement."

13:34:16 2 My question to you is, do you know what

13:34:18 3 the current rate schedule is?

13:34:18 4 A. 5 percent.

13:34:22 5 Q. So in 2006 it would have been 3 percent.

13:34:26 6 Right?

13:34:30 7 A. Right. Yes.

13:34:32 8 Q. Today it's 5 percent.

13:34:32 9 Why did it jump from 3 percent back up to

13:34:36 10 5 percent?

13:34:38 11 A. Negotiation.

13:34:40 12 Q. Were you involved in that negotiation process

13:34:42 13 of the change?

13:34:44 14 A. Yes. Yes.

13:34:48 15 Q. What specifically during the negotiation

13:34:52 16 process made you go from a 3 percent number back up to

13:34:54 17 a 5 percent number?

13:35:00 18 A. I don't know. It's been a while since I --

13:35:12 19 since we had the negotiation. I'd have to go back and

13:35:18 20 revisit my notes and -- and take a look at the new

13:35:22 21 contract. But --

13:35:28 22 Q. Did you say "take a look at the new contract?"

13:35:38 23 Is there a new contract?

13:35:38 24 A. This contract covers up through 2006.

13:35:42 25 Correct?

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13:35:42 1 Q. I'm asking you. That's all I have.
 13:35:46 2 A. Okay.
 13:35:46 3 Q. Is there a new contract?
 13:35:50 4 A. I don't -- I don't know if there's a new -- I
 13:35:52 5 don't believe there is a new contract with Lost Key
 13:35:56 6 Telecom, no.
 13:35:56 7 I think we're paying 5 percent today to
 13:36:00 8 Lost -- to Lost Key slash CGI or CGN.
 13:36:06 9 Q. Is there any documentation, e-mails, anything
 13:36:08 10 that reflects the change from the 3 percent number in
 13:36:12 11 2006 in this document to the 5 percent number that you
 13:36:16 12 just referenced?
 13:36:18 13 A. There may be. I'd have to look.
 13:36:22 14 MR. TURNER: Chris, that is one thing
 13:36:24 15 we're going to need.
 13:36:46 16 Q. (By Mr. Turner) It's pretty clear that this
 13:36:48 17 is not going to happen, but I'm trying to use this as
 13:36:50 18 an example to understand the relationship between Lost
 13:36:52 19 Key and dPI.
 13:36:54 20 Mr. O'Roark, let's just assume that dPI
 13:36:56 21 decided we're not going to seek this recovery in the
 13:37:00 22 State of North Carolina.
 13:37:04 23 Is that a decision under the relationship
 13:37:06 24 between Lost Key and dPI that dPI alone can make, or is
 13:37:12 25 that something that dPI's required to consult with Lost

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13:39:20 1 A. This is Seagle.
 13:39:26 2 MR. TURNER: Chris, do you need a copy?
 13:39:28 3 I've got one here.
 13:39:32 4 MR. MALISH: Here. Bracy.
 13:39:38 5 A. South California?
 13:39:46 6 Q. (By Mr. Turner) Mr. O'Roark, I'm going to
 13:39:50 7 hand you a copy of the testimony right here.
 13:39:52 8 A. Okay.
 13:39:52 9 Q. You can have your counsel look on with you.
 13:39:58 10 Be asking you about page 6 to begin with.
 13:40:28 11 A. Okay.
 13:40:30 12 Q. On lines 12 through 16, Ms. Bracy testifies
 13:40:34 13 that AT&T did not provide dPI any of the cash back
 13:40:38 14 promotional credit it requested from billing periods
 13:40:42 15 prior to July 2007.
 13:40:44 16 You agree with that testimony, don't you?
 13:40:46 17 A. Yes.
 13:40:48 18 Q. The next question and answer reflects that the
 13:40:50 19 first time Ms. Bracy became aware that dPI intended to
 13:40:56 20 seek payment for cash back promotional credit requests
 13:41:00 21 that it had previously submitted to AT&T and that AT&T
 13:41:04 22 previously had not paid was in early 2008.
 13:41:08 23 My question to you is, do you know if dPI
 13:41:14 24 told AT&T that it was going to challenge AT&T's prior
 13:41:20 25 denial of cash back promotional request prior to that

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13:37:16 1 Key before giving up that claim?
 13:37:36 2 A. If we -- you're saying if we agree to abandon
 13:37:42 3 our claim --
 13:37:42 4 Q. Just assume you did not pursue the North
 13:37:46 5 Carolina claim for 156,000.
 13:37:48 6 Is that a decision solely within dPI's
 13:37:50 7 promise to make, or does it have to consult with Lost
 13:37:54 8 Key to see if Lost Key is willing to do that?
 13:38:00 9 A. I believe that's a decision dPI can make on
 13:38:04 10 its own.
 13:38:06 11 And I think that Lost Key is only paid
 13:38:12 12 other than any upfront fees or fixed fees on a
 13:38:16 13 successful efforts basis. If we don't receive credit
 13:38:22 14 from BellSouth, then nothing is due to Lost Key.
 13:38:26 15 So we don't -- I don't believe that
 13:38:28 16 there's any approval required from Lost Key for us to
 13:38:36 17 negotiate in a settlement of a dispute and/or to agree
 13:38:40 18 to lose a dispute or to abandon a dispute.
 13:38:46 19 Q. Moving on to Ms. Bracy's testimony.
 13:38:50 20 Do you have AT&T witness Nicole Bracy's
 13:38:52 21 testimony, the direct that was filed on November 5th,
 13:39:02 22 2008?
 13:39:02 23 A. Ms. Bracy's.
 13:39:04 24 MR. MALISH: It's in here I think.
 13:39:10 25 MR. TURNER: I've got it.

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13:41:24 1 time?
 13:41:26 2 In other words, dPI submitted a request.
 13:41:28 3 It had not been paid.
 13:41:30 4 When is the earliest that you contend dPI
 13:41:34 5 informed AT&T, We disagree with that, and we're going
 13:41:36 6 to challenge it?
 13:41:56 7 A. I don't -- I don't understand. We don't file
 13:42:00 8 claims, and we don't intend to have credit. Right?
 13:42:04 9 We're putting you on notice that we
 13:42:08 10 intend to receive that credit.
 13:42:10 11 Q. And then the credit becomes denied?
 13:42:12 12 A. Which happens almost on every claim we file.
 13:42:16 13 Right?
 13:42:16 14 Until recently. Right.
 13:42:18 15 Q. And my question was, when that claim was
 13:42:20 16 denied and not paid, when did dPI first come to AT&T
 13:42:24 17 and say, We dispute the denial, and we're going to
 13:42:26 18 escalate?
 13:42:28 19 A. I don't know. I'd have to go check. But we
 13:42:34 20 typically do not -- we get routine denials of disputes
 13:42:40 21 we file, and we typically do not accept those denials.
 13:42:42 22 And we typically and routinely escalate those claims.
 13:42:46 23 Q. Well, my question is this. Earlier you
 13:42:48 24 mentioned that part of the reason for waiting so long
 13:42:52 25 to bring this to the Commission was to go through the

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13:42:54 1 entire dispute escalation process.

13:42:58 2 And my question to you is, do you, as

13:43:02 3 dPi's witness in this proceeding, know when dPi first

13:43:06 4 began that escalation process?

13:43:10 5 A. I don't know when dPi first began that

13:43:14 6 escalation process. But it's not a unilateral process.

13:43:20 7 Right?

13:43:20 8 I mean, merely -- merely because AT&T

13:43:24 9 denies a claim doesn't change the nature of the claim.

13:43:28 10 Q. Okay.

13:43:28 11 A. Doesn't change the validity of the claim.

13:43:32 12 Doesn't change anything. In order for there to be a

13:43:34 13 resolution of dispute, there has to be a meeting of the

13:43:38 14 minds.

13:43:38 15 And so the fact that we receive a denial

13:43:42 16 from AT&T on a claim we file doesn't change the nature

13:43:46 17 of that claim.

13:43:46 18 Q. Okay. Go with me to Exhibit NWB-1 of Ms.

13:43:52 19 Bracy's testimony.

13:43:54 20 A. Uh-huh.

13:44:02 21 Q. Is there anything on that exhibit that you

13:44:08 22 personally can say is inaccurate?

13:44:14 23 A. That I can personally say what?

13:44:16 24 Q. Is inaccurate, is wrong.

13:44:22 25 A. This is an exhibit that was prepared by AT&T?

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13:45:48 1 Assessing this information is accurate, if

13:45:52 2 it is, do you have any way of knowing why dPi would

13:45:56 3 wait three years to seek the promotional credit request

13:46:00 4 in the first place?

13:46:02 5 A. Well, we've already talked about the fact that

13:46:04 6 we didn't have any ability to -- to audit those bills

13:46:10 7 to determine if we'd been overcharged until Steve

13:46:12 8 Watson developed his process, developed his program and

13:46:16 9 was able to process that data.

13:46:18 10 That was a very difficult process. Steve

13:46:20 11 went through multiple iterations working with AT&T

13:46:24 12 BellSouth people to develop that process. That takes

13:46:26 13 time.

13:46:28 14 Q. When did he begin that process?

13:46:30 15 A. Not sure. We could look at a contract.

13:46:36 16 Right?

13:46:36 17 What's the date of that contract?

13:46:38 18 Q. 2004.

13:46:40 19 A. August of 2004.

13:46:52 20 And you would assume that he would start

13:46:54 21 with the most recent data first and get to go month by

13:46:56 22 month on that data. So he's starting in August of 2004

13:47:00 23 and working backwards.

13:47:02 24 At what point did he get to November

13:47:04 25 of 2003? This says he filed that -- if this is

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13:44:28 1 I don't see how I could.

13:44:40 2 Q. Look at that first line of the exhibit. In

13:44:46 3 column two it indicates that the billing period for

13:44:50 4 that specific request was the November 8th, 2003

13:44:58 5 billing period.

13:44:58 6 Do you see that?

13:44:58 7 A. Uh-huh.

13:45:02 8 Q. Column three on the same row indicates that

13:45:08 9 Lost Key submitted that credit request to AT&T January

13:45:12 10 of 2006.

13:45:14 11 Do you see that?

13:45:14 12 A. Uh-huh.

13:45:16 13 Q. Why is there a three-year gap in the time

13:45:20 14 frame from the -- your reselling the promotion to your

13:45:24 15 end user and you're asking AT&T for a credit?

13:45:28 16 A. I don't know that there was. This is your

13:45:30 17 document that you prepared. You're asking me to defend

13:45:34 18 your document or explain your document?

13:45:36 19 I don't know that this document is

13:45:38 20 accurate in any respect.

13:45:40 21 Q. And you don't know that it's inaccurate,

13:45:42 22 right?

13:45:42 23 A. I don't, no.

13:45:44 24 Q. Let's assume. I'm not asking you to admit it.

13:45:48 25 This is not a trick.

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13:47:10 1 accurate, which I have no way of knowing if it is or

13:47:12 2 not, this says he got to the August of 2003 sometime

13:47:16 3 around January of '06. It looks like he got to August,

13:47:22 4 December, sometime around then.

13:47:26 5 So, you know, when -- when he -- I guess

13:47:30 6 he's working through this process and trying to develop

13:47:32 7 this process. It looks like some of these you filed in

13:47:46 8 2005. Looks to me as if he got the product up and

13:48:02 9 working sometime around 12/23/2005. Looks like that's

13:48:04 10 the earliest date she's got here.

13:48:06 11 And then he's working backwards. And he

13:48:08 12 got back to 2003 stuff on one -- 1/2/06. Looks like he

13:48:16 13 did 7/8/06 stuff in August.

13:48:22 14 So I'm not sure. Just took him some

13:48:28 15 process. The earliest dates -- it looked like the

13:48:30 16 first time he filed anything here is in December

13:48:36 17 of 2005. So I would assume that from the time we

13:48:38 18 signed this contract with him until 2005 he's working

13:48:42 19 on this process. He's developing this process. And

13:48:44 20 he's getting to this older data, and -- he's going back

13:48:48 21 and -- and working through current data and getting

13:48:50 22 back to this older data, and he's finally getting back

13:48:52 23 to -- to these dates -- to this data and getting this

13:48:56 24 stuff filed.

13:48:58 25 He had a lot of data to work through

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13:48:58 1 obviously. Current data, current month data, as well
 13:49:02 2 as going back to previous data.
 13:49:08 3 Q. If a dPI end user came to you and said, You
 13:49:14 4 made an error on my bill three years ago, would dPI
 13:49:18 5 entertain that request, or do you have a policy about
 13:49:20 6 how far back you go?
 13:49:28 7 A. You made an error on my bill three years ago.
 13:49:34 8 You know, if -- we would certainly consider it. We
 13:49:44 9 would take a look at it. And if we made an error on
 13:49:46 10 the bill and it's valid and we could prove that -- a
 13:49:50 11 customer could prove to us that we had made an error on
 13:49:52 12 the bill, we certainly wouldn't -- and we'd comply with
 13:50:02 13 rules and regulations.
 13:50:06 14 For example, if we were under a Fourth
 13:50:08 15 Circuit court order to do something, we certainly would
 13:50:12 16 do it.
 13:50:12 17 Q. Do you have a policy that tells your service
 13:50:16 18 representatives how far back to go in resolving
 13:50:20 19 customer billing issues?
 13:50:22 20 Or do you know?
 13:50:26 21 A. A written policy?
 13:50:28 22 Q. Uh-huh.
 13:50:28 23 A. I don't know. I'd have to look. I don't know
 13:50:42 24 in my experience that we've ever had that situation
 13:50:46 25 come up.

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13:50:46 1 Q. Kind of unusual for someone to come in that
 13:50:50 2 late?
 13:50:50 3 A. Yeah. Would be unusual for an end user
 13:50:54 4 subscriber to do something like that.
 13:50:56 5 Q. Mr. O'Roark, does dPI contend the competition
 13:51:00 6 in North Carolina was somehow stifled or unduly harmed
 13:51:06 7 by AT&T not providing the credit you're requesting in
 13:51:10 8 this docket?
 13:51:14 9 A. Well, I think it's clear that our growth has
 13:51:18 10 been stifled. We only have 50,000 subscribers
 13:51:20 11 nationwide. We're a little, tiny company. We have
 13:51:26 12 immeasurable markets. If it wasn't for the billing
 13:51:30 13 market conditions, we'd be a much larger company, have
 13:51:32 14 many more subscribers than we do.
 13:51:34 15 We've been in business ten years. In ten
 13:51:36 16 years we've been able to accumulate a grand total of
 13:51:40 17 50,000 subscribers over 30 plus states that we do
 13:51:42 18 business in. It's clear that we're not -- we're not
 13:51:46 19 anywhere close to your size. We're not anywhere close
 13:51:48 20 to -- very small company. We're very small, almost
 13:51:54 21 immeasurable market share in any market we're in. We
 13:51:58 22 don't -- we're almost insignificant in terms of our
 13:52:00 23 percentage market share in almost any state and clearly
 13:52:04 24 in any -- almost any local market.
 13:52:08 25 It's clear that we haven't had huge

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13:52:10 1 success in growing our company and that we hadn't had
 13:52:14 2 great success in this. And we're not -- we're not --
 13:52:18 3 you know, we've struggled to make a profit. We are a
 13:52:22 4 profit, but we're not -- we're not hugely a profit.
 13:52:24 5 Q. Mr. O'Roark --
 13:52:26 6 A. A minimal profit.
 13:52:28 7 Q. -- are you seriously contending that if AT&T
 13:52:30 8 had provided the \$156,000 in promotional credit
 13:52:36 9 requests that are at issue in this docket, dPI would be
 13:52:38 10 a significantly larger company?
 13:52:40 11 A. I'm -- if you're talking about \$100 cash back
 13:52:46 12 that would have been available to an end user subscriber
 13:52:50 13 back in these years that I could have passed that
 13:52:52 14 through to the new subscriber and offered them \$100
 13:52:56 15 discount, would I have been able to grab additional
 13:52:58 16 market share and grow much more quickly? Yes.
 13:53:02 17 Absolutely I'm saying that. No question about it.
 13:53:06 18 Q. That's not what I'm asking. You talked about
 13:53:08 19 how small you are compared to AT&T.
 13:53:10 20 There's \$156,000 at stake in this
 13:53:12 21 proceeding, right?
 13:53:12 22 A. That's a lot of money.
 13:53:14 23 Q. How big would you have gotten if you had
 13:53:16 24 gotten that \$156,000?
 13:53:18 25 How many more customers would you have

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13:53:20 1 today?
 13:53:22 2 A. I don't know. How -- I mean how -- how can I
 13:53:28 3 predict that? \$156,000 of additional credit must be
 13:53:32 4 offered to my customers in terms of reduced pricing in
 13:53:34 5 North Carolina.
 13:53:36 6 How much more quickly could I have grown
 13:53:36 7 in North Carolina and how much larger would I be able
 13:53:40 8 to be in North Carolina.
 13:53:40 9 Is that what you're asking me?
 13:53:42 10 Q. Yeah.
 13:53:42 11 A. How can I predict that? How do I know that?
 13:53:46 12 Q. Let me ask you this.
 13:53:46 13 If you had gotten the \$156,000 that's in
 13:53:50 14 dispute in this docket, how would that have reduced the
 13:53:54 15 claim that you were experiencing as a business?
 13:54:00 16 MR. MALISH: Object to the form of the
 13:54:02 17 question.
 13:54:04 18 Q. (By Mr. Turner) You can answer.
 13:54:12 19 A. Well, for one thing those customers that are
 13:54:18 20 enticed away from me because they can go to BellSouth
 13:54:20 21 and get a \$100 credit from BellSouth would have been
 13:54:24 22 just as likely to have been enticed to me. Right?
 13:54:28 23 And so while it wouldn't have necessarily
 13:54:32 24 affected my claim, it could clearly have affected my
 13:54:36 25 ability to outgrow my claim. And it would have driven

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13:54:40 1 -- and it clearly could have impacted on driving my
 13:54:42 2 turn-down as a percentage of my total customer base.
 13:54:46 3 The fact that I -- that you had that
 13:54:48 4 credit out there and available in the marketplace and
 13:54:50 5 you weren't giving it to me put me at a huge
 13:54:54 6 competitive disadvantage relative to you and relative
 13:54:58 7 to anybody else that you gave that credit to and
 13:55:00 8 clearly drove down the retail -- the effective retail
 13:55:04 9 price a customer could pay.
 13:55:06 10 And I was not able to compete with that.
 13:55:08 11 I was not able to offer that to my retail customers.
 13:55:10 12 Surely you're not suggesting that \$100
 13:55:12 13 off in month one is not a hugely impactful reduction in
 13:55:18 14 the net retail price that customers were paying.
 13:55:22 15 Q. Your prices today reflected on Exhibit 5
 13:55:24 16 reflect the flow through of the promotional credit
 13:55:26 17 request that is happening today.
 13:55:28 18 Correct?
 13:55:28 19 A. Zero price. Yes, it does. Right? The LCCW
 13:55:32 20 credit and the cash back credit.
 13:55:34 21 Q. And in month three your customer is paying
 13:56:06 22 \$53.23 for basic service. Right?
 13:56:10 23 A. Which exhibit are you looking at?
 13:56:12 24 Q. Exhibit 5.
 13:56:22 25 A. Right.

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13:58:14 1 I'm -- my cost is just slightly less than what your
 13:58:18 2 retail customer pays. Right? 20 percent. Right?
 13:58:24 3 So if the retail cost of that product is
 13:58:26 4 \$25, and I'm getting a 20 percent discount off of it
 13:58:32 5 -- let's say theoretically 20 percent discount. You're
 13:58:34 6 selling it to your customer for \$25, and my cost is
 13:58:38 7 only \$5 less \$20. Right? In month two, three, four
 13:58:46 8 thereafter. Right?
 13:58:50 9 Are you suggesting that I would only make
 13:58:52 10 \$5 per customer?
 13:58:56 11 Q. I'm asking you the question, sir.
 13:58:58 12 A. Okay. The question -- I guess the question to
 13:59:02 13 me doesn't make any economic sense.
 13:59:04 14 The promotional credit is only a month
 13:59:08 15 one issue. You're using it to acquire customers in
 13:59:10 16 month one. You've been ordered by the Fourth Circuit
 13:59:14 17 to pass it through to us as effective reducing retail
 13:59:16 18 price. And in month one it clearly does.
 13:59:22 19 We're not talking about a promotional
 13:59:22 20 credit that's available in month two, three, four and
 13:59:26 21 five. If there was such a promotional credit
 13:59:28 22 available, we would apply for it.
 13:59:32 23 Q. Now, you've been talking about how AT&T's
 13:59:36 24 decision not to provide these credits impacted one
 13:59:40 25 competitor, dFi?

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13:56:26 1 Q. So when you're getting the promotional credit,
 13:56:32 2 your month three rate, which is really the flat line
 13:56:34 3 rate that extends is \$3.23?
 13:56:36 4 A. The promotional credits are not recurring.
 13:56:40 5 They're only month one.
 13:56:40 6 Q. Assume with me that the AT&T basic service
 13:56:44 7 price in North Carolina is around \$25. Just make that
 13:56:48 8 assumption for me.
 13:56:52 9 Are you contending that you're competing
 13:56:54 10 with AT&T for that customer when your price is \$3.23
 13:56:58 11 for month three and beyond?
 13:57:00 12 A. \$23 all in, including taxes, surcharges,
 13:57:04 13 everything?
 13:57:04 14 Q. Let's assume it does. If AT&T price for basic
 13:57:10 15 in month three and beyond is significantly lower than
 13:57:12 16 yours, I'm trying to understand how you contend that
 13:57:16 17 you were really competing with that customer.
 13:57:30 18 MR. MALISSE: Object to the form.
 13:57:30 19 Q. (By Mr. Turner) You can answer.
 13:57:40 20 A. I don't -- let me think about that. These
 13:57:54 21 promotional credits are only available on month one.
 13:57:58 22 They're not recurring credits. They're not available
 13:58:00 23 in month two, month three, month four.
 13:58:04 24 Since I'm buying my product from you as a
 13:58:08 25 slight discount off your retail tariff, then obviously

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13:59:42 1 A. All of the competitors.
 13:59:44 2 Q. My question is, do you contend that
 13:59:46 3 competition in North Carolina, not one competitor but
 13:59:50 4 competition in North Carolina, was stifled or unduly
 13:59:54 5 harmed by AT&T's not providing the credit you're
 13:59:56 6 requesting in this docket?
 14:00:00 7 A. I think AT&T not providing it to CLECs in
 14:00:06 8 general, yes, it did. It gave AT&T an unfair
 14:00:12 9 advantage. It reduced the retail price, effectively
 14:00:14 10 reduced the retail price, by \$100. And you didn't pass
 14:00:18 11 through that effective reduction of retail price to the
 14:00:22 12 CLEC community of which dFi is one. And, therefore, we
 14:00:32 13 didn't -- all of us were at a competitive disadvantage.
 14:00:36 14 Q. So you would agree with me, won't you, that
 14:00:40 15 AT&T North Carolina did not pass these credits to some
 14:00:44 16 prepaid resellers but not to others?
 14:00:48 17 MR. MALISSE: Can you say that again?
 14:00:52 18 A. It -- it -- yeah. You're asking me -- did you
 14:00:56 19 give it to Budget? Did you give it to Teleconex?
 14:01:00 20 My understanding is that -- in some of
 14:01:02 21 the other testimony and some of the other studies I
 14:01:04 22 read that you did, in fact, give these promotional
 14:01:10 23 credits to Budget, Teleconex, 100 percent almost.
 14:01:12 24 Q. (By Mr. Turner) You talking about how
 14:01:14 25 connection waiver, or are you talking about the cash

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14:01:16 1 back?

14:01:16 2 A. I'm not sure. I'm just saying that I know

14:01:20 3 that you gave some promotional credit to Budget that

14:01:22 4 you didn't give to us. I know you gave some

14:01:26 5 promotional to Teleconex you didn't give to us.

14:01:30 6 Whether it was line waiver or cash back, I'm not sure.

14:01:32 7 In reading the testimony I was reading --

14:01:34 8 in preparing for this hearing, I read through the

14:01:36 9 testimony. I saw that those issues were allowed in

14:01:42 10 some of the testimony I read. And so -- and I think

14:01:46 11 some of the testimony I saw from AT&T said that yes,

14:01:48 12 you did do that. And then you were giving them

14:01:52 13 100 percent. At some point you stopped doing that, and

14:01:54 14 we -- we were the ones that -- that didn't get anything

14:02:00 15 and didn't get what we applied for. You stopped doing

14:02:06 16 that.

14:02:06 17 And so I think -- I think that there is a

14:02:08 18 very distinct possibility that you gave these credits

14:02:12 19 to some CLECs that you didn't give them to us. I don't

14:02:14 20 -- have no way of knowing that. How would I know that?

14:02:18 21 Q. Well, Mr. O'Roark, what I'm trying to figure

14:02:22 22 out is what you can and can't testify to.

14:02:24 23 A. I can't testify one way or the other when I

14:02:26 24 don't have any direct knowledge of that.

14:02:28 25 Q. Okay. All I need.

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14:02:28 1 A. Okay.

14:02:30 2 MR. TURNER: Let's take a break. Let me

14:02:32 3 see if there's anything else.

14:02:32 4 (Break taken from 2:02 p.m. to 2:09 p.m.)

14:09:14 5 MR. TURNER: We're back on the record.

14:09:16 6 Chris, I'm going to ask the court

14:09:18 7 reporter to mark dP1's second supplemental responses to

14:09:22 8 interrogatories that we discussed with Mr. O'Roark as

14:09:24 9 the next deposition exhibit.

14:09:46 10 (Exhibit 9 marked.)

14:09:50 11 MR. TURNER: Chris, while we're on the

14:09:50 12 record, there were a number of items that were

14:09:52 13 referenced as potential follow-ups.

14:09:56 14 MR. MALISH: Uh-huh.

14:09:56 15 MR. TURNER: What I am going to suggest

14:09:58 16 is that the court reporter believes she can turn around

14:10:02 17 a copy of the deposition within ten business days.

14:10:04 18 What I'm going to suggest is let me look

14:10:06 19 through it as that time and then send you either a

14:10:10 20 letter or a supplemental, you know, discovery request

14:10:14 21 and somehow find an organized way to get it all at

14:10:18 22 once.

14:10:18 23 MR. MALISH: Right. That's fine. I

14:10:20 24 would brief if it was a supplemental discovery request.

14:10:24 25 You can couch it as a letter, if you want to.

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14:10:26 1 MR. TURNER: Sure.

14:10:26 2 MR. MALISH: I think that would -- To

14:10:30 3 rather have sort of a checklist to work from.

14:10:32 4 MR. TURNER: I do understand. There are

14:10:34 5 limits to the number of interrogatories in North

14:10:38 6 Carolina.

14:10:38 7 MR. MALISH: Okay.

14:10:38 8 MR. TURNER: Assuming the follow-up is

14:10:40 9 within reason, based solely on this deposition, do you

14:10:44 10 anticipate objecting to it if it goes beyond a total of

14:10:48 11 50?

14:10:48 12 MR. MALISH: I would be surprised if it

14:10:50 13 got that high. You mean --

14:10:52 14 MR. TURNER: In total.

14:10:52 15 MR. MALISH: Not 50 more.

14:10:54 16 MR. TURNER: Not 50 more.

14:10:56 17 MR. MALISH: I wouldn't have a problem

14:10:58 18 with that.

14:10:58 19 MR. TURNER: And, finally, understanding

14:11:00 20 and respecting the concerns about the witness appearing

14:11:04 21 at the hearing, if there is a change, if the witness --

14:11:08 22 we are going to have some concerns, we will address it

14:11:12 23 hopefully together and not with the Commission.

14:11:14 24 MR. MALISH: Right.

14:11:14 25 MR. TURNER: Don't expect to have that

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14:11:16 1 discussion now, but I did want to put you on notice

14:11:18 2 that.

14:11:18 3 MR. MALISH: Oh, I'm sure.

14:11:20 4 MR. TURNER: Unless you have any further

14:11:22 5 questions for Mr. O'Roark, I think the deposition is

14:11:24 6 concluded.

14:11:26 7 MR. MALISH: We will reserve ours.

14:11:28 8 MR. TURNER: Okay. Thank you.

14:11:28 9 (Deposition concluded at 2:11 p.m.)

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CHANGES AND SIGNATURE

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2 WITNESS: THOMAS O'ROARK DATE: 8/25/09

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BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

1

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3

4

5 In the Matter of)

6)

7 dFi Teleconnect, LLC,)

8)

9 vs.) Docket No. P-55,

10) Sub 1744

11 BellSouth)

12 Telecommunications, Inc.,)

REPORTER'S CERTIFICATION
DEPOSITION OF THOMAS O'ROARK
August 25, 2009

13

14

15

16

17 I, April L. Struck, RPR, Certified

18 Shorthand Reporter in and for the State of Texas, do

19 hereby certify to the following:

20 That the witness, THOMAS O'ROARK, was

21 duly sworn by the officer and that the transcript of

22 the oral deposition is a true record of the testimony

23 given by the witness;

24 That the deposition transcript was

25 submitted on September ____, 2009, to the witness or to

CHANGES AND SIGNATURE (Cont'd)

1

2 PAGE	LINE	CHANGE	REASON
3			
4			
5			
6			
7			
8			
9			

10

11 I, THOMAS O'ROARK, have read the

12 foregoing deposition and hereby affirm my signature that

13 same is true and correct, except as noted above.

14

15 _____

16 THOMAS O'ROARK

17 THE STATE OF _____)

18 COUNTY OF _____)

19 Before me, _____, on this day personally

20 appeared THOMAS O'ROARK, known to me (or proved to me

21 water oath or through _____ (description

22 of identity card or other documents) to be the person

23 whose name is subscribed to the foregoing instrument

24 and acknowledged to me that they executed the same for

25 the purposes and consideration therein expressed.

Given under my hand and seal of office this ____ day

of _____, 2009.

NOTARY PUBLIC IN AND FOR
THE STATE OF _____

1 the attorney for the witness for examination, signature

2 and return to me in 20 days pursuant to Rule 203.1(b)

3 or agreement;

4 That the amount of time used by each

5 party at the deposition is as follows:

6 Mr. Patrick Turner - 4 hours, 5 minutes

7

8 That pursuant to the information given to

9 the deposition officer at the time said testimony was

10 taken, the following includes counsel for all parties

11 of record:

- 12 Mr. Chris Malish, Attorney for Plaintiff
- 13 Mr. Patrick Turner, Attorney for Defendant

14

15 I further certify that I am neither

16 counsel for, related to nor employed by any of the

17 parties or attorneys in the action in which this

18 proceeding was taken, and further that I am not

19 financially or otherwise interested in the outcome of

20 the action.

21

22 Further certification requirements

23 pursuant to Rule 203 of TRCP will be certified to after

24 they have occurred.

25

1
2 Certified to by me this ____ day of
3 September, 2009.



April L. Struck
April L. Struck, RPR, CSR 7535

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1 FURTHER CERTIFICATION UNDER RULE 203 TRCP

2
3 The original deposition was/was not
4 returned to the deposition officer on _____;

5 If returned, the attached Changes and
6 Signature page contains any changes and the reasons
7 therefor;

8 If returned, the original deposition was
9 delivered to Mr. Patrick Turner, Custodial Attorney,

10 That \$ _____ is the deposition
11 officer's charges to the Respondent for preparing the
12 original deposition transcript and any copies of
13 exhibits;

14 That the deposition was delivered in
15 accordance with Rule 203.3, and that a copy of this
16 certificate was served on all parties shown herein on
17 _____ and filed with the Clerk.

18 Certified to by me this ____ day of
19 _____

20
21 _____
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1 PLACE: Dobbs Building, Raleigh, North Carolina
 2 DATE: Thursday, November 12, 2009
 3 DOCKET NO.: P-55, Sub 1744
 4 TIME IN SESSION: 10:03 A.M. - 4:37 P.M.
 5 BEFORE: Commissioner William T. Culpepper, III, Presiding
 6 Chairman Edward S. Finley, Jr.
 7 Commissioner Bryan E. Beatty

IN THE MATTER OF:

8
 9 BellSouth Telecommunications, Inc.: Complaint of dPi
 10 Teleconnect, LLC

A P P E A R A N C E S:

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P R O C E E D I N G S

1
2 COMMISSIONER CULPEPPER: Good morning. Let's
3 come to order, please, and go on the record. I am
4 Commissioner Bill Culpepper and with me are Commission
5 Chairman Edward S. Finley, Jr. and Commissioner Bryan E.
6 Beatty.

7 The Commission now calls for hearing at this
8 time Docket No. P-55, Sub 1744, in the Matter of dPi
9 Teleconnect, LLC, 2997 LBJ Freeway, Suite 225, Dallas,
10 Texas, 75234, Complainant v. BellSouth Telecommunications,
11 Incorporated, Respondent.

12 On April 11, 2008, Complainant filed its
13 Complaint against the Respondent seeking to recover cash
14 back promotional credits that it is allegedly owed
15 pursuant to the parties' interconnection agreement.

16 On May 2, 2008, Respondent filed its Answer in
17 which it denies that Complainant is entitled to the
18 promotional credits it seeks in its Complaint.

19 On May 23, 2008, Complainant filed its response
20 indicating that Respondent's Answer is not satisfactory
21 and requesting an evidentiary hearing.

22 On September 10, 2008, the Commission issued an
23 Order Scheduling Docket for Hearing and Prefiling of
24 Testimony. Pursuant to this Order, this docket was

1 originally scheduled for hearing on December 9, 2008.

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

7 On November 12, 2008, Respondent filed its
8 Motion to Compel and Motion to Suspend Procedural
9 Schedule. On November 19, 2008, Complainant filed its
10 Response to Complainant's Motion to Compel and the
11 rebuttal testimony of its witness Brian Bolinger.

12 On November 20, 2008, Respondent filed the
13 rebuttal testimony of its witnesses P.L. (Scot) Ferguson
14 and Nicole Bracy.

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

23 On August 27, 2009, the Commission issued its
24 Order Scheduling Hearing by which this hearing was

1 scheduled for this date and in this place. By separate
2 Order issued October 28, 2009, the starting time for the
3 hearing was changed to 10:00 a.m.

4 On November 6, 2009, Respondent filed a Motion
5 to Compel by which it has requested the Commission to
6 enter an Order compelling Complainant to respond to
7 certain interrogatories.

8 Pursuant to G.S. 138A-15(e) I remind members of
9 the Commission of their duty to avoid conflicts of
10 interest and inquire at this time as to whether any
11 Commissioner has any known conflict of interest with
12 respect to this docket?

13 (No response.)

14 Let the record reflect that no such conflicts
15 were identified.

16 I now call upon the parties to announce their
17 appearances for the record, beginning with the
18 Complainant.

19 MR. MCDONALD: Good morning. I'm Ralph McDonald
20 appearing for the Complainant, dPi. And appearing with me
21 is Chris Malish of the Texas authority. He's been
22 admitted for the purpose of this proceeding.

23 COMMISSIONER CULPEPPER: Good morning,
24 gentlemen.

1 Incorporated, doing business as AT&T North Carolina filed
2 a Motion to Compel on November 6, 2009. Mr. Rankin, I'll
3 be glad to hear from you -- or Mr. Turner I think wants to
4 argue that; is that correct?

5 MR. RANKIN: That's correct.

6 MR. TURNER: Yes, sir.

7 COMMISSIONER CULPEPPER: Be glad to hear from
8 you.

9 MR. TURNER: Thank you. Mr. Chairman,
10 Commissioners, I'm Patrick Turner representing AT&T North
11 Carolina. We have filed a written Motion to Compel. And
12 I will not go through it in detail. I'd just like to hit
13 the highlights. But before I do, I would also like to
14 point out, I have some of the information that we have
15 gathered from publicly available sources that I intend to
16 use in the cross-examination today, so while I understand
17 the Commission may not rule on the motion today, it may
18 come up in that setting. So it will be basically the same
19 issue, so I would like to at least walk you through at a
20 high level our concern.

21 This docket is about cash back promotions,
22 promotions in which a -- an AT&T North Carolina end user,
23 if they met certain qualifications, could receive a coupon
24 for some cash back -- \$50 check, \$100 check -- during the

1 time period at issue, which is prior to June of 2007.
2 During that time period, AT&T would sell telecommunication
3 service to dPi at the resale rate established by the
4 Commission. So we provided the resale discount, but AT&T
5 would not provide the cash back portion of that offering.
6 And that's the dispute here.

7 One of our defenses in the case is that dPi
8 waited too long to ask for those credits or to dispute the
9 denial. You'll hear a lot about that on cross, but that
10 aspect of our defense does not relate to the Motion to
11 Compel. The Motion to Compel relates to our second
12 primary defense.

13 The FCC has said and the Fourth Circuit has
14 affirmed that a -- an incumbent local exchange company can
15 place reasonable and nondiscriminatory restrictions on the
16 resale of its services. We contend that our denying these
17 credits is just that, a reasonable and nondiscriminatory
18 restriction on the resale of these services.

19 In a prior docket, the Commission entertained
20 that type of dispute. It went up through the district
21 court and ultimately to the Fourth Circuit in the Sanford
22 decision. In the orders that the Commission entered,
23 which discussed a cash back offering just like you have in
24 front of you now, in those orders the Commission gave

1 guidance. It said here is some factors we will consider
2 if a party comes and tries to say this is a reasonable and
3 nondiscriminatory restriction. One of those factors is
4 will competition be stifled or unduly harmed if the resale
5 is not available. The other -- another factor is the
6 extent to which a reseller offers promotional inducements
7 that are different than the inducements offered by the
8 ILEC.

9 The third factor that is relevant today is the
10 Commission noted that while it was possible that a
11 reseller might not pass all the benefit along to its end
12 user, the Commission said it's unlikely -- and I'm quoting
13 from your Order -- "unlikely because a reseller's success
14 is based on being able to sell services at prices that are
15 competitive with the ILEC's prices in the marketplace."

16 In discovery, we have asked dPi for information
17 related to what services do you sell at what prices to
18 your customers in North Carolina. We believe that
19 question is directly relevant to the three issues that
20 this Commission said that you would consider in
21 determining our defense. It goes to whether competition
22 is stifled or harmed; it goes to the extent to which they
23 may offer inducements that are different than ours; and it
24 also goes to the extent to which they do or do not attempt

1 to compete with us on a price basis.

2 We believe the information that we will present
3 today and that we will attain through discovery will show
4 that they do not. Now, dPi can certainly argue the merits
5 of what that does and doesn't show, but we are convinced
6 that we are entitled to obtain it in discovery and to ask
7 that type of question on cross-examination. All of the
8 questions are designed to get information that is relevant
9 to those matters and we would request -- respectfully
10 request that you grant our Motion to Compel. Thank you,
11 sir.

12 COMMISSIONER CULPEPPER: All right. Let me ask
13 you something while I've got it on my mind. And it -- it
14 may be more toward the case in chief than -- than the
15 Motion to Compel. I think you've already alluded to that,
16 but since you brought it up and it's fresh on my mind,
17 before I forget it, you indicate that one of the defenses
18 that your client would have against the Complainant's
19 complain -- Complaint -- Complaint is that it waited too
20 long to bring this matter forward, make the request and
21 then bring this complaint.

22 When you say waited too long, are you talking
23 about a statute of limitations matter or you talking about
24 an equitable defense of laches or both or which -- what's

1 -- what are you talking about in that regard?

2 MR. TURNER: Really two things. One, there --
3 we will demonstrate in our cross that there was a
4 contractual obligation that dPi committed not to dispute
5 on amount that we had billed more than a year after that
6 amount was submitted. We'll demonstrate that they did not
7 comply with that contractual obligation. So in that sense
8 we believe it is contractual time limitations that they
9 have failed to comply with.

10 Beyond that, we will demonstrate that they
11 waited a long time to ask; they waited a longer time to
12 dispute, which also, in our view, violates their
13 contractual obligations, and by the time that they brought
14 it to the Commission some of the evidence was no longer
15 available. So I believe it is a combination, sir, of
16 contractual obligations, laches and possibly statute of
17 limitations.

18 COMMISSIONER CULPEPPER: Okay. Since you say
19 statute of limitations, if that were to be something --
20 and I'm not saying that it will be. We haven't heard the
21 case. If that were something that we would have to make
22 some kind of decision on, there's -- there's -- seems to
23 be indication that the state law applicable to the
24 interconnection agreement is the State of Georgia; is that

1 correct?

2 MR. TURNER: I think there is a provision of
3 that nature, yes, sir. And we concede that that State of
4 Georgia law would apply to the general terms and
5 conditions. We do not mean to concede that that means
6 that the Georgia Commission's rulings on
7 interconnection --

8 COMMISSIONER CULPEPPER: Well, I understand that
9 part. I'm not talking about the Georgia Commission.

10 MR. TURNER: Yes, sir. But, yes, sir --

11 COMMISSIONER CULPEPPER: I'm talking about
12 the -- whatever the state law of Georgia, whatever the
13 limitation of actions law in Georgia is with respect to a
14 case like this. Is -- do you concede that that is
15 applicable --

16 MR. TURNER: Yes, sir.

17 COMMISSIONER CULPEPPER: -- if we get to that
18 point? And it seems to me that it's stated that that
19 period under Georgia law is -- if we're talking about a
20 breach of contract -- is six years; is that --

21 MR. TURNER: Yes, sir. We concede.

22 COMMISSIONER CULPEPPER: Okay. You concede to
23 that. Okay. Thank you for that.

24 Now, let me ask you this: Regarding the cash

1 back, what form would this cash back take? I mean, was it
2 a credit to the customer's bills or was it a coupon for
3 \$50 or a check for \$50? What form would it take?

4 MR. TURNER: Yes, sir. Need to answer that in
5 two ways. One, on the retail side, that we made it
6 available to our end user customers; and then two, if the
7 question also was what form did it make -- did we make it
8 available to dPi, I can answer that as well.

9 COMMISSIONER CULPEPPER: Right.

10 MR. TURNER: On the retail side, the three
11 promotions that are at issue here, each involved a coupon
12 that was sent to the customer after they purchased the
13 services. And the customer had to turn around and redeem
14 that coupon within a stated amount of time, usually 90
15 days. If AT&T's end user customer received the coupon and
16 did not turn it in within that 90-day time frame, they did
17 not receive the benefit.

18 COMMISSIONER CULPEPPER: When you say "turn it
19 in," would it be a credit on their bill? Is that what it
20 was? What was it?

21 MR. TURNER: So they would send the coupon back
22 to a designated address. And when that coupon was
23 received, AT&T would send a check to the customer. So
24 actual benefit to the end user customer took the form of a

1 check.

2 COMMISSIONER CULPEPPER: Cash money --
3 eventually cash money when they cashed the check?

4 MR. TURNER: Yes, sir.

5 COMMISSIONER CULPEPPER: So the deal was AT&T
6 would send the coupon, the customer would be required to
7 send the coupon back to AT&T, and if AT&T got the coupon
8 back within a prescribed time, then the customer would get
9 a check from AT&T?

10 MR. TURNER: Yes, sir.

11 COMMISSIONER CULPEPPER: Not a credit on the
12 bill, but a check?

13 MR. TURNER: Not a bill credit, no, sir.

14 COMMISSIONER CULPEPPER: Okay. All right.

15 Thank you.

16 MR. TURNER: Yes, sir.

17 COMMISSIONER CULPEPPER: Other Commissioners
18 have questions?

19 (No response.)

20 All right. Thank you very much. You may have a
21 seat. And, Mr. Malish, I'll be glad to hear from you.

22 MR. MALISH: Thank you, Mr. Chairman. Again,
23 it's Chris Malish here on behalf of dPi. And as I
24 mentioned earlier during the informal housekeeping

1 get-together at the bench, we have a more formal extended
2 written reply that's being filed today.

3 The first part of our reply to that Motion to
4 Compel is that in its original Order this Commission set
5 out a time frame for -- in which discovery was to take
6 place. And that ended at some point in 2008. Now, in
7 2009 we agreed to provide some additional information to
8 AT&T and we answered some questions that they had. We
9 provided a witness for deposition voluntarily. However,
10 we did not voluntarily agree to provide information on
11 things that we consider to be completely irrelevant to the
12 question that this tribunal must decide. And that's where
13 we objected to some of the materials that they are asking
14 from here.

15 Because the underlying -- the underlying law
16 here is what -- what drives the inquiry. The Federal
17 Telecommunications Act requires that AT&T resell the rates
18 -- resell the services that it provided to its end users
19 to resellers at wholesale rates. And, of course, the --
20 you know, when you get \$100 cash back from AT&T, that
21 affects your -- your rate that your -- you know, the net
22 rate that you're actually paying for that service.

23 The things that they were asking us for was
24 information about what we do with those discounts if we

1 get them from AT&T. So generally what happens -- and I'll
2 go over this in my opening statement because it is kind of
3 at the core case in its entirety -- but at the end of the
4 day the question is is AT&T providing the same offer to
5 dPi that it is providing its own retail customers. And
6 that's it. That's the end of the question.

7 They are allowed to put restrictions on the
8 offers that they make from retail to resale and there are
9 examples of that that the -- that the FCC has noted are
10 reasonable. For example, restrictions that prevent
11 promotion that's directed primarily at business customers,
12 that's something that can't be -- if you sell it to one
13 class of customers, business customers, you can't turn
14 around as a reseller and sell it to retail customers.
15 That's the kind of discrimination or restriction that is
16 -- has been decided is okay. But the kind that they're
17 talking about is not.

18 So the end inquiry is simply whether they've
19 made us the same offer and if they haven't, what they've
20 done is illegal and it violates not just the law, but also
21 the contract. And so when they ask about our relations
22 with third parties, our customers, that is outside of the
23 kinds of things that this Commission needs to look at to
24 reach a decision in this case and so that's why we've

1 resisted the discovery on those matters.

2 And there will be more information in our
3 written response, but that's just at a very high level
4 where we're coming from. And I am happy to answer
5 questions.

6 COMMISSIONER CULPEPPER: All right.

7 Commissioners have any questions?

8 (No response.)

9 All right. Thank you. Ms. Edmondson, do you
10 care to be heard on the Motion to Compel?

11 MS. EDMONDSON: No.

12 COMMISSIONER CULPEPPER: All right. Thank you.
13 Well, gentlemen, as I indicated to you, I was inclined to
14 take the matter under advisement with respect to the
15 motion and I'm going to do that. I'm not going to rule on
16 it today. I'm going to take the matter under advisement.

17 Now, it's been represented by Mr. Malish on
18 behalf of his client that they are intending to file a
19 written response, which is something new that apparently
20 has not been filed yet. And it is in reply to, I suppose,
21 the Motion to Compel and per -- and hopefully the
22 underlying discovery.

23 And assuming that takes place, Mr. Rankin,
24 Mr. Turner, of course I know y'all are going to take a

1 real close look at that and that may narrow things down
2 for the Commission to rule on. And I would, therefore,
3 invite you when they make that filing, after you carefully
4 review that, that perhaps you would wish to make a
5 supplemental filing with the Commission if that, in fact,
6 narrows things down a little bit and so advise the
7 Commission of that and then we'll be prepared to -- or
8 I'll be prepared to rule on whatever your -- is left that
9 you're dissatisfied with in the way of a response if
10 that's okay with you. Does that sound like a satisfactory
11 way to proceed?

12 MR. RANKIN: That does, Mr. Chairman.

13 MR. TURNER: Yes.

14 COMMISSIONER CULPEPPER: Okay. Fine. All
15 right. So we'll be on the lookout for the written
16 response.

17 Okay. That would conclude the hearing on the
18 Motion to Compel. That brings us to the evidentiary
19 hearing. Mr. Malish indicated that you would like to make
20 an opening statement and I'll be glad to hear from you.

21 MR. MALISH: Thank you. And Mr. Chairman, I had
22 prepared a Power Point type presentation so that y'all
23 could actually see what it is that I'm saying, but we lack
24 an overhead projector here that we can use and so I have a

1 handout instead.

2 Generally, gentlemen -- or Commissioners, what
3 I've proposed to do is give you -- basically start with a
4 recap of the law on resale and the key contract provisions
5 in this case. I feel like it never hurts to go back and
6 set the stage so that we can remember exactly why we're
7 talking about what we're talking about.

8 I'm going to spend almost no time talking about
9 the actual details of the promotions themselves because
10 that's doesn't appear to be the core of the dispute
11 between the two parties. And then I will try to take on
12 some of BellSouth's "yeah, buts." And by that I mean
13 that's what they say when we say -- we make our
14 presentation and they say, yeah, but they're not entitled
15 to it for one reason or another. And I'll cover those
16 when we get to them.

17 I'm jumping up to slide three there. To go into
18 some background on the law on resale, that originates, of
19 course, way back in 1996 with the Federal
20 Telecommunications Act. And basically what it says is
21 that monopolist incumbents like BellSouth, now AT&T, have
22 the obligation to offer at wholesale rates, rates, any
23 telecommunications service that they provide at retail to
24 CLECs like dPi. And they have the -- a duty to not impose

1 unreasonable discriminatory conditions in doing so.

2 The FCC has clarified in its various different
3 rulings and rule-makings exactly what is expected from
4 incumbents like AT&T or BellSouth. And on page 4 you'll
5 see among other things that 47 CFR says that the incumbent
6 has the obligation to offer -- and this is the key thing
7 to focus on -- offer any communications service that the
8 LEC offers on a retail basis it has to offer to CLECs like
9 dPi.

10 There has been a number of cases, rule-makings,
11 pronouncements by the FCC as to what this means when we're
12 talking about promotions. And on page 5 you'll see among
13 other things that they're required to provide the
14 promotions that they make available at retail, the
15 promotional offers they make available at retail, to CLECs
16 like dPi if they're being made for a period of more than
17 90 days.

18 And if you skip to page 6, you'll see that they
19 can impose a restriction only if they go to the Commission
20 and show that that discrimination or restriction that they
21 want to impose is reasonable and nondiscriminatory. So
22 that's something that they're supposed to be doing
23 beforehand if they want to do that, not after the fact.

24 On page 7 there is some additional

1 pronouncements from the FCC to make clear that these
2 obligations to extend offers that are made at retail to
3 CLECs like dPi are also -- also extend to promotional or
4 discounted offerings. So the Act makes no exception for
5 promotional or discounted offerings. Our rules require
6 the incumbents to apply the wholesale discount to the
7 special reduced rate.

8 Again, the rule on offers. You know, the point
9 is that it has to be the offer that is made to the retail
10 customer must also be offered to the CLEC like dPi. And,
11 again, it has to -- if you want to deviate from that, you
12 have to get permission from the Commission first.

13 Turning to the contract, which is where the rest
14 of the obligations and duties of the parties arise.
15 You'll see that the contract says over and over again that
16 it's designed or created to basically further set out the
17 duties between the parties that originate from Sections
18 251 and 252 of the Act. And so in substantive matters,
19 the agreement is supposed to be governed and conformed and
20 construed in accordance with federal and state
21 telecommunications laws, including those regulations from
22 the FCC that we just covered a second ago. And in the
23 resale attachment it says, again, that BellSouth is
24 supposed to make available to dPi for resale those

1 services that BellSouth makes available to its customers.

2 Page 9 is basically what the bottom line is. If
3 AT&T makes an offer available to its retail customers, it
4 has to make the same offer available to CLECs like dPi.
5 That's the bottom line. Unless they get permission or
6 approval beforehand to not do so, which hasn't happened in
7 this case.

8 The promotion in dispute is -- is -- there's
9 three different cash back -- and the actual details of
10 these promotions really aren't in dispute. There's a
11 couple of promotions in which they give \$100 cash back and
12 another one that's similar in which they give \$50 cash
13 back. The dispute is all about whether we're just
14 entitled to these at all to begin with, not whether we've
15 actually qualified them. At least that's the way I
16 believe that the dispute is framed.

17 So BellSouth has a number of responses to our
18 claim here. And this is what I call their "yeah, buts."
19 They're like, yeah, dPi, but. Yeah, but a promotion is
20 not a service and we're only supposed to have to resell
21 our services at wholesale. And they also say, yeah, but
22 if they don't give it to their past end users, we don't
23 have to give it to dPi. And AT&T or BellSouth says, yeah,
24 but dPi's late. They've waived their rights. And, you

1 know, yeah, but when we give -- when we undercut the
2 pricing, it doesn't hurt competition. When we -- when we
3 give our customers \$100 off but we don't give that to dPi,
4 that doesn't hurt competition. So those are some of the
5 "yeah, buts" that BellSouth has.

6 I responded to these not in any particular
7 order. Starting with, though, this issue -- this argument
8 that yeah, but if they don't give it to their past end
9 users, we don't have to give it to them. That's not in
10 the law anywhere. The law says nothing about what a --
11 what a CLEC has to do with -- with the rates that it gets
12 from AT&T. It doesn't say that the wholesale discount,
13 for example, has to be passed through 100 percent to its
14 customers or any part of a promotion. That's simply not
15 part of the law. It's not part of the contract either.
16 It's simply irrelevant to the question of what they are
17 obligated to do under the law and under the contract.

18 This issue about the yeah, but we don't have to
19 offer a promotion because it's not a service, it's not a
20 service and all we have to offer is a service. Well, yes,
21 that's true. The promotion is not a service, but whether
22 the promotion is a service is really not the inquiry here.
23 The inquiry is the rate at which the service is provided.
24 And so if you go back and you look at the federal statutes

1 and rules, they have the rate -- the obligation, the duty
2 to offer for resale at wholesale rates. And this is what
3 we're looking at, the rates that the service is being
4 provided at. And so obviously when you get a kickback of
5 \$100 or \$50, the rate you're paying is not the tariffed
6 rate.

7 Another interesting thing to look at here is the
8 SBC, which is -- eventually took over BellSouth, has
9 resold these kinds of promotions all along. And, of
10 course, after SBC acquired BellSouth and after the Sanford
11 decision, BellSouth has been reselling these kinds of
12 promotions to resellers like dPi ever since.

13 There is a -- you know, the yeah. Yeah, but
14 they've waited too long. Well, you know, that's really
15 not true either because in this particular instance in the
16 contract that was in place from 2003 to June of 2007,
17 which is the period that we're seeking these -- seeking to
18 recover these unpaid promotion credits, the agreement was
19 governed by federal law and state substantive
20 communications law, but in all other respects it was
21 governed by and enforced in accordance with the state --
22 and with the laws of the State of Georgia. And in Georgia
23 the statute of limitations for written contracts is six
24 years. So we're well within that time period.

1 So that's sort of the basic legal argument,
2 right. But the other half of that is the equitable
3 argument that they're making which -- in which they say,
4 well, it's -- they've just waited too long. They waived
5 their right under the rules of equity.

6 Equity applies only in situations where there is
7 not a contract provision addressing the particular issue.
8 Here, though, the contract does. And the contract
9 specifically provides that there is no waiver of any right
10 that is accomplished by delay. So this is at the general
11 terms and conditions Section 16 of the contract between
12 the parties and it says a failure or a delay of either
13 party to enforce any of the provisions hereof, blah, blah,
14 blah, blah, does not affect a waiver.

15 So before we even got to the situation when the
16 contract was negotiated between these parties and signed
17 back in 2003, there was an agreement that no delay affects
18 a waiver. And that trumps any sort of equitable argument
19 that there might be that there's some sort of waiver going
20 on here.

21 The last "yeah, but" is this contention that by
22 being able to give their own customers \$100 cash back but
23 by not extending such discounts or price breaks to CLECs
24 that AT&T isn't hurting competition. It's not hurting

1 competition.

2 Now, the first thing to remember here is that
3 the FTA was created with the intention of eliminating the
4 monopolies like AT&T's, local franchises, BellSouth, for
5 example. And that has been, you know, stated pointblank
6 by the Supreme Court. That is one of the policy goals
7 behind the FTA, to eliminate the monopolies, for example,
8 BellSouth, and to promote competition from new entrants
9 like dPi and other CLECs. The purpose is not to
10 facilitate competition by ILECs like BellSouth with people
11 like dPi and other CLECs in their positions.

12 And, you know, there's no way around it. When
13 your competitor is selling something to its customers for
14 \$100 or \$50 less than you can even get it for from them,
15 that hurts competition. I mean, we'll get into this
16 later, but apparently the argument from AT&T's witnesses
17 is the fact that dPi is still alive is proof that
18 competition has not been injured.

19 So the argument that this kind of restriction is
20 reasonable is -- we find to be not very plausible,
21 especially when you -- when you put it up against the
22 kinds of restrictions that the FCC has said are
23 reasonable. And this tends to be the kind of thing that I
24 mentioned before, the cross-class selling. For example,

1 if there's a special deal that's available only to AT&T's
2 retail customers, a reseller like dPi can't take that and
3 spin into something that it offers to its business
4 customers. So that's the sort of thing that the FCC has
5 specifically said is okay, and that's obviously not
6 similar to what we're dealing with here.

7 So that's our presentation in a nutshell. And
8 I'm happy to answer any questions if y'all have any.

9 COMMISSIONER CULPEPPER: All right. Chairman
10 Finley.

11 CHAIRMAN FINLEY: Mr. Malish, I believe I heard
12 you to say that if AT&T contends that the nature of the
13 restriction on the promotion, whether it's reasonable or
14 nondiscriminatory, if that is a reasonable and
15 nondiscriminatory restriction, they've got to make that at
16 the time of the offer to what -- this Commission and this
17 Commission has got to approve it at the time of the offer.
18 Did I understand you correctly about that?

19 MR. MALISH: That is -- that is my reading of
20 the FCC's rules.

21 CHAIRMAN FINLEY: And what rule is that
22 that's --

23 MR. MALISH: Let's see if I have that. I
24 believe that's 47 CFR 51.613(b).

1 CHAIRMAN FINLEY: All right. And also I believe
2 that I heard you to say both in your opening statement
3 there and in your addressing of the Motion to Compel that
4 your ability to compete without the promotion is
5 irrelevant to the case; is that right?

6 MR. MALISH: Well, what is irrelevant to the
7 case, I believe, is our interactions with our customers.

8 CHAIRMAN FINLEY: Whether you pass that onto
9 your customers is irrelevant?

10 MR. MALISH: Is irrelevant.

11 CHAIRMAN FINLEY: Well, I've looked at this
12 Sanford case. And I just -- I'm looking at page 452, I
13 guess. And I'll read this paragraph. "BellSouth argues
14 that N.C. Commission's orders stack the deck against it
15 denying it the opportunity to compete by using marketing
16 incentives unless it pays for those incentives twice, once
17 in paying for the incentives and again in reducing the
18 retail rate for its competitors. The competing LECs would
19 respond in like manner, that without the orders they would
20 have to pay for the incentives twice in order to compete,
21 once when they pay for the service of the wholesale rate
22 that was not adjusted for the incentives and again when
23 they pay for similar marketing incentives to offer their
24 own customers."

1 Is that type of inquiry not relevant in this
2 case when we look at whether or not BellSouth's refusal to
3 pass on this promotion is reasonable and
4 nondiscriminatory?

5 MR. MALISH: Commissioner Finley, I don't have
6 that language in front of me. Of course I have read that
7 case in the past. But I believe that what they are --
8 what -- I don't believe the Fourth Circuit is taking a
9 position. I believe what the Fourth Circuit is doing
10 there is relaying or restating what the arguments of the
11 parties are without making a determination one way or the
12 other. You know -- and so they're not taking a position.

13 If you're asking me to take a position on that
14 issue or let you know where I think -- what I see on it,
15 my point is that this may hurt AT&T. This may not be --
16 this may make it more difficult for them to compete. And
17 that is frankly the purpose behind the Federal
18 Telecommunications Act. It is designed to break the
19 monopoly and to make competition by new entrants like dPi
20 easier.

21 And so when you have a situation where, for
22 example, the tariffed rate for BellSouth is \$50 but they
23 are giving a kickback to their customers of \$100 and
24 they're selling it at -- to us for \$40, we are getting a

1 service that we have to sell at more than \$40 in order to,
2 you know, break even while the customers that we are
3 competing for are able to buy that service for basically
4 negative \$50. So that hurts competition.

5 CHAIRMAN FINLEY: Well, the case talks about the
6 tipping point. At some point some of these promotions can
7 be pro-competitive and at some point they become
8 anti-competitive. And are we not free in light of what
9 the Fourth Circuit has said about this particular
10 promotion, the 1FR + 2 cash back, don't we have to look
11 into the facts of this particular promotion and the impact
12 that it has on dPi to determine whether or not it is
13 reasonable and anti-competitive in this case?

14 MR. MALISH: Well, I think -- I think when it
15 talks about the effect on competition, I think they are
16 talking about the effect on the industry as a whole as
17 opposed to dPi in particular. You get a -- you get --
18 you're looking for a pinhole when you look only at dPi.
19 So that doesn't -- that doesn't really help as much as
20 looking at the industry on the whole.

21 Those are things that you can look at. But you
22 have to remember that the purpose, again, is to promote
23 competition by dPi or competition by outfits like dPi to
24 help them compete with the incumbent monopolists because

1 the point is we're trying to break that monopoly and
2 replace it with competition, real competition.

3 CHAIRMAN FINLEY: Thank you.

4 COMMISSIONER CULPEPPER: Mr. Malish, I think
5 Chairman Finley hit on the beginning of something I wanted
6 to ask, and get you to refresh my recollection. What was
7 the promotional offer in the Sanford case that was the
8 subject of the Sanford case? What was it -- that offer?
9 How did that offer work?

10 MR. MALISH: If I recall correctly, this had to
11 do with a slightly different -- it wasn't a cash back like
12 these ones that we're disputing here in this case. If I
13 recall correctly, it was like gift cards, and I don't
14 know, maybe to Wal-Mart or Target or something like that.
15 So it's something that had a certain kind of monetary
16 value, one that was not as easily as quantifiable because
17 it wasn't a check going directly back to the customer.

18 COMMISSIONER CULPEPPER: Well --

19 MR. MALISH: And, again, I don't have the case.

20 COMMISSIONER CULPEPPER: Yeah. That sort of
21 refreshes my recollection 'cause I was going to ask --
22 well, first off, let me ask you this: Mr. Turner in his
23 argument on -- under my questioning while he was arguing
24 the Motion to Compel described this cash back promotion,

1 how it worked, about that the customer would get sent a
2 coupon and then the customer would have to send the coupon
3 back to AT&T and if AT&T got it back within a certain
4 period of time, then they would send the customer a check.

5 Is that -- is that a fair statement of the way
6 this -- how this promotion worked in this case?

7 MR. MALISH: That's how at least one of them
8 worked. And I don't have any particular reason to believe
9 that the other ones were substantially different from
10 that.

11 COMMISSIONER CULPEPPER: All right. So -- well,
12 let's just say for the purposes of discussion that that's
13 the way it works. It's a coupon that must be returned and
14 then you get your check.

15 MR. MALISH: Uh-huh.

16 COMMISSIONER CULPEPPER: Is there any difference
17 between that kind of promotional offer as opposed to if
18 what they sent to the customer was a \$50 gift certificate
19 that they could redeem at Wal-Mart within 90 days? I
20 mean, is there any difference in the effect of that kind
21 of promotional -- two differences in those --

22 MR. MALISH: I would say that it is a -- I would
23 say it's a clearer cut case when they're actually sending
24 a check for -- or the equivalent of a check for \$50. It's

1 much easier to say, well, that's obviously worth \$50. And
2 so it is -- to me it's much more stark when we're talking
3 about -- instead of a gift card or, you know, I don't
4 know, you know, a toaster or something like that. When
5 you actually give cash back, to me that makes it much more
6 easy to get your mind around. I mean, that's just a
7 flatout kickback on the price of the service.

8 And if you're talking about looking at it as a
9 coupon as opposed to an automatic price adjustment on the
10 bill, was that perhaps what you were asking about? Does
11 that --

12 COMMISSIONER CULPEPPER: Well --

13 MR. MALISH: In any event --

14 COMMISSIONER CULPEPPER: No. Obviously and -- I
15 mean, obviously an automatic reduction on the bill is one
16 thing. It's another thing if they send something. I know
17 -- I guess -- I guess you can get around to this. Let's
18 just say you're correct in your case regarding the matter
19 you've alleged in the Complaint. How would you account --
20 and you've got a figure -- you know, you've got a figure.
21 It's a little bit in the -- I mean the figure's in
22 dispute, but you cite a figure of \$156,000, round figures,
23 I think, is the amount of the claim.

24 How would you account for the possibility that

1 there might be customers that wouldn't send the coupon
2 back? How would you account for that in any kind of
3 accounting that -- as far as the amount of money that
4 would be due your client?

5 MR. MALISH: That's actually easier than you
6 might think. If you recall what their obligation under
7 the rules are, their obligation is to make whatever offer
8 they make at retail, they are obliged to make at
9 wholesale.

10 And actually, you know, AT&T makes a lot of
11 offers. They have a whole tariff of different things you
12 can choose from, right? But customers pick and choose
13 what they want. They don't accept every offer. But
14 whatever offer that they make they are required by law to
15 extend to dPi. Which dPi or other CLECs can choose to
16 accept or not accept. And there -- just like there may be
17 customers who are qualified to accept an offer but don't
18 get around to doing it, that doesn't change the fact that
19 -- let me back up.

20 Just like there are customers that do that,
21 there are CLECs that may choose to accept or not accept
22 offers that are available to them, right. But the offer
23 has to be made. And if the offer is accepted, they must
24 perform on the promise. And so as long as dPi is

1 accepting that offer over and over and over again, AT&T
2 has the obligation to make good on it. So -- so it is --
3 I think from a logical standpoint, it is just
4 fundamentally wrong to try to go and say, well, how much
5 should we reduce the amount that we're going to pay dPi
6 for every offer that it does accept because some of our
7 clients, some of our retail clients don't accept this
8 offer. Does that make sense?

9 COMMISSIONER CULPEPPER: We'll see if we can
10 make some sense of it.

11 MR. MALISH: Well, sometimes I start --

12 COMMISSIONER CULPEPPER: No, you did fine. You
13 did fine. Anything else?

14 (No response.)

15 All right. Does that conclude your opening
16 statement?

17 MR. MALISH: Unless -- unless the panel has any
18 more questions.

19 COMMISSIONER CULPEPPER: Okay. We don't have
20 any more questions. Ms. Edmondson, did you desire to make
21 an opening statement --

22 MS. EDMONDSON: Do not.

23 COMMISSIONER CULPEPPER: -- on behalf of Public
24 Staff?

1 Mr. Turner or Mr. Rankin, be glad to hear from
2 either one of you.

3 MR. TURNER: Thank you, Mr. Chairman. I'll be
4 very brief. I promise you at the end of this proceeding
5 we're going to write you a good brief and we'll address
6 all these issues for you in much more detail, but I just
7 want to give you a sort of a preview of what evidence we
8 intend to present to you today and then briefly hit on a
9 point or two that came up during Mr. Malish's opening.

10 DPI began making these offerings available to
11 its own end users back in late 2003. We'll present
12 evidence to show that the first time that they asked AT&T
13 North Carolina for any of these cash back credits was in
14 2005. Why did they wait so long? We'll show you that one
15 reason is because they hired a third party and paid them a
16 lot of money to go back in time and dig up disputes that
17 dPi -- or credit requests that dPi itself never presented
18 and present them all to BellSouth. So that happened
19 around 2005 and AT&T did not pay them. DPI waited until
20 2007 to do anything that suggested that it was going to
21 somehow contest not getting paid for that.

22 Now, you may wonder were they told that they
23 wouldn't get paid for it. We'll present evidence to show
24 you absolutely back in 2004 Ms. Kristy Seagle, who will

1 take the stand and present her testimony to you, will show
2 you that she told them back in 2004 we're not making these
3 available. And they didn't get around to filing the case
4 with the Commission until April of 2008. Those are the
5 basic facts that we'll present to you today.

6 Very briefly, I want to go through the slides
7 just to address a few main points that we'll, as I said,
8 address more thoroughly in our briefs. On slide number
9 six of what Mr. Malish presented, this is the federal rule
10 on restrictions. And it says an incumbent LEC may impose
11 a restriction only if it proves to the state commission
12 that the restriction is reasonable and nondiscriminatory.

13 Commissioner Finley, you asked basically when
14 does that have to be proven. Well, we disagree with dPi.
15 That is there because the FCC established a presumption, a
16 presumption that restrictions other than the ones they
17 laid out would be unreasonable or discriminatory. This is
18 simply rebutting a presumption. If the law presumes that
19 a particular type of clause in a contract will be
20 unenforceable, parties don't have to come to court, argue
21 the case, ask the court to sign off on it before they put
22 that clause in the contract. Parties put the clause in
23 the contract realizing, realizing that if challenged,
24 they'll have to come to the court and they've got to

1 overcome the presumption, but you don't go on the front
2 end and have to get pre-approval of it. And we submit
3 that this is the exact same thing in this case.

4 Also, the Fourth Circuit in the Sanford decision
5 referenced several times to the fact that this Commission
6 in its orders made provisions for companies to be able to
7 come in and make that proof. And nothing in the FC -- in
8 the Fourth Circuit's order suggests that the proof had to
9 be made before the promotion was extended or before the
10 restriction was placed.

11 If you would, please go with me to page 15 of
12 dPi's handout. This is the waiver provision in the
13 contract. It's quoted in part, but not in full in their
14 testimony, but it's quoted in full here. Here's how we
15 read that provision. If you look at the very last phrase,
16 it begins three lines from the bottom after the comma,
17 "shall have the right thereafter to insist upon the
18 performance of any and all of the provisions of the
19 agreement."

20 The way we read that is if AT&T had received a
21 late request for a credit, if back in 2005 we had paid
22 those 2003 credits, that would not waive our ability to
23 thereafter come and tell dPi, wait a minute, this latest
24 batch is late, we won't accept them. That's what that

1 means. That does mean that the fact that dPi never
2 submitted it within the time frames it committed to by
3 contract is waived. I submit to you if that's the case,
4 then what does anything in the contract mean. If their
5 reading of it is that means that we can't be held
6 accountable for anything in the contract because there's
7 no waiver, that just abrogates the entire contract. So we
8 believe that it's the way we laid it out.

9 If you'll flip the page on page 16, Mr. Malish
10 made a statement that this may hurt AT&T, but that's the
11 purpose of the '96 Act. That was not the purpose of the
12 '96 Act. The purpose of the '96 Act was to establish
13 widespread competition across the entire industry. What
14 you see here are the exact same arguments made by the
15 exact same types of resellers back in '96 as though
16 nothing has changed.

17 Since the 1996 Act, folks can get their
18 telephone service from cable providers, wireless
19 providers, voice over internet protocol providers. You
20 have more choices than you can shake a stick at because
21 the Act worked. But what you have here is a reseller --
22 and remember, the resale provisions of the Act were
23 anticipated to be the first step, to let people get the
24 foot in the door and then Congress and the FCC anticipated

1 what happened, that we would shift over to
2 facilities-based. People would buy commercial agreements;
3 people would buy their own facilities, use them in
4 combination with other facilities and the UNES or the
5 AT&T's of the world and come out and compete.

6 What you have here -- that last sentence, "the
7 anemic state of wireline competition in North Carolina,"
8 that is simply a reseller who has never moved a foot along
9 with the rest of the industry and wants to cling to the
10 1996 Act the way it was written in 1996. We submit to you
11 that competition is much broader than that and there is
12 widespread competition in North Carolina.

13 There is also some questions about dPi's ability
14 to compete and attract customers. We're going to show you
15 some interesting numbers in our case that will show you
16 the number of customers dPi had back when this started,
17 the number of customers they had when we started making
18 these available for resale and the number of customers
19 they had today. We think that will tell you an
20 interesting story.

21 The final thing that I want to do is flip back
22 to page -- sorry, bear with me. I thought I marked it and
23 I didn't. To page 9, please. This goes to the heart of
24 the case that I hope we don't ever have to go to, but

1 should you decide that this was not a reasonable and
2 nondiscriminatory restriction and should you decide that
3 dPi is entitled to some of its claims, we believe that dPi
4 is asking you to order us to provide the entire face value
5 of the \$50 cash back to them, not discounted by the resale
6 discount rate. That's the way we read their request.

7 If that's the request, and I intend to clarify
8 that on cross, if that's their request, we'll have some
9 numbers to show you as to why that's wrong and that if
10 they're entitled to anything, it's the cash back. The
11 most that they're entitled to, the absolute most would be
12 the face value of the cash back less the resale discount.

13 We look forward to presenting our facts to you
14 and I'll be happy to answer any questions you have at this
15 point.

16 COMMISSIONER CULPEPPER: Thank you, Mr. Turner.
17 Let me ask you this: You've alluded to a 12-month -- I
18 guess not a statute of limit -- but a 12-month contract
19 provision that would establish a 12-month limitation on
20 presentation of such claims as this. What section of the
21 interconnection agreement, if you have that --

22 MR. TURNER: I do.

23 COMMISSIONER CULPEPPER: -- would you refer us
24 to in that regard?

1 MR. TURNER: I do.

2 MR. MALISH: Mr. Chairman, I can -- that's in --

3 MR. TURNER: I have it.

4 MR. MALISH: You've got it.

5 MR. TURNER: Mr. Chairman, there are two things.

6 First of all, this would be in Mr. Ferguson's direct
7 testimony, Exhibit PLF-2. The actual provision is on
8 attachment 7, page 9. It's attachment 7, page 9, Section
9 2.2. The second sentence says, "dPi agrees not to submit
10 billing disputes for amounts billed more than 12 months
11 prior to the submission of a billing dispute filed for
12 amounts billed."

13 Another provision that is related to that
14 appears on -- in the same exhibit. This is the general
15 terms and conditions, page 20. The third sentence of
16 Section 30.1, Section 30.1 on page 20 of the general terms
17 and conditions. I won't read it because it's long, but it
18 basically says that the parties agree that any orders that
19 had been placed under prior interconnection agreements are
20 governed now by this interconnection agreement. So that
21 12-month window applies to all the claims that are at
22 issue here.

23 COMMISSIONER CULPEPPER: All right. Thank you.
24 Thank you very much. That would bring us to -- the case

1 is with you, Mr. Malish, on behalf of your client.

2 MR. MALISH: Thank you, Mr. Chairman. We'll
3 call Tom O'Roark to the stand, please.

4 COMMISSIONER CULPEPPER: Mr. O'Roark, come
5 around here to the witness stand.

6 TOM O'ROARK; Being first duly sworn,

7 testified as follows:

8 DIRECT EXAMINATION BY MR. MALISH:

9 Q. Mr. O'Roark, you are here today on behalf of dPi
10 and you're actually adopting the testimony that was filed
11 back in 2008 in this case by Brian Bolinger; is that
12 correct?

13 A. That's correct.

14 Q. And Mr. Bolinger has left dPi to start his own
15 business; is that correct?

16 A. Yes.

17 Q. Okay. And generally speaking, you have been over
18 Mr. Bolinger's testimony and except for where it says "I,"
19 for example, when he's talking about himself, you adopt
20 that testimony?

21 A. Right.

22 Q. So where it says "I" it should be Brian Bolinger
23 said such and such, correct?

24 A. Yes.

1 Q. And the only correction that we had to make was in
2 the rebuttal where we're re -- where we're referring to --
3 well, where Mr. -- where Mr. Bolinger is referring to the
4 Georgia Statute with the limitations on written contracts,
5 which is on page 4, line 30, and the correction we talked
6 about before is that should be -- a couple of typos in the
7 citation. It should be O.C.G.A., Official Code of the
8 Georgia Annotated, and then the section should be 9-3-24
9 and not 25, correct?

10 A. Yes.

11 Q. Typically I believe the Commission appreciates it
12 if you can give a brief summary of dPi's position as
13 outlined in the testimony --

14 COMMISSIONER CULPEPPER: Well, let me ask you
15 this before you get to that. Mr. O'Roark, if Mr. Malish
16 asked you today the questions that were asked of
17 Mr. Bolinger in his prefiled testimony, would the answers
18 that Mr. Bolinger gave at that time be your answers today?

19 THE WITNESS: That's our company's position and
20 I'm adopting that position.

21 COMMISSIONER CULPEPPER: Right. And other than
22 the correction that Mr. Malish has pointed you out to with
23 respect to the citation of the statute on page 4 of the
24 witness' rebuttal testimony, would you have any other

1 corrections to the answers that Mr. Bolinger gave to the
2 questions in his prefiled testimony?

3 THE WITNESS: No.

4 COMMISSIONER CULPEPPER: All right. And
5 Mr. Malish, I take it that you are moving that Mr. O'Roark
6 be allowed to adopt the prefiled direct and rebuttal
7 testimony of Witness Bolinger and that that testimony be
8 received into the evidence and copied into the record as
9 if had been given word for word orally from the stand?

10 MR. MALISH: I am, Mr. Chairman.

11 COMMISSIONER CULPEPPER: All right. Thank you.
12 All right. You may proceed now.

13 A. DPi Teleconnect is [sic] been in business for
14 about ten years. We're licensed in about 40-plus states.
15 We have -- actually have customers in 30-something states.
16 North Carolina is one of the states that we have --

17 COMMISSIONER CULPEPPER: Let me -- let me
18 interrupt you there. Just housekeeping measure here. Mr.
19 Malish's motion is allowed and the testimony is copied
20 into the record as if it had been given orally from the
21 stand.

22 (Whereupon, the prefiled direct and rebuttal
23 testimony of Brian Bolinger was adopted by Tom
24 O'Roark and will be reproduced in the record at

1 this point the same as if the questions had been
2 orally asked and the answers orally given from
3 the witness stand.)
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DIRECT TESTIMONY OF BRIAN BOLINGER

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Q. Please tell us who you are and give a little background about yourself.

A. My name is Brian Bolinger. I am dPi's vice president of legal and regulatory affairs. I am the one who has taken the lead in dealing with this dispute over promotion credits with BellSouth since its inception, along with Steve Watson of Lost Key Telecom Inc., which functions as dPi's billing and collections agent for promotions.

Q. Please give a little background on dPi Teleconnect and describe the history of dPi Teleconnect's dispute with BellSouth.

A. dPi Teleconnect is a competitive facilities-based telecommunications company authorized to provide intrastate local exchange and interexchange telecommunications services in North Carolina. dPi provides telecommunications services to residential and business customers. This case involves only dPi Teleconnect's resale operations and relationship with BellSouth.

BellSouth is required by law and by contract to make available for resale any promotion that BellSouth makes available to its customers for an extended period of time.

Among other things, the parties' contract provides in relevant part the following:

- a. That the parties wish to interconnect "pursuant to Sections 251 and 252 of the Act" GTC p.1;**
- b. Parity: "When DPI purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be be ... subject to the same conditions... that BellSouth provides to its ...End Users." GTC p. 3**
- c. Governing Law: "... this agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC...." GTC p. 15.**
- d. Resale Attachment's General Prbvision sections 3.1: p. 4: "...Subject to effective and applicable FCC and Commission rules and orders, *BellSouth shall make***

1 *available to DPI for resale those telecommunications services BellSouth makes*
 2 *available...to customers who are not telecommunications carriers."*

3
 4 Federal law provides, among other things, the following:

- 5
 6 e. 47 U.S.C. § 251(c)(4)(A). ILECs have the duty to "offer for resale at wholesale
 7 rates any telecommunications service that the carrier provides at retail to
 8 subscribers who are not telecommunications carriers."
 9
 10 f. 47 U.S.C. § 251(c)(4)(B). ILECS have a duty not to "prohibit, and not to impose
 11 unreasonable or discriminatory conditions or limitations on, the resale of such
 12 telecommunications service."
 13
 14 g. 47 C.F.R. § 51.613(a)(2). "The following types of restrictions on resale may be
 15 imposed: Short term promotions. An incumbent LEC shall apply the wholesale
 16 discount to the ordinary rate for a retail service rather than a special promotional
 17 rate only if:
 18 (i) Such promotions involve rates that will be in effect for no more than 90
 19 days; and
 20 (ii) The incumbent LEC does not use such promotional offerings to evade
 21 the wholesale rate obligation, for example by making available a
 22 sequential series of 90-day promotional rates."
 23

24
 25 This dispute arises because BellSouth has over the past months and years sold its retail
 26 services at a discount to its end users under various promotions that have lasted for more than 90
 27 days. dPi Teleconnect is entitled to purchase and resell those same services at the promotional
 28 rate, less the wholesale discount. As a practical matter, dPi Teleconnect has bought these
 29 services at the regular retail rate less the resale discount, then been credited the difference
 30 between that rate and the promotional rate pursuant to "promotion credit requests."

31 **Q. What promotions are involved in this case?**

32 **A. Of concern in this particular case, BellSouth has provided a number of "cash back"**
 33 **promotions to its retail customers going back to late 2003.¹**

¹The three promotions involved through July 2007 are designated by BellSouth as Cash Back \$100 Two Features;
 Cash Back \$100 Discount Complete Choice \$100; and Cash Back \$50 2 Pack Plan (PAMA6)- CBP6.

1 **Q. What is the effect of these promotions?**

2
3 **A. BellSouth's retail customers qualifying for these promotions get cash (or cash equivalent)**
4 **back from BellSouth in the stated amount. Essentially, these are rebates. Obviously, the**
5 **practical effect of these promotions is to reduce the effective retail rate qualifying customers pay**
6 **for telephone service. The size of the promotions is so large that the end result is that the net**
7 **amount BellSouth's retail customers qualifying for the promotions pay for service is far less than**
8 **the wholesale amount.**

9 **Q. What happened when dPi applied for these promotion credits?**

10
11 **A. Although dPi met the same qualifications as BellSouth's retail end users, and applied for**
12 **these promotional credits, it has to this point not been notified one way or the other that**
13 **BellSouth would pay the credits requested for the periods ending June 8, 2007. BellSouth has,**
14 **however, paid the credits requested for service rendered after June 2007. The timing appears to**
15 **coincide with the 4th Circuit's decision in *BellSouth Telecommunications Inc. v. Sanford et al.*,**
16 **494 F3d 439 (C.A. 4 - N.C., 2007), in which the 4th Circuit upheld the North Carolina**
17 **Commission's decision that promotions that tend to reduce the retail price paid**
18 **by retail customers must be made available to CLECs.**

19 **Although BellSouth has failed to either deny or accept dPi's promotional credit requests**
20 **despite multiple inquiries by dPi, at this point it seems unlikely that BellSouth will make the**
21 **promotion payments unless compelled to do so by the judiciary or the state commissions, making**
22 **the filing of this case necessary. I escalated and attempted to resolve this issue with BellSouth's**
23 **Pam Tipton, but according to her, the BellSouth/AT&T legal department has instructed her that**
24 **they do not owe any cash back promotions prior to the date of the appellate court's ruling.**

1 Obviously that is not accurate and I cannot imagine any attorney actually providing that advice. I
2 tried to explain the senselessness of that line of thinking and the response I received was "that is
3 just what I am being told."

4 **Q. How much money in promotions is at stake?**

5 **A. The amounts at state are shown in Exhibit dPi 1, attached, which includes a spreadsheet**
6 **showing the totals in North Carolina, and another with the totals for the nine state region. Here**
7 **in North Carolina, dPi qualified and applied for, but was not paid, approximately \$156,500 in**
8 **cash back promotions. Across the nine state BellSouth region, the total figure that dPi qualified**
9 **and applied for, but was not paid, \$465,950, in cash back promotion credits.**

10 **Q. Has BellSouth paid any requests for cash back promotions?**

11
12 **A. Yes. BellSouth has admitted dPi is entitled to these kinds of promotional credits on these**
13 **telecommunications services dPi has purchased from BellSouth by paying these credits from July**
14 **2007 forward. However, BellSouth has neither formally accepted nor denied dPi's claims for**
15 **identical credits for earlier periods; this, for all practical purposes, must now be treated as a**
16 **denial or refusal to pay these credits to which dPi is entitled. dPi accordingly requests that this**
17 **Commission enter an order directing BellSouth to pay the credits together with interest at the**
18 **contract rate.**

19 **Q. Does this conclude your testimony?**

20 **A. It does, for now. But I reserve the ability to change or modify it as new information**
21 **makes doing so necessary.**

22

1 Q. Mr. Bolinger, have you considered the direct testimony from BellSouth's witnesses?

2
3 A. I have. Generally, BellSouth attempts to claim that (1) it never had a legal obligation to
4 provide the cashback promotions to dPi or other CLECs; (2) that even if it did, dPi has waived its
5 right to seek those amounts by its "delay" in attempting to recover the overpayments it made; and (3)
6 the amounts requested are incorrect because of faulty mathematical calculation.

7 Q. What is your response?

8
9 A. Generally, contrary to its assertions, BellSouth (1) has had, since implementation of the FTA,
10 a legal obligation to provide the cashback promotions to dPi or other CLECs; (2) that dPi has never
11 waived its right to recover overcharges by any "delay" in seeking to recover these amounts; but (3)
12 that there may be some merit to BellSouth's concern that some of the amounts requested are
13 incorrect because of faulty mathematical calculation.

14 Q. Is BellSouth required to provide resale services at the promotional price?

15
16 A. Yes. BellSouth is plainly required by law and by contract to make available for resale any
17 promotion that BellSouth makes available to its customers for an extended period of time. Federal
18 law provides, among other things, the following:

19 47 U.S.C. § 251(c) (4) (A). ILECs have the duty to "offer for resale at wholesale rates any
20 telecommunications service that the carrier provides at retail to subscribers who are not
21 telecommunications carriers."

22
23 47 U.S.C. § 251(c) (4) (B). ILECS have a duty not to "prohibit, and not to impose
24 unreasonable or discriminatory conditions or limitations on, the resale of such
25 telecommunications service."

26
27 47 C.F.R. § 51.613(a) (2). "The following types of restrictions on resale may be imposed:
28 Short term promotions. An incumbent LEC shall apply the wholesale discount to the
29 ordinary rate for a retail service rather than a special promotional rate only if:

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

32 (ii) The incumbent LEC does not use such promotional offerings to evade the
33 wholesale rate obligation, for example by making available a sequential series of
34 90-day promotional rates."

1
2 When BellSouth issues a cashback promotion, the net effect of that promotion is to reduce the retail
3 price its customers are paying for telephone service. Essentially, these are rebates. The amount of
4 the cash returned to the end user is so large that the net amount BellSouth's retail customers
5 qualifying for the promotions pay for service is far less than dPi could otherwise buy the service,
6 even taking into account the wholesale discount dPi otherwise receives. It seems self evident that
7 allowing the incumbent to effectively charge its retail customers less than the wholesale rate
8 BellSouth extends to CLECs like dPi completely eviscerates the resale portions of the FTA.
9 Consequently, BellSouth's parent, AT&T, never took a position as specious as BellSouth's claim in
10 this instance; AT&T always extended promotional pricing (including cashback promotions) to
11 CLECs like dPi. And presumably that is why BellSouth has paid the credits requested for service
12 rendered after June 2007, although the timing appears to coincide with the 4th Circuit's decision in
13 BellSouth Telecommunications Inc. v. Sanford et al., 494 F3d 439 (C.A. 4 – N.C., 2007), in which
14 the 4th Circuit upheld the North Carolina Commission's decision that promotions that tend to reduce
15 the retail price paid by retail customers must be made available to CLECs.

16 **Q. Does the parties' contract excuse BellSouth from complying with the federal**
17 **mandate to extend promotional pricing to CLECs like dPi?**

18
19 **A. No – in fact, the opposite is true. The contract clearly indicates support and compliance with**
20 **federal law – including the requirement that BellSouth make available its promotional pricing to dPi.**
21 **Among other things, the parties' contract provides in relevant part the following:**

- 1 a. That the parties wish to interconnect "pursuant to Sections 251 and 252 of the
2 Act" GTC p.1;
3
- 4 b. Parity: "When DPI purchases Telecommunications Services from BellSouth
5 pursuant to ... this Agreement for the purposes of resale to End Users, such services shall
6 be... subject to the same conditions... that BellSouth provides to its ...End Users." GTC p.
7 3.
8
- 9 c. Governing Law: "... this agreement shall be governed by and construed in
10 accordance with federal and state substantive telecommunications law, including rules
11 and regulations of the FCC..." GTC p. 15.
12
- 13 d. Resale Attachment's General Provision sections 3.1: p. 4: "...Subject to effective
14 and applicable FCC and Commission rules and orders, BellSouth shall make available to
15 DPI for resale those telecommunications services BellSouth makes available...to
16 customers who are not telecommunications carriers."
17
- 18 **Q. Does the parties' contract provide a limitation on dPi's ability to recover the
19 overpayments BellSouth has extracted from dPi?**
20
- 21 **A. No. Again, the opposite is true. Scot Ferguson suggests that Attachment 7 (Billing), section
22 2.2, provides a limitation period of 12 months. But if you actually read that section, it does not
23 include the 12 month limitation period he discusses.**
- 24 **Q. So what is the limitations period?**
25
- 26 **A. The contract provides at Section 18 of its Terms and Conditions that the Agreement will be
27 governed federal and state substantive telecommunications law, but in all other respects the
28 "Agreement shall be governed by and construed and enforced in accordance with the laws of the
29 State of Georgia without regard to its conflict of laws principles." In Georgia, the limitations period
30 for a breach of contract is six years. O.G.C.A. section 9-3-25.**
- 31 **Q. What about BellSouth's claim that dPi has nonetheless waived its right to recover
32 the overpayments that BellSouth extracted?**
33
- 34 **A. This appears to be some sort of equitable argument, i.e., that dPi has taken too long to bring
35 these claims. Without even going into the facts, I note that this should be swept aside because the**

1 contract clearly provides at *General Terms and Conditions* section 17 (16 in the later contract) that
2 "A failure or delay of either Party to enforce any of the provisions... or to require performance of any
3 of the provisions hereof shall in no way be construed to be a waiver of such provisions...."

4 Second, BellSouth cannot rely on principles of equity to protect it in this case because
5 BellSouth has unclean hands. The conduct which BellSouth seeks to protect is its own inequitable
6 conduct of overcharging dPi for the services at issue. To allow BellSouth to retain these funds would
7 result in its unjust enrichment at the expense of dPi.

8 Finally, BellSouth's claim that it should be allowed to keep the overcharges that it extracted
9 from dPi because it has not refunded similar overcharges to other CLECs is likewise an argument
10 that perverts the concept of equity. Equity requires not that BellSouth keep the overcharges it
11 extracted from its competitors, which results in BellSouth's unjust enrichment, but that BellSouth
12 disgorge those overcharges to all CLECs who were wrongfully overcharged.

13 Q. What about BellSouth's contention that some of the cashback amounts requested by
14 dPi are too high?

15
16 A. There may be some merit in this concern. This has to do with when the retail price is
17 calculated, and when the corresponding wholesale discount is applied. Thus, if the discount is
18 applied before the promotion is taken, the promotion should also be discounted. The converse is
19 also true. The parties should be able to reach agreement on the true numbers at issue.

20 Q. Does this conclude your testimony?

21
22 A. It does, for now. But I reserve the ability to change or modify it as new information makes
23 doing so necessary.

24

1 COMMISSIONER CULPEPPER: How do you want to
2 identify the exhibits that were attached to that prefiled
3 testimony, Mr. Malish? Do you want to identify them as
4 O'Roark Hearing Exhibit No. 1, consisting of nine pages?

5 MR. MALISH: That would be acceptable.

6 COMMISSIONER CULPEPPER: All right. Well, then,
7 the exhibit will be so identified.

8 (Whereupon, O'Roark Hearing Exhibit No. 1 was
9 marked for identification.)

10 Now, I apologize for interrupting you, Mr.
11 O'Roark. You may proceed now.

12 A. Thank you. We're a small company. We compete in
13 an industry of giants. We compete against BellSouth,
14 multi-billion dollar company. They owe us \$156,000 for
15 cash backs. They gave those cash back promotions to their
16 customers, didn't give them to us.

17 In June of '07 when the Sanford ruling came out,
18 they started giving the cash backs to us and all the
19 CLECs, but they never went back and gave them for the
20 prior periods. We've applied to them to get those cash
21 backs for the private -- for the prior periods. They've
22 refused to give them, \$156,000 for North Carolina, about
23 465,000 total across all the BellSouth states. And
24 obviously what happens to North Carolina is going to

1 affect all of those.

2 They clearly have a contractual obligation if they
3 give a cash back to their customer, that they have to give
4 it to us. That's law not in dispute. Federal law says if
5 you give it to your customer and it has more than a 90-day
6 life, you have to give it to CLECs; it's not in dispute.
7 We're owed that money. We've asked them to give it to us.
8 They won't give it to us. We've come to the North
9 Carolina PUC asking North Carolina PUC for justice to
10 force this massive giant to do the right thing for our
11 small company and for our customers.

12 We service low-income customers. Seventy percent
13 of our customers are Lifeline customers, meaning they're
14 on some type of federal subsidized program. They're in
15 federal housing; they're receiving food stamps; they're
16 elderly; they're getting aid to dependent children, on
17 some federal program, and they are the working poor of
18 this country.

19 We are a prepaid provider; meaning that they can
20 pay as they go. They can come and pay cash. We have
21 nationwide about 6,000 payment locations where those
22 customers can come and make a payment. And most of our
23 customers don't have bank accounts and don't have credit
24 cards, don't have debit cards. They deal with us because

1 we are convenient for them in terms of making easy payment
2 available to them in terms of working with them to make it
3 easy and convenient for them to retain their phone service
4 and we work with them to help provide life management
5 skills, frankly, that they lack to remind them to make
6 payments.

7 We do an awful lot of account administration work
8 with them to remind them to make payments to try to keep
9 their phone service active and that type of thing. We
10 also allow them to come back if their phone service gets
11 interrupted because they have to make a decision between
12 diapers and phone service, we allow them to come back. We
13 don't require them to put up deposits; we don't charge
14 them penalties, that type of thing for leaving service,
15 coming back to service. We're very friendly to them in
16 that regard.

17 Those customers need us. And -- and we feel like
18 that we provide a valuable and needed service in our
19 prepaid niche that's not served by BellSouth and it's not
20 served by any prepaid -- any postpaid provider. So we
21 feel like to a certain extent that we're here representing
22 those customers.

23 The -- we do business with all of the major ILECs.
24 And in most cases when we deal with an ILEC, they offer a

1 promotion. They provide either a code or a universal
2 service ordered code or some code that we can put on an
3 order --

4 MR. TURNER: Mr. Chairman, I object.

5 COMMISSIONER CULPEPPER: I'm going to sustain
6 the objection. Mr. O'Roark, I appreciate what you're
7 having to say here today, but y'all are getting beyond the
8 words that were in the prefiled direct testimony of
9 Mr. Bolinger and that's really what we're limited to
10 receiving at this particular time.

11 Now, we have received into evidence all of those
12 words, and unless you have something that you want to
13 recite that's in those words, I'm going to have to sustain
14 the objection.

15 Mr. Malish, do you want to ask him any other
16 questions?

17 MR. MALISH: No, Mr. Chairman. And Mr. O'Roark,
18 I think, has done a pretty fair job of incapsulating
19 what's in there --

20 COMMISSIONER CULPEPPER: All right.

21 MR. MALISH: -- and perhaps going a little bit
22 beyond and he may have a chance to speak about those
23 things in response to cross.

24 COMMISSIONER CULPEPPER: Well, he'll be subject

1 to cross-examination. Okay. That will be fine.

2 Ms. Edmondson, do you have any questions of the
3 witness?

4 MS. EDMONDSON: If I may, I would like to go
5 after the --

6 COMMISSIONER CULPEPPER: That's fine. No
7 problem about that. Cross-examination --

8 MS. EDMONDSON: AT&T, sorry.

9 COMMISSIONER CULPEPPER: -- BellSouth?

10 MR. TURNER: Thank you, Mr. Chairman.

11 CROSS-EXAMINATION BY MR. TURNER:

12 Q. Morning, Mr. O'Roark.

13 A. Morning.

14 Q. I'd like to start our discussion by getting to
15 know dPi and you a little better. I believe you'll agree
16 with me that dPi is exclusively a prepaid provider?

17 A. That's correct.

18 Q. And for the most part, dPi's customers are what I
19 believe you describe in your summary as the working poor
20 of the country?

21 A. I'm sorry?

22 Q. For the most part, dPi customers are what you
23 described in your summary as the working poor?

24 A. That's correct.

1 Q. DPi is a reseller?

2 A. That's correct.

3 Q. You'll agree with me that dPi does not actually
4 own or operate any telecommunications facilities in North
5 Carolina?

6 A. Well, to the extent that we do offer UNE-P
7 services, we're considered to be facilities-based. Is
8 that your question?

9 Q. No. I'm asking you do you own and operate your
10 own facilities in North Carolina?

11 A. No.

12 Q. Go with us to page 2 of the direct testimony that
13 you just adopted. I'll be asking you about lines 13
14 through 15. Tell me when you're ready.

15 THE WITNESS: Chris, I'm not sure what I'm
16 supposed to be looking at here.

17 MR. MALISH: He's asking you to look at the
18 direct testimony of Brian Bolinger. What was the page and
19 line?

20 MR. TURNER: It's page 2, lines 13 through 15.

21 A. Okay.

22 Q. There it says dPi Teleconnect is a competitive
23 facilities-based telecommunications company, right?

24 A. Because we have a UNE-P relationship with

1 BellSouth or what's today considered a wholesale
2 relationship with BellSouth. That's considered to be
3 facilities-based.

4 Q. That's what you mean by facilities-based there in
5 your testimony, then?

6 A. Yes.

7 Q. You mentioned that -- in your summary that there
8 are nearly 6,000 payment locations for dPi nationwide. Do
9 you remember that?

10 A. Yes.

11 Q. Are those locations run by dPi employees or by
12 third parties?

13 A. Those are run by third parties.

14 Q. Does dPi have any employees in North Carolina?

15 A. No.

16 Q. When you and I last spoke during your deposition
17 in August, dPi was then owned by a publicly traded company
18 called Rent-A-Center, do you remember that?

19 A. Yes.

20 Q. And Rent-A-Center was a rent-to-own company?

21 A. Yes.

22 Q. And that rent-to-own company had owned dPi since
23 November of 2007, right?

24 A. Correct.

1 Q. And at the time of your deposition, dPi was
2 undergoing a change in ownership. Has that change in
3 ownership been finalized?

4 A. No.

5 Q. So you're still owned by Rent-A-Center today?

6 A. Yes.

7 Q. When we spoke during your deposition in August,
8 you were responsible for being vice president of finance
9 for dPi. Are you still today responsible for being vice
10 president of finance for dPi?

11 A. Yes.

12 Q. And are you still responsible today for acting in
13 the capacity of CEO for dPi?

14 A. I'm acting CEO, CFO for dPi at the moment, yes.

15 Q. Okay. Now that we've gotten to know you and dPi a
16 little better, I want us to talk about the dispute before
17 the Commission today, really the amounts at issue and the
18 time frame involved.

19 First, the dispute in general. Go with me to page
20 3 of your direct testimony. I'll be asking about lines 31
21 through 33. Tell me when you're ready.

22 A. Okay. I'm ready.

23 Q. All right. We can agree, can't we, that this case
24 involves cash back promotions that AT&T North Carolina

1 provided to its retail customers?

2 A. Yes.

3 Q. And in footnote 1 on page 3 of your direct
4 testimony there, you identify the three cash back
5 promotions that are at issue in this docket. Let's talk
6 about that term "cash back."

7 Under these promotions, if an AT&T end user
8 qualified when she bought the services involved in one of
9 these promotions, she received a coupon that she could
10 redeem for a certain amount of cash. Can we agree to
11 that?

12 A. Okay.

13 Q. And that's generally what we mean when we say
14 "cash back" here, right?

15 A. Okay.

16 Q. Do you agree with that?

17 A. Yes.

18 Q. And during the time frame relevant to this
19 proceeding, dPi bought the services that were involved in
20 those cash back offerings from AT&T and it resold them to
21 its own end users in North Carolina, right?

22 A. Yes.

23 Q. All right. Go to page 4, lines 11 through 13.

24 A. Okay.

1 Q. We can agree that dPi has asked AT&T North
2 Carolina for promotional credits for these cash back
3 promotions and that AT&T has not given dPi the credits
4 that it asked for that are in dispute in this proceeding,
5 right?

6 A. Correct.

7 Q. So for example, if AT&T's retail offer said buy
8 service A and get a coupon that you can redeem for a check
9 in the amount of \$50, if that's what had happened, then
10 dPi is asking AT&T for bill credits to address that \$50
11 cash back aspect of the promotion, right? That's what
12 we're arguing about?

13 A. Yes.

14 Q. All right. Now, that we've sort of identified the
15 dispute, let's talk about the amount in dispute and that
16 should be easy. We can agree, can't we, that the total
17 amount that dPi is seeking in this proceeding is \$156,500?

18 A. Yes.

19 Q. All right. Now, let's talk about the time period.
20 And, again, that should be pretty easy. Can we agree that
21 the most recent bill period for which dPi is seeking cash
22 back promotional credits here in North Carolina is June of
23 2007?

24 A. Yes.

1 Q. And the earliest bill period for which dPi is
2 seeking cash back promotional credits in this docket is
3 November of 2003, right?

4 A. Yes.

5 Q. So the time frame that we're talking about here is
6 from November of 2003 through June of 2007, right?

7 A. Right.

8 Q. Let's move to another topic. I want to talk a
9 little bit about when and how dPi started applying for the
10 promotional credit requests that are at issue in this
11 proceeding. To get us started, let's go to your direct
12 testimony at page 2, lines 6 through 9. Let me know when
13 you're there.

14 A. Yes.

15 Q. First of all, we can agree that you were not the
16 person who took the lead in dealing with this dispute over
17 promotional credits since its inception, right?

18 A. That's correct.

19 Q. That was Mr. Bolinger, right?

20 A. Right.

21 Q. You also mention in that same line 8 a Steve
22 Watson with Lost Key. Mr. Watson -- well, Lost Key was
23 dPi's billing and collection agent for the promotions that
24 are at issue in this proceeding, correct?

1 A. Correct.

2 MR. TURNER: Mr. Chairman, I have an exhibit
3 that I would like to mark for identification purposes at
4 this point. I may want to move it in at a later point.
5 I'm going to ask permission to hand it to opposing counsel
6 and the court reporter.

7 COMMISSIONER CULPEPPER: How do you want it
8 marked?

9 MR. TURNER: For now I'd like to mark it as, if
10 it -- if it suits you, as AT&T's Cross-Exhibit 1.

11 COMMISSIONER CULPEPPER: All right. I tell you
12 what, let's identify -- identify the exhibit as O'Roark
13 Cross-Examination Exhibit No. 1 if that's okay with you?

14 MR. TURNER: Yes, sir.

15 COMMISSIONER CULPEPPER: All right. Let the
16 exhibit be so identified. And if you want to pass it out,
17 that will be fine.

18 (Whereupon, O'Roark Cross-Examination Exhibit
19 No. 1 was marked for identification.)

20 Q. Mr. O'Roark, tell me when you've had a chance to
21 look at that and when you're ready to begin.

22 A. Go ahead.

23 Q. Can we agree that this is the contract between dPi
24 and its billing agent Lost Key Telecom, Inc.?

1 A. Yes.

2 Q. And the date on the front page of that contract is
3 August the -- the 2nd, 2004, right?

4 A. Correct.

5 Q. Flip to the last page. And we see that it was
6 signed by dPi's president and CEO on August the 23rd,
7 2004?

8 A. Right.

9 Q. Now, I understand that dPi's been unable to
10 produce a copy of this that was signed by Lost Key, but
11 based on your deposition testimony, we can agree, can't
12 we, that this is the contract that Lost Key and dPi
13 operated under beginning in August of 2004?

14 A. Correct.

15 Q. One of the things that Lost Key, dPi's billing
16 agent, agreed to do under this contract is to submit
17 promotional credit requests and disputes to AT&T on behalf
18 of dPi, right?

19 A. Right.

20 Q. Go with us to page 3 of this contract. It's not
21 numbered, but it's the third page in. We'll be looking
22 under "Current Promotional and Dispute Fees." It's about
23 a third of the way from the top. Tell me when you're
24 ready.

1 A. I see it.

2 Q. Does that accurately depict the amounts that dPi
3 agreed to pay Lost Key for submitting credit requests and
4 disputes on a going-forward basis from July 1st, 2004?

5 A. Yes.

6 Q. Another thing that Lost Key agreed to do in this
7 contract is to develop a strategy to send all back-data
8 for requests and disputes from 2000 to 2004 to AT&T on
9 behalf of dPi, right?

10 A. Correct.

11 Q. And if you're still there on page 3, go down one
12 heading, "Back Promotional Dispute Fees." Do you see
13 that?

14 A. Yes.

15 Q. Can we agree that dPi agreed to pay Lost Key twice
16 the amount for back promotional credits as it did for
17 going-forward promotional credits?

18 A. Ten percent.

19 Q. At the time it was the five percent going-forward,
20 right?

21 A. It says duration agreement will be 10 percent of
22 promotions and disputes paid.

23 Q. I'm sorry. I didn't ask my question clearly. At
24 the time you entered the contract for promotional disputes

1 submitted on a going-forward basis, dPi agreed to pay five
2 percent, right?

3 A. 2004, five percent; 2005, five percent; 2006,
4 three percent.

5 Q. And for backward disputes it was 10 percent,
6 right?

7 A. Ten percent, yes, backwards, yes.

8 Q. Parking back to your deposition in August, can we
9 agree that as of the date this contract was entered into,
10 dPi had not submitted any cash back promotional credit
11 requests to AT&T North Carolina?

12 A. Prior to entering into this agreement with Lost
13 Key?

14 Q. That's my question.

15 A. That's correct.

16 Q. So just to clarify for the record, as of August
17 2nd, 2004, dPi had not submitted any promotional credit
18 requests to AT&T North Carolina?

19 A. Correct.

20 Q. And in this August of 2004 time frame, AT&T
21 specifically told dPi -- I'm sorry, AT&T specifically told
22 Lost Key that these cash back promotions were not
23 available for resale, right?

24 A. I'm sorry, would you ask that again?

1 Q. Yes, sir. In the August 2004 time frame, can we
2 agree that AT&T specifically told Lost Key that cash back
3 promotions were not available for resale?

4 A. I don't know what AT&T told Lost Key.

5 MR. MALISH: We're willing to stipulate that.

6 MR. TURNER: Thank you. That makes it much
7 easier.

8 Q. Can we also agree that A -- that Lost Key did not
9 submit any requests for promotional credits to AT&T North
10 Carolina on behalf of dPi until December of 2005?

11 MR. MALISH: We can stipulate to that for cash
12 backs.

13 THE WITNESS: Yes.

14 MR. TURNER: For the cash backs that are
15 involved in this docket?

16 MR. MALISH: Right.

17 MR. TURNER: That's acceptable to us if it's
18 acceptable to the Chair.

19 COMMISSIONER CULPEPPER: Well, if it's
20 acceptable to you and it y'all's case.

21 MR. TURNER: Thank you.

22 COMMISSIONER CULPEPPER: I understand what --
23 there have been two stipulations that have been entered
24 into and they're a part of the record.

1 Q. And can we agree that in June of 2005 dPi
2 instructed Lost Key to get the cash back promotions
3 submitted in North Carolina "because it would be worth a
4 ton of cash to both of us"?

5 MR. MALISH: We'll stipulate to that, too.

6 MR. TURNER: That's fine.

7 Q. All right. Now, let's talk about what happened
8 when dPi first asked AT&T for these credits. Once Lost
9 Key actually began submitting these cash back promotional
10 credit requests to AT&T North Carolina, AT&T North
11 Carolina did not pay those requests, correct?

12 A. That's correct.

13 Q. And the first time that AT -- that dPi disputed
14 AT&T's denial, AT&T's decision not to pay those requests
15 was in 2007, correct?

16 A. I heard you say that and -- in your opening
17 statement. I don't -- I don't have that date in front of
18 me. I don't know.

19 MR. MALISH: Yeah, we can stipulate to that,
20 too.

21 MR. TURNER: I'll accept the stipulation,
22 Mr. Chairman. I would also ask that under the rules of
23 civil procedure, dPi Teleconnect's First Supplemental
24 Response to AT&T North Carolina's Second Set of

1 Interrogatories be submitted as an exhibit to the -- to
2 the testimony here.

3 MR. MALISH: No objection.

4 COMMISSIONER CULPEPPER: All right. Well, let's
5 identify it. Tell me again what it is.

6 MR. TURNER: Yes, sir. This is dPi
7 Teleconnect's First Supplemental Response to AT&T North
8 Carolina's Second Set of Interrogatories in this docket.
9 And I can present a copy to the court reporter, the
10 Commissioners and opposing counsel.

11 COMMISSIONER CULPEPPER: All right. Well, for
12 purposes of this proceeding, we're going to identify that
13 as AT&T Hearing Exhibit No. 1.

14 (Whereupon, AT&T Hearing Exhibit No. 1 was
15 marked for identification.)

16 And if you'll get a copy of that to the court
17 reporter.

18 MR. TURNER: Yes, sir.

19 COMMISSIONER CULPEPPER: And of course Mr.
20 Malish needs a copy of that. And Ms. Edmondson, excuse
21 me.

22 Q. Last question before I move to another point,
23 Mr. O'Roark. In light of the timing we just discussed,
24 can you tell us this: Does dPi have any of the actual

1 service orders that it submitted to then BellSouth that
2 are associated with the cash back promotional credits it
3 seeks in this docket?

4 A. I don't believe so. I don't think we keep those.

5 MR. TURNER: Did you get that?

6 Q. Mr. O'Roark, I'm going to ask you to speak up just
7 a little bit to help the court reporter out some.

8 Now, let's move to another topic.

9 COMMISSIONER CULPEPPER: All right. Before you
10 do that, Mr. Turner, this would be a good time for us to
11 take a 10-minute morning break, so we're going to take
12 that break and we'll resume in about 20 minutes till the
13 hour of 12. Stand in recess.

14 . [RECESS - 11:27 A.M. TO 11:40 A.M.]

15 COMMISSIONER CULPEPPER: All right. Let's go
16 back on the record. Mr. Turner, before you resume your
17 cross-examination, let me go ahead and reflect for the
18 record that there has now been filed in this docket a
19 filing entitled "dPi Teleconnect's Response to AT&T North
20 Carolina's Motion to Compel." And indicates that a copy
21 of that has been served on AT&T by hand delivery.

22 And I just suggest that that's the document that
23 Mr. Malish referred to earlier today in our prior
24 discussions. And it would appear to be that perhaps -- of

1 course I'm not going to tell you how to try your case --
2 that AT&T may wish to file a reply to that response, and
3 then that should tee the issue up for a ruling sometime
4 subsequent to -- to this hearing. So I'll just note all
5 of that for the record:

6 With that having been noted, Mr. Turner, you may
7 resume your cross-examination.

8 MR. TURNER: Thank you.

9 Q. Mr. O'Roark, now that we're back on the record,
10 during your summary I believe you stated that -- well, let
11 me ask you this: You don't have a written copy of the
12 summary you delivered, do you?

13 A. A written copy of the summary?

14 Q. Yes, sir. When you gave your summary of your
15 testimony, it looked to me like you were just giving it
16 without reading any document. Was that accurate? You
17 don't have a copy of what you were reading from or
18 anything?

19 A. I wasn't reading.

20 Q. Okay. So there's no document that has your
21 summary written out, right?

22 A. No.

23 Q. Okay. I believe I heard you say in your summary
24 that dPi serves a prepaid niche that is not served by

1 BellSouth. Did I hear that right?

2 A. I don't have it in front of me.

3 Q. Well, do you remember saying that or does that --

4 A. Haven't committed to memory.

5 Q. Does that sound accurate, though? Will you agree
6 with me that dPi serves a prepaid niche that is not served
7 by BellSouth?

8 A. BellSouth's a postpaid provider, correct? Are you
9 -- are you in the prepaid business? I don't -- I'm not
10 familiar with every aspect of your business. Do you offer
11 prepaid services?

12 COMMISSIONER CULPEPPER: Okay. Now,
13 Mr. O'Roark, you're here to answer his questions. If you
14 don't know the answer, the answer is I don't know.

15 A. I don't know.

16 COMMISSIONER CULPEPPER: Okay.

17 A. I don't know about BellSouth.

18 COMMISSIONER CULPEPPER: Ask him another
19 question.

20 THE WITNESS: Okay.

21 Q. Now, you're aware from having read the testimony
22 of AT&T's witnesses that AT&T views its decision not to
23 make these promotions that are issue in this docket
24 available for resale as a reasonable and nondiscriminatory

1 restriction on resale? You're aware that's AT&T's
2 position, right?

3 A. Yes.

4 MR. TURNER: In that context, I'd like to ask
5 the Chair if I may present AT -- or mark for
6 identification O'Roark Cross-Examination Exhibit No. 2.

7 COMMISSIONER CULPEPPER: All right, sir. Let
8 the exhibit be so identified.

9 (Whereupon, O'Roark Cross-Examination Exhibit
10 No. 2 was marked for identification.)

11 MR. MALISH: Was not the response to the
12 interrogatories exhibit -- Cross-Examination Exhibit No.
13 2?

14 MR. TURNER: No.

15 COMMISSIONER CULPEPPER: That was
16 Cross-Examination Exhibit No. 1. This is
17 Cross-Examination Exhibit No. 2, whatever it is.

18 MR. TURNER: Yes, sir.

19 COMMISSIONER CULPEPPER: Can you identify it?

20 MR. TURNER: Yes, sir. I have not identified it
21 yet. Mr. Chairman, I have O'Roark Exhibit 1 was his
22 testimony -- his exhibit to his direct testimony. I have
23 O'Roark Cross-Examination Exhibit No. 1 as the contract.
24 I have AT&T hearing -- I'm sorry, AT&T Hearing Exhibit No.

1 1 being the supplemental discovery.

2 MR. MALISH: Oh, okay.

3 COMMISSIONER CULPEPPER: That's correct. And
4 now we're talking about O'Roark Cross-Examination Exhibit
5 No. 2, which is what, Mr. Turner?

6 MR. TURNER: Yes, sir. This is a page from
7 dPi's website that sets forth pricing information for its
8 services here in North Carolina.

9 COMMISSIONER CULPEPPER: All right. Let the
10 document be identified as previously stated.

11 Q. Tell me when you're ready, Mr. O'Roark.

12 A. Okay.

13 Q. Mr. O'Roark, at the bottom of this document there
14 is an indication that this comes from the dPi website and
15 was printed on November the 10th, 2009, two days ago,
16 right?

17 A. Okay.

18 Q. I'm sorry, Mr. O'Roark, I didn't hear your answer.

19 A. Yes, that's what it says.

20 Q. On the first page of the document, at the top
21 left, this is a quote for basic service for dPi. Could
22 you give us the price that appears for dPi's basic service
23 there?

24 MR. MALISH: Excuse me for a moment. I

1 understand that the Commission is -- sort of allows broad
2 cross-examination, but I -- you know, in the interest of
3 conserving time, I would move to object to this line of
4 questioning as irrelevant.

5 Again, they're going into the pricing that dPi
6 has with its retail customers and I don't see how that
7 could possibly be related to the basic question of whether
8 AT&T is obligated to provide the offers that it makes
9 available at retail to resellers like -- like dPi. It's
10 just -- it's just inquiring about matters that -- entirely
11 extraneous to that decision.

12 COMMISSIONER CULPEPPER: All right. Well, I'm
13 going to overrule your objection, Mr. Malish. You may
14 proceed.

15 Q. Mr. O'Roark, on page 1 at the top left under
16 "Quote," tell us the price for basic service that is
17 quoted there.

18 A. You want me to read from this thing you've handed
19 me? Basic Total 39.99, is that what you want me to read?

20 Q. I'm asking you the price that's indicated on this
21 exhibit for the basic service that dPi provides in North
22 Carolina. What is it?

23 A. It says Basic Total, 39.99.

24 Q. Go with me to page 3 of the document. This is an

1 order summary that is, again, taken from the dPi website.
2 If you look at the top right corner, you'll see that ZIP
3 code there.

4 A. Uh-huh.

5 Q. Will you accept subject to check that that is a
6 ZIP code for Charlotte, North Carolina?

7 A. 28202?

8 Q. Yes, sir.

9 A. If you say so. Okay.

10 Q. In the middle of the page under product name,
11 there is a chart that goes from month one to month nine.
12 Do you see that?

13 A. Yes.

14 Q. As I read this chart, the -- today the total
15 amount that a dPi end user pays for basic service in North
16 Carolina is \$55.60 in month one; is that correct?

17 A. That's what it says.

18 Q. Well, Mr. O'Roark, you're the CEO of this company.
19 I asked you these questions in your deposition in August.
20 Is that an accurate number or not?

21 A. I don't have my product catalog in front of me. I
22 don't have access to that database from this desk and we
23 have -- we operate in 30-plus states. We have different
24 prices, different products for every ILEC in every state.

- 1 Q. Do you have any reason to believe sitting here on
2 the stand today that the information set forth on dPi's
3 website in that exhibit is inaccurate?
- 4 A. I don't have any reason to believe it's not
5 accurate.
- 6 Q. Go with us to month two and tell us the price that
7 dPi's end user pays for basic service in North Carolina in
8 month two.
- 9 A. This says the same 39.99.
- 10 Q. Look at the product name under total where you
11 just said on month one the total was 55.60. What's the
12 total for month two?
- 13 A. The total amount for all of the above, 64.56,
14 including taxes, fees, surcharges and all of the other.
- 15 Q. Including an A.A.M. fee, correct, of \$3 -- \$5?
- 16 A. Right.
- 17 Q. Including a dPi Club Program of \$3, right?
- 18 A. Correct.
- 19 Q. What's the total amount that the dPi end user in
20 North Carolina pays in month three for basic service?
- 21 A. 39.99.
- 22 Q. The total amount --
- 23 A. The total for all of the above --
- 24 Q. Yeah.

1 A. -- 54.56.

2 MR. TURNER: Mr. Chairman, may I have one moment
3 to confer with co-counsel?

4 COMMISSIONER CULPEPPER: Certainly.

5 (Brief pause.)

6 Q. Mr. O'Roark, those total numbers for month three
7 and beyond, we can agree that those numbers assume that
8 dPi's end user pays on a timely basis, correct?

9 A. That's right. There's a prompt pay discount.

10 Q. And if the dPi end user does not pay on a timely
11 basis in month three forward, how much gets added to their
12 bill?

13 A. Well, they wouldn't qualify for the prompt pay
14 discount if they didn't pay promptly, right, so it's \$10.

15 Q. \$10 additional. Are there any late fees that
16 would apply as well?

17 A. There may be. Late fees vary by state by ILEC. I
18 would have to look that up.

19 Q. Is it fair and accurate to say that essentially
20 every single one of dPi's new customers is someone who was
21 formerly a customer of AT&T or another provider and who
22 left after getting into trouble over their phone bill?

23 A. Is it -- is it true that every customer of ours
24 was formerly your customer or someone else's customer who

1 left after getting in trouble over not paying their bill?

2 Q. Is it fair and accurate to say that essentially
3 every single one of dPi's new customers is someone who was
4 formerly a customer of AT&T or another provider and who
5 left after getting into trouble over their phone bill?

6 A. A lot of -- yeah. I mean, a lot of our customers
7 that would be true about, yes. Not 100 percent, but,
8 yeah, that would be true about a large percentage of our
9 customers, yes.

10 Q. I believe the phrase you used in your prefiled
11 testimony in Georgia was "essentially every single one."
12 Does that refresh your recollection?

13 A. That's the testimony that Brian Bolinger gave that
14 I've adopted, is that what you're quoting? Yes. Okay.

15 Q. Does it refresh your recollection?

16 A. Okay.

17 Q. That's a yes?

18 A. Yes.

19 Q. Let's move to the next topic. Let's talk about
20 the number of customers dPi serves in North Carolina. The
21 promotions at issue go back to late 2003, right?

22 A. Right.

23 Q. Can we agree that in September 2003 dPi served
24 2,896 customers in North Carolina?

1 A. September of 2003 dPi had 2,896 customers in North
2 Carolina.

3 Q. How many in June of 2009?

4 A. 3,966 as of June 2009.

5 Q. And AT&T began giving cash back credit requests on
6 a going-forward basis in June 2007, right?

7 A. Correct.

8 Q. How many customers did dP have -- dPi have in
9 June 2007?

10 A. 5,139 customers in North Carolina as of June 2007.

11 MR. TURNER: Mr. Chairman, I would like to mark
12 as O'Roark Cross-Examination Exhibit No. 3 a chart
13 depicting the numbers we just described and ask that it be
14 handed out by my colleague to the witness, his counsel and
15 the Commission and other attorneys.

16 COMMISSIONER CULPEPPER: All right. Let the
17 document be so identified. Get a copy to the court
18 reporter, please.

19 (Whereupon, O'Roark Cross-Examination Exhibit
20 No. 3 was marked for identification.)

21 Q. Mr. O'Roark, the midpoint on that chart is June of
22 2007, right?

23 A. Yes.

24 Q. So from September of '03 through June of '07 when

1 AT&T was not providing cash back credits to dPi, the
2 number of customers in North Carolina increased from 2,896
3 to 5,139, right?

4 A. Right.

5 Q. And from the time that AT&T began giving these
6 credit requests to dPi in North Carolina, your number of
7 customers in North Carolina dropped from 5,139 to 3,966 in
8 June of 2009, correct?

9 A. Correct.

10 Q. Now, let's talk about the amounts that dPi is
11 seeking in this docket. I want you to assume that AT&T's
12 promotion provided its retail customer a coupon that could
13 be redeemed for a \$50 cash back check, okay?

14 A. Okay.

15 Q. If that is the request at issue in this docket, is
16 dPi asking the Commission to order BellSouth or AT&T to
17 pay \$50 in credits or \$50 less the promotional discount
18 and credits?

19 A. I believe that we've asked for \$50, right?

20 Q. I'm asking you, sir.

21 A. I'd have to go back and revisit the calculation,
22 but I believe it's based on \$50.

23 MR. TURNER: Mr. Chairman, I have a four-page
24 exhibit that I'd like to walk through in hypothetical form

1 with the witness. And I'd like that -- to ask that it be
2 marked as O'Roark Cross-Examination Exhibit No. 4.

3 COMMISSIONER CULPEPPER: All right. Let the
4 document be so identified.

5 (Whereupon, O'Roark Cross-Examination Exhibit
6 No. 4 was marked for identification.)

7 Would you tell us again what this document is?

8 MR. TURNER: Yes, sir. The first page is titled
9 "Telecommunications Service A Retail Price of \$75."
10 Mr. Chairman, what I intend to do is walk through the
11 document and compare a price reduction to a cash back and
12 see the dollar amounts that would be at issue there.

13 COMMISSIONER CULPEPPER: All right. Well, let's
14 let the exhibit be identified as O'Roark Cross-Examination
15 Exhibit No. 4.

16 Q. Tell me when you've had a chance to look through
17 that, Mr. O'Roark, and are ready for me to ask you
18 questions.

19 A. I've looked at it.

20 Q. In order to explore dPi's position that it's
21 entitled to a credit for the full face value of a
22 promotional offering, I want you to assume, as depicted on
23 page 1 here, that AT&T has a retail telecommunications
24 service A that has a retail price of \$75. I also want you

1 to assume that the residential resale discount in North
2 Carolina is 21.5 percent. Will you assume that with me?

3 A. Sure.

4 Q. Now, if A -- if dPi purchases service A for
5 resale, we can agree, can't we, that dPi would pay AT&T
6 the \$58.88 price that's set out on the last line of page 1
7 of Exhibit 4?

8 A. Hypothetically, yes.

9 Q. That's simply the \$75 retail price less
10 21-and-a-half percent resale discount, right?

11 A. Right.

12 Q. Now, you've testified that the net effect of a
13 cash back promotion is to reduce the retail price that
14 AT&T's customers are paying for telephone service, right?
15 And if you want to look at your rebuttal, page 3, lines 1
16 through 2, it could refresh your memory.

17 A. You giving \$50 to your customer reduces the price
18 that your customer pays, is that your question?

19 Q. My --

20 A. Yes, it does. Yes, it does.

21 Q. So let's assume that -- I said 50. I want you to
22 do 25. Let's assume that there's a \$25 price reduction.
23 And let's assume that instead of taking the form of a cash
24 back offer, AT&T simply decides to reduce its price for

1 Telecommunication Service, here A, by \$25. Will you make
2 that assumption with me?

3 A. Okay.

4 Q. Go to page 2 of Exhibit 4. We see a retail price
5 of \$50 there, right?

6 A. Uh-huh.

7 Q. That's a yes?

8 A. Yes.

9 Q. And that is \$25 less than the price on page 1,
10 right?

11 A. Right.

12 Q. If dPi purchased this service now with a \$50
13 retail price, it would pay the 39.25 depicted at the
14 bottom of Exhibit 2, right?

15 A. Right.

16 Q. Now, flip to page 3. When the price of the
17 service was \$75 dPi paid to resell the service, it paid
18 58.88, right?

19 A. Correct.

20 Q. And after the \$25 reduction of the face value of
21 the price, dPi paid 39.25, right?

22 A. That's right.

23 Q. That's a difference of 19.63, right?

24 A. That's right.

1 Q. So a retail price reduction of \$25 resulted in a
2 price reduction for dPi of 19.63, correct?

3 A. Correct.

4 Q. And you agree that if that's the way that this was
5 laid out, the 19.63 would be the difference that dPi was
6 entitled to, correct?

7 A. Do I agree that the difference between 58.88 and
8 39.25 is 19.63, yes, I agree.

9 Q. That's not quite what I asked. I'll clarify.

10 A. Okay.

11 Q. Do you agree that if AT&T reduced its retail price
12 from \$75 to \$50, that would inure to a benefit of \$19.63
13 to dPi? It's not a \$25 price reduction for dPi, it's a
14 19.63 price reduction, isn't it?

15 A. Yes. Yes.

16 Q. Let me ask you --

17 A. If you reduce the retail price, yes, that's
18 correct.

19 Q. If when we reduce our resale price by \$25 you're
20 only entitled to 19.63, how is it that you claim to be
21 entitled to more than that when the reduction takes the
22 form of a cash back offer as opposed to a retail price
23 reduction?

24 A. Well, my understanding is that the law is and that

1 our interconnection agreement is that any promotion you
2 make available to your customer you have to make available
3 to my -- to my customer. And that if a customer comes to
4 you through the CLEC sales channel, you can't treat that
5 customer different than you treat a customer who comes to
6 you through your direct sales channel. So that when -- if
7 you give \$25 to a customer that comes to you through your
8 direct channel, that you're obligated by contract and by
9 law to give that same \$25 to the customer that comes to
10 you through the CLEC sales channel.

11 So, you know, that's my understanding of it. If
12 I'm -- I guess the Commission will decide what the actual
13 rule is, but, you know, we've -- we've asserted what we
14 believe to be the law and what we believe to be your
15 contractual obligation, that any promotion you make
16 available to your customer, you're obligated to make
17 available to my customer. If you give your customer \$25,
18 you're obligated to give that same \$25 to my customer.

19 You know, it's -- they're -- they're both
20 BellSouth customers. They just come through different
21 sales channels. They're still both BellSouth customers.
22 So we understood that the rule was that any promotion you
23 made available to your customer you had to make available
24 to my customer. You couldn't treat the two customers

1 differently just because one came through the CLEC sales
2 channel and one came through your direct sales channel,
3 that you had to treat them both the same; and that if you
4 didn't do that, that was -- that was unfair and that that
5 wasn't the rule. So that's part of what, I guess, is
6 going to be decided.

7 Q. Yes, your understanding of the law. I take it
8 that you rely in part on the Sanford decision in
9 determining whether it complies with the law or not?

10 A. I think the Sanford decision -- in my mind the
11 only -- the significance of the Sanford decision was that
12 it says that any promotion that tends to reduce the retail
13 price paid had to be passed through, had to be made
14 available to the CLEC. That didn't deal -- my
15 understanding was -- and I'm not a lawyer, but my
16 understanding was it didn't deal with this specific cash
17 back, but it just dealt with general principle that if a
18 retail promotion had the effect of -- tended to have the
19 effect of reducing the price that a customer paid, that
20 that retail promotion had to be made available to the
21 CLEC.

22 And the only other significance was that for some
23 reason you began issuing credits to CLECs about the same
24 time that that ruling came down. So -- but you never went

1 back and corrected the prior, so...

2 MR. TURNER: Mr. Chairman, I would like to
3 explore that a bit. And what I'd like to propose is that
4 I use the blackboard and ask my colleague, Ms. Phillips,
5 to copy what I'm putting on that blackboard. We'll
6 probably make it a -- move to make it a hearing exhibit at
7 the end so that the transcript can reflect what's on that
8 board.

9 COMMISSIONER CULPEPPER: That will be fine. Go
10 right ahead.

11 Q. See if we can make the hypothetical jibe with the
12 Sanford decision. Let's assume that the retail price is
13 \$120. Assume that the coupon involved is \$100. And to
14 make the math the same as the Fourth Circuit made it,
15 let's assume that the discount, resale discount, is
16 20 percent, right? If you take the service of 120, you'll
17 agree with me that 20 percent of 120 is 24, right?

18 A. Uh-huh.

19 Q. And that leaves -- if the CLEC bought the \$120
20 service at a 20 percent discount, it would pay \$96 for the
21 service, correct?

22 A. Uh-huh.

23 Q. Take the coupon. Coupon has a face value of \$100,
24 right? You've got to say yes or --

1 A. Oh, I'm sorry. Yes. Sorry.

2 Q. That's all right. And if you take 20 percent
3 discount off the coupon, you come up with 80, right?

4 A. Uh-huh.

5 Q. Well -- so if AT&T charged dPi \$96 for the
6 service, then credited it \$80, how much does dPi end up
7 paying for the service?

8 A. 16, right.

9 Q. Do you have a copy of the Sanford decision in
10 front of you?

11 A. No.

12 COMMISSIONER CULPEPPER: He doesn't have a copy
13 of it, Mr. Turner.

14 MR. TURNER: Oh, I'm sorry. I didn't hear him.
15 I'm trying to think of the least painful way to do this.

16 COMMISSIONER CULPEPPER: That's all right.

17 MR. TURNER: Mr. Chairman -- and I'm going to
18 ask counsel to agree to this so we can speed the process
19 up -- what I would like to do is to read into the record a
20 paragraph from the Sanford decision to show how it applies
21 to this.

22 COMMISSIONER CULPEPPER: Do you have a copy of
23 the Sanford excision -- decision that you want to present
24 to the witness?

1 MR. TURNER: I don't have it -- I have one copy,
2 Your Honor, and that's the problem.

3 COMMISSIONER CULPEPPER: You have one copy of
4 it, okay. Well --

5 MR. MALISH: I don't have -- I don't have an
6 objection to him reading it into the record. I don't have
7 an objection to him putting a copy in and he'll just add
8 it -- you know, actually give the court reporter --

9 COMMISSIONER CULPEPPER: Well, I --

10 MR. MALISH: -- a hard copy later. I mean, this
11 decision -- excuse me, the decision speaks for itself.

12 COMMISSIONER CULPEPPER: I understand that,
13 Mr. Malish. I understand that. So I tell you what, let's
14 -- let's do it this way. Mr. Turner, you hand Mr. O'Roark
15 a copy of the Sanford decision and you ask him to read
16 into the record whatever part of that decision you would
17 like for him to do so.

18 MR. TURNER: Yes, sir.

19 Q. Mr. O'Roark, just to save time, I would like you
20 to read from "suppose" down to this 20 percent number
21 here.

22 A. Subbose -- "Suppose BellSouth offers its
23 subscribers residential telephone service for \$20 a month.
24 Assuming a 20 percent discount for avoided cost, see Local

1 Competition Order PP [sic] 931-33. BellSouth must resell
2 this service to competitive LECs for \$16 per month,
3 enabling the competitive LEC to compete with BellSouth's
4 \$20 retail fee. Now suppose that BellSouth offers its
5 subscribers telephone service for 120 a month, but sends
6 the customer a coupon for a monthly rebate for \$100.
7 According to the North Carolina Commission's orders, the
8 appropriate wholesale rate is still \$16, because that is
9 the net price paid by the retail customer (\$20) less the
10 wholesale discount. According to BellSouth's position,
11 however, the appropriate resale rate" --

12 Q. That's fine.

13 A. -- "the appropriate wholesale rate would be \$96,
14 the nominal rate of 120, less the 20 percent discount for
15 *451 avoided cost."

16 COMMISSIONER CULPEPPER: All right. Stop right
17 there, Mr. O'Roark. Do you wish him to read any more of
18 the --

19 MR. TURNER: No.

20 COMMISSIONER CULPEPPER: -- of the decision?

21 All right. Thank you, Mr. O'Roark.

22 Q. Mr. O'Roark --

23 COMMISSIONER CULPEPPER: Ask him another
24 question now.

1 MR. TURNER: Yes, sir.

2 Q. Mr. O'Roark, we can agree that in that passage the
3 Fourth Circuit said that if you had a \$120 retail price
4 and a \$100 coupon, the appropriate price that a reseller
5 should pay is 16, correct?

6 A. According to the North Carolina Commission orders,
7 the appropriate rate is still \$16, yes, that's what it
8 says.

9 Q. In our hypothetical here when we took the coupon
10 and discounted it by the percentage that is there in that
11 order, we came to \$16, didn't we?

12 A. Yes.

13 Q. If we gave the full value of the coupon, we'd come
14 up with a negativē four, wouldn't we?

15 A. Right.

16 Q. And that's not the number that's in that Sanford
17 decision --

18 A. No, it's not.

19 Q. -- is it?

20 Could I have the decision back, please?

21 A. Yes.

22 MR. TURNER: Mr. Chairman, may I give a copy of
23 Ms. Phillips' notes on the board to opposing counsel so he
24 can agree that it's an accurate depiction of what was on

1 the blackboard?

2 COMMISSIONER CULPEPPER: You can do that. Do
3 you want to mark it as an exhibit?

4 MR. TURNER: Yes, sir. I'd like -- thank you.
5 I'd like to mark it as O'Roark Cross-Examination Exhibit
6 No. 5.

7 COMMISSIONER CULPEPPER: All right. Let it be
8 so identified.

9 (Whereupon, O'Roark Cross-Examination Exhibit
10 No. 5 was marked for identification.)

11 And state again for the record what O'Roark
12 Cross-Examination Exhibit No. 5 is.

13 MR. TURNER: Yes, sir. It is the -- it is a
14 copy of the information that I was using on the blackboard
15 as I was cross-examining Mr. O'Roark on the Sanford
16 decision.

17 COMMISSIONER CULPEPPER: All right. Why don't
18 you present that to the witness and ask him if that's not
19 true.

20 MR. TURNER: Yes, sir.

21 Q. Mr. O'Roark, do you have in front of you O'Roark
22 Cross-Examination Exhibit No. 5?

23 A. Yes.

24 Q. Is that a fair and accurate depiction of what is

1 on the blackboard that I used as I was asking you
2 questions about the Sanford decision?

3 A. Yes, it is.

4 Q. Just a few housekeeping matters and I'll be done.

5 A. I remind you that I said I didn't know the amount
6 that was used in coming up with the 156. I would have to
7 go back and revisit that calculation.

8 Q. Mr. O'Roark, can we agree that your personal
9 involvement with the disputes before the Commission was
10 limited to communications with Brian Bolinger and
11 communications with Steve Watson?

12 A. Yes.

13 Q. Can we agree you have no personal involvement in
14 the process by which the interconnection agreements were
15 entered into between dPi and AT&T?

16 A. Yes.

17 Q. You did not prepare Exhibit 1 to your direct
18 testimony, did you?

19 A. No.

20 Q. You were not involved in the preparation of
21 Exhibit 1 to your direct testimony, were you?

22 A. No.

23 Q. Go to your direct, page 4. -- 4, line 22. I'll
24 ask you about that through page 5, line 3. Tell me when

1 you're ready.

2 A. Okay.

3 Q. That testimony addresses conversations with AT&T
4 employee Pam Tipton, correct?

5 A. Yes, it does.

6 Q. You did not speak with Ms. Tipton, did you?

7 A. No, I did not.

8 Q. Mr. Bolinger spoke with Ms. Tipton, didn't he?

9 A. Yes, he did.

10 Q. You were not there when Mr. Bolinger and Ms.
11 Tipton spoke, were you?

12 A. No, I was not.

13 Q. And you have no personal knowledge of anything
14 that was said between Mr. Bolinger and Ms. Tipton, do you?

15 A. No, I don't.

16 MR. TURNER: Mr. Chairman, I have a brief
17 motion. Rule 602 of the North Carolina Rules of Evidence
18 requires a witness to have personal knowledge, and Rule
19 805 provides that there are multiple layers of hearsay in
20 a document, each has to meet an exception. And I will
21 concede that the statement by Ms. Tipton meets a hearsay
22 exception. However, there's an additional layer of
23 hearsay here, that is that Mr. Bolinger told Mr. O'Roark
24 what happened. Mr. O'Roark was not there. This is a

1 direct statement by an AT&T employee that we cannot have
2 any way to cross-examine him on or explore. I'd ask to
3 strike that portion of his testimony.

4 COMMISSIONER CULPEPPER: Motion denied.

5 MR. TURNER: Thank you, Mr. Chairman. I have
6 nothing further.

7 COMMISSIONER CULPEPPER: All right. Ms.
8 Edmondson, do you have questions of the witness,
9 cross-examination?

10 MS. EDMONDSON: I do have a few questions.

11 CROSS-EXAMINATION BY MS. EDMONDSON:

12 Q. Mr. O'Roark, what does LCCW stand for?

13 A. It's the -- and on the exact LCCW line cost, it's
14 basically the waiver of the non-recurring charges
15 associated with activating a new customer.

16 Q. And are those waived for customers in North
17 Carolina currently?

18 A. Currently they are, yes. And BellSouth, yes.

19 Q. Okay. Looking at O'Roark Cross-Examination 2, do
20 you have that before you?

21 A. Remind me of which one --

22 Q. That was the printout from, I believe, the dPi
23 website.

24 A. The website --

1 Q. Yes.

2 A. -- yes.

3 Q. Is it correct -- is this indicating that the --
4 whoever printed this out did not indicate they were
5 eligible for either Lifeline or Link-Up?

6 A. Right. This -- this is not a Lifeline or Link-Up
7 customer, I don't believe we -- well, I'm certain it's not
8 because if it were you would see Lifeline credits on here
9 and you don't.

10 Q. And I'm on the second page of this exhibit, it --
11 at the -- toward the bottom it says Lifeline credit of
12 13.50 and a Link-Up America credit of \$30?

13 A. Right. If a customer is Lifeline eligible, we
14 pass through 100 percent of the credit that we receive
15 from USAC to that customer and then that -- and in this
16 case the website is representing that that's 13.50
17 recurring and \$30 non-recurring one-time Link-Up credit.

18 Q. And so the one -- the Link-Up credit would come
19 out the first month; is that correct?

20 A. That's right.

21 Q. And then the Lifeline credit would come out each
22 month?

23 A. Monthly, right.

24 Q. And that would be reflected in the bottom line?

1 There may be some variation for --

2 A. That's right.

3 Q. -- taxes --

4 A. That's exactly right, yes.

5 Q. Okay. And you testified that about 70 percent of
6 your customers are Lifeline customers are in --

7 A. Yes, ma'am.

8 Q. -- over -- over your entire area?

9 A. Over our entire customer base, about 70 percent
10 are Lifeline.

11 Q. And does dPi have customers participating in
12 Lifeline and Link-Up in North Carolina?

13 A. Yes, we do.

14 Q. How is it determined these customers qualify for
15 these programs?

16 A. The customer certifies to dPi that they are
17 eligible for Lifeline and they sign a self-certification
18 form and then depending upon the various state rules and
19 USAC rules, we may or may not require supporting
20 documentation.

21 Q. And you said USAC. Is that Universal Service
22 Administrative Company?

23 A. Universal Service Administration Company --

24 Q. Corporation, corporation.

1 A. -- yeah, I think it is. USAC. Corporation, USAC,
2 yes.

3 Q. All right. And do -- does dPi receive support
4 from the low-income program of USAC?

5 A. Low income, yes.

6 Q. And do y'all apply monthly for that support?

7 A. Right. We file a 497, I believe it is, with them
8 on a monthly basis, right.

9 Q. All right. And you -- do you pass the entire
10 amount of the savings to your customers?

11 A. We're obligated to do that by law, yes.

12 Q. Okay. All right. And you currently waive the
13 line connection cost for all customers regardless of being
14 Lifeline/Link-Up or just anyone?

15 A. Well, what we currently do is we have a \$60
16 activation fee, which we receive \$30 from USAC for that
17 activation fee. For a non-Lifeline customer, we defer
18 that activation fee and collect it over a period of months
19 into the future.

20 Q. Okay. So if I'm looking on the third page of
21 O'Roark Cross-Exhibit 2 -- and we determined this was for
22 someone who is not Lifeline or Link-Up -- seeing the
23 service activation charge is \$60 --

24 A. \$60, right.

1 Q. -- and then a payment deferral of 69 --

2 A. 69.68.

3 Q. -- is --

4 A. So we offer a payment deferral and then we -- and
5 then we collect that payment deferral into the future. If
6 a customer leaves prior to the end of the deferral period,
7 we charge them for the balance of that.

8 Q. And is that \$60 service activation charge
9 reflected as a portion of that 69 payment deferral?

10 A. Not -- not specifically. I mean, it's not
11 specifically associated with the activation, it's just a
12 payment deferral option that we offer to our customer.

13 Q. So how is that waiver reflected in this month one?
14 Because right now it looks like --

15 A. Well, this is not a Lifeline -- this is a
16 non-Lifeline customer, right, so we're charging them the
17 full \$60 service activation fee and then we're offering
18 them a payment deferral option of 69.68, which they can
19 pay, I believe, over some period -- I'd have to get you
20 the specifics on that, but some period of months into the
21 future.

22 Q. But you said that you waive the LCC -- you pass
23 through the LCCW waiver to your customers; is that
24 correct?

1 A. To a Lifeline customer, yes, we do. So if this
2 were a Lifeline customer, we would have passed through
3 both the 13.50 and the \$30.

4 Q. But you also waive that for other customers as
5 well?

6 A. We don't waive it. We don't waive it for a
7 non-Lifeline customer. We don't -- we offer this payment
8 deferral option.

9 Q. Okay. Can I show you a page from your deposition?

10 A. Yes.

11 Q. Let me approach. Referring you to page 28 of your
12 deposition, you testified, I believe, that you passed
13 through the -- this line waiver charge --

14 A. Yes.

15 Q. -- to your customers. Can you explain that a
16 little further?

17 A. There's a difference between -- North Carolina is
18 a state where we are an eligible telecommunications
19 provider, ETC. In BellSouth, in general, we're not
20 necessarily ETC in every state. We're not an eligible
21 telecommunications company in every state, so how we do
22 business and how we operate obviously is different in
23 those states where we are an eligible telecommunications
24 company than the states where we're not an eligible

1 telecommunications company.

2 So North Carolina happens to be one of those
3 states where we are an eligible telecommunications company
4 and where we have a very heavy concentration of Lifeline
5 customers. So in North Carolina we -- we have a \$60
6 activation fee, which we charge to all of our customers,
7 and then we pass through the \$30 Lifeline credit to a
8 Lifeline customer and then offer this payment deferral
9 option to all of our customers.

10 So in BellSouth states where we're not an eligible
11 telecommunications company, then we would tend to do
12 things differently and this indicates basically how we do
13 it in BellSouth, generally speaking, if we're not an ETC.

14 Q. But the question that was asked in the deposition,
15 line 16 and 17, you were asked does dPi charge any service
16 connection charges to its customers in North Carolina.
17 And what was your answer in lines 18 through 23?

18 A. We pass through the LCCW waiver to our customer.
19 So since we're able to qualify for promotional credits
20 from BellSouth, we're able to not charge a customer
21 activation fee. Were it not for the LCCW waiver, we would
22 have to charge the customer an activation fee.

23 Q. All right.

24 A. And that -- I guess I would --

1 Q. Thank you.

2 A. -- I would clarify that to say that --

3 Q. That's all the questions I have.

4 A. Okay. Were it not for that activation fee,
5 though, we would -- we wouldn't be able to offer this
6 payment deferral option.

7 COMMISSIONER CULPEPPER: Does that conclude your
8 questions, Ms. Edmondson?

9 MS. EDMONDSON: Yes. Thank you.

10 COMMISSIONER CULPEPPER: All right. Redirect
11 examination, Mr. Malish?

12 REDIRECT EXAMINATION BY MR. MALISH:

13 Q. Mr. O'Roark, do you have the little graph in here
14 that's AT&T Cross-Examination 3?

15 A. Yes.

16 Q. That's plotting three points over a course of six
17 years, true?

18 A. Yeah. From '03 to '09.

19 Q. And is -- what would this graph look like if you
20 plotted it out every single month? Would it trend exactly
21 like that?

22 A. No.

23 Q. Would it go up and down in between?

24 A. Yep.

1 Q. Do y'all have -- what's the best explanation for
2 when y'all have a big increase in customer count?

3 A. The best explanation is prior to MCI coming out
4 with their friends and family program. When MCI came out
5 with their friends and family program is when we took a
6 huge hit in customer base.

7 Q. Do y'all ever --

8 A. Generally --

9 Q. Do y'all ever --

10 A. Generally speaking, dPi peaked at around, I don't
11 know, 80-something-thousand subscribers at our peak
12 nationwide and then after MCI came out with their friends
13 and family program, our customer base declined
14 dramatically.

15 Q. And here in 2007, do you -- were y'all -- do y'all
16 also acquire other companies?

17 A. Huh?

18 Q. Do you acquire other companies that are customer
19 bases of other companies?

20 A. We did -- we did -- we have done acquisitions of
21 other companies, yes.

22 Q. And would Vertex be one of them?

23 A. Right.

24 Q. One of the cases where we applied for that here in

1 North Carolina?

2 A. Yes.

3 Q. Did that result in a spike in your customer count
4 for North Carolina?

5 A. It resulted in, yes, significant growth in our
6 customer count, right.

7 Q. Can I turn your attention to dPi Cross-Exhibit No.
8 2. Looking at page -- I guess page 3 of that exhibit. At
9 the top of mine it says page 1 of 1. But this is the list
10 of the total prices from month to month where it says
11 55.60, 64.56 and so on across --

12 A. Right.

13 Q. -- the board. Do you see that?

14 A. Right.

15 Q. That's higher than AT&T's basic service packages,
16 isn't it?

17 A. I don't know.

18 Q. Do you suspect that it is?

19 A. I suspect that it is.

20 MR. TURNER: Objection. Speculation.

21 COMMISSIONER CULPEPPER: Overruled.

22 Q. Does it cost y'all more per line to operate than
23 it does AT&T? Is your cost per line higher than theirs?

24 A. I -- I -- yes. I would -- I would assume that it

1 is. Now, we're -- our -- our basic costs from AT&T is a
2 discount off of their retail tariff.

3 Q. Okay.

4 A. I'm assuming they're not discounting it below
5 their cost.

6 Q. All right.

7 A. Is that your question?

8 Q. How much -- how much personal attention does your
9 average customer require?

10 A. A lot of personal attention.

11 Q. All right.

12 A. Right.

13 Q. It's not the situation that you have sort of a
14 long-standing embedded customer base that just sends you
15 checks month after month; is that --

16 A. That's right. Prepaid customers typically require
17 a lot more attention, a lot more high touch service than
18 do postpaid customers. And, you know, we do an awful lot
19 of reaching out to that customer, helping that customer to
20 maintain his service, stay on service, doing everything we
21 can to retain that customer, make sure that he doesn't get
22 disconnected for nonpayment. So we do an awful lot of
23 what I tend to refer to as life management, you know,
24 trying to help that customer to remember to make his

1 payments and remember what his obligations are and that
2 type of thing.

3 Q. Do you -- even though A -- even though dPi
4 operates on a prepaid basis, do y'all still have the
5 possibility of losing money or not getting paid for
6 service that's provided to customers?

7 A. Well, we don't provide service to customer until
8 I -- until it's -- he's paid for it. So the risk that we
9 would run would be that a customer would somehow manage to
10 stay on service for a time frame that he hasn't yet paid
11 for.

12 Q. And that happens from time to time?

13 A. It occasionally happens.

14 Q. All right. What is your customer turnover?

15 A. We have a much higher turn than does a postpaid
16 provider. The prepaid customers, the turn rate for
17 prepaid customers is -- varies by state and by company
18 and -- but generally speaking, it ranges from a low of 10
19 percent turn every month to a high of 30 percent turn.

20 Q. All right. And do you have any idea of what it is
21 in North Carolina?

22 A. I don't know what it is in North Carolina
23 specifically.

24 Q. Okay. So you're constantly having to spend money

1 to replace those customers --

2 A. Yes.

3 Q. -- or --

4 A. Right.

5 Q. -- that affects your cost per line?

6 A. Yes. That's -- that's much higher than what a
7 typical postpaid provider would experience.

8 MR. MALISH: We're trying to break at 12:30,
9 right?

10 COMMISSIONER CULPEPPER: We're going to go a
11 little bit longer than that.

12 MR. MALISH: I'll pass -- I'll pass the witness.

13 COMMISSIONER CULPEPPER: Are you concluded with
14 your redirect examination?

15 MR. MALISH: Yes.

16 COMMISSIONER CULPEPPER: All right. Questions
17 by the Commission?

18 (No response.)

19 All right. Appears that there aren't any
20 questions by the Commission. Mr. O'Roark, that would
21 conclude your testimony and you may stand down from the
22 witness chair.

23 (Whereupon the witness was dismissed.)

24 MR. TURNER: Mr. Chairman, is now the

1 appropriate time to move the cross-examination exhibits
2 into evidence?

3 COMMISSIONER CULPEPPER: Going to get right --
4 right to that in just a second.

5 Mr. Malish, do you wish to move the admission of
6 O'Roark Hearing Exhibit No. 1?

7 MR. MALISH: I -- I do. I do move to admit,
8 yeah.

9 COMMISSIONER CULPEPPER: I thought so.

10 MR. MALISH: I thought I already had, but I'm
11 wrong.

12 COMMISSIONER CULPEPPER: No. We've identified
13 it for purposes of this hearing, but we haven't received
14 it into evidence yet. So I know you wish to move it into
15 evidence.

16 MR. MALISH: I do. And also the rebuttal, I
17 believe. There's one in the back of rebuttal too, is
18 there not? Maybe I'm wrong.

19 COMMISSIONER CULPEPPER: I didn't have an
20 exhibit --

21 MR. MALISH: No, there's not.

22 COMMISSIONER CULPEPPER: -- attached to the
23 rebuttal.

24 MR. MALISH: So you're -- you're correct.

1 COMMISSIONER CULPEPPER: Just have the one --

2 MR. MALISH: Just the one --

3 COMMISSIONER CULPEPPER: -- exhibit consisting
4 of nine pages?

5 MR. MALISH: Just the one.

6 COMMISSIONER CULPEPPER: All right. Any
7 objection to that?

8 MR. TURNER: No, Your Honor.

9 COMMISSIONER CULPEPPER: All right. Well, let
10 that exhibit be received.

11 (Whereupon, O'Roark Hearing Exhibit No. 1 was
12 admitted into evidence.)

13 And now, Mr. Turner, I'll be glad to hear from
14 you.

15 MR. TURNER: Thank you, Mr. Chairman. We would
16 move into evidence AT&T Hearing Exhibit No. 1, which was
17 the dPi first supplemental response to North Carolina's
18 second set of interrogatories.

19 COMMISSIONER CULPEPPER: Let it be received.

20 (Whereupon, AT&T Hearing Exhibit No. 1 was
21 admitted into evidence.)

22 MR. MALISH: No objection.

23 MR. TURNER: We would also remove -- move into
24 evidence AT&T Cross-Examination Exhibit Nos. 1 through 5.

1 COMMISSIONER CULPEPPER: Well, they're
2 identified as O'Roark Cross-Examination Exhibit Nos. 1
3 through 5.

4 MR. TURNER: Thank you.

5 COMMISSIONER CULPEPPER: And you have no
6 objection to that, do you, Mr. Malish?

7 MR. MALISH: I had the objection already
8 articulated to Cross-Exhibit No. 2, which was the -- you
9 know, the pricing that dPi provides to its end user, but
10 no objection to 1, 3, 4 -- and 5 was the blackboard,
11 right?

12 COMMISSIONER CULPEPPER: Yes. Well, I'm going
13 to overrule your objection to the one exhibit you've
14 objected to. And that being the case, O'Roark
15 Cross-Examination Exhibits Nos. 1 through 5 are received
16 into evidence.

17 (Whereupon, O'Roark Cross-Examination Exhibit
18 Nos. 1 through 5 were admitted into evidence.)

19 MR. MALISH: Do y'all have the -- the yellow
20 page?

21 MR. TURNER: I think he still has it.

22 MR. MALISH: He took it with him. Oh, we're
23 trying to recover the --

24 COMMISSIONER CULPEPPER: Yeah. Let's --

1 MR. MALISH: -- the yellow page.

2 COMMISSIONER CULPEPPER: Let's let the court
3 reporter have that. I believe that's the one and only
4 copy of that we have. If you'll pass that to the court
5 reporter, that will clean up that housecleaning matter.

6 Now, Mr. Malish, does that conclude your case at
7 this point in time?

8 MR. MALISH: That concludes our direct.

9 COMMISSIONER CULPEPPER: All right. Be glad to
10 hear from you, Mr. Turner or Mr. Rankin.

11 MR. TURNER: Mr. Chairman, at this time AT&T
12 calls its first witness, Ms. Seagle.

13 COMMISSIONER CULPEPPER: Ms. Seagle, if you'll
14 come forward.

15 MR. MALISH: Mr. Chairman, is it possible to
16 dismiss Mr. -- Mr. O'Roark?

17 COMMISSIONER CULPEPPER: Are there any
18 objections to that?

19 MR. TURNER: No, sir.

20 COMMISSIONER CULPEPPER: Without objection,
21 Mr. O'Roark may be excused.

22 MR. MALISH: Thank you.

23 COMMISSIONER CULPEPPER: Thank you very much,
24 Mr. O'Roark. Appreciate your coming.

1 KRISTY SEAGLE; Being first duly sworn,
2 testified as follows:

3 DIRECT EXAMINATION BY MR. TURNER:

4 COMMISSIONER CULPEPPER: Mr. Turner, you may
5 examine your witness.

6 Q. Ms. Seagle, could you state your name, your
7 employer and your business address for the record?

8 A. Yes. My name is Kristy Seagle, AT&T. I work for
9 AT&T. The address is 3535 Colonnade Parkway in
10 Birmingham, Alabama.

11 Q. And did you file or cause to be filed in this
12 proceeding direct testimony dated November 5th, 2008, and
13 consisting of 14 pages?

14 A. Yes, I did.

15 Q. Do you have any revisions that you need to make to
16 that testimony?

17 A. No, I don't.

18 Q. If I were to ask you the same questions that
19 appear in your prefiled direct testimony, will your
20 answers be the same as they appear in that prefiled direct
21 testimony?

22 A. Yes, they would.

23 Q. And you had five exhibits to your direct testimony
24 labeled KAS-1 to KAS-5?

1 A. Yes, I do.

2 Q. And do you need any revisions to those exhibits?

3 A. No, I don't.

4 Q. And I do not believe you had any rebuttal, did
5 you?

6 A. No, I did not.

7 MR. TURNER: Mr. Chairman, I would ask that Ms.
8 Seagle's prefiled direct and pre -- testimony along with
9 the associated exhibits be entered into the record as if
10 given live from the stand.

11 COMMISSIONER CULPEPPER: All right. The
12 witness' prefiled direct testimony will be admitted into
13 evidence as if it had been given word for word orally from
14 the stand. The witness' five exhibits are identified as
15 marked when filed.

16 (Whereupon, the prefiled direct testimony of
17 Kristy Seagle will be reproduced in the record
18 at this point the same as if the questions had
19 been orally asked and the answers orally given
20 from the witness stand.)

21
22 (Whereupon, Exhibits KAS-1 through KAS-5 were
23 marked for identification.)

24

FILED

NOV 05 2008

**Clerk's Office
N.C. Utilities Commission**

AT&T NORTH CAROLINA

DIRECT TESTIMONY OF KRISTY A. SEAGLE

BEFORE THE NORTH CAROLINA PUBLIC UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1744

NOVEMBER 5, 2008

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Q. PLEASE STATE YOUR NAME, YOUR EMPLOYER, AND YOUR BUSINESS ADDRESS

A. My name is Kristy Seagle. I am employed by AT&T Operations, Inc. in the area of wholesale operations. My business address is 3535 Colonnade Parkway, Suite N3C, Birmingham, Alabama 35243.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I received my Masters of Business Administration degree from the University of Alabama in Birmingham in 1982. I have ten years experience in the telecommunications industry. My career with AT&T/BellSouth began in 1998 as a Small Business Service Representative. Since then I have worked as a Systems Designer, Resale Product Manager, and Lead Interconnection Agreements Manager.

1 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

2

3 A. The purpose of my testimony is to: (1) provide an overview of the process
4 Competing Local Providers ("CLPs") like dPi Teleconnect, L.L.C. ("dPi") use to
5 request promotional credits from AT&T North Carolina ("AT&T"); (2)
6 summarize conversations I had with dPi representatives regarding this process; (3)
7 discuss how I informed dPi representatives in 2004 and again in 2005 that AT&T
8 would not make the cashback portions of promotional offerings available for
9 resale; and (4) discuss the timing of the promotional credit requests at issue in this
10 docket.

11

12 I. OVERVIEW OF PROMOTIONAL CREDIT REQUEST PROCESS

13

14 Q. PLEASE GIVE A GENERAL SUMMARY OF HOW AT&T GOES ABOUT
15 RESELLING PROMOTIONS TO CLPS LIKE DPI?

16

17 A. The CLP purchases the services that are required in conjunction with a promotion
18 from AT&T and pays the standard resale rate (the tariffed rate less the resale
19 discount) for those services. The CLP then submits a promotional credit request
20 seeking any additional credits to which it claims to be entitled pursuant to the
21 promotion.

22

1 For example, assume that AT&T North Carolina ran a promotion that waived a
 2 tariffed \$40 installation charge when an end user ordered a line with a tariffed rate
 3 of \$20 per month during the promotional period. Assume further that the resale
 4 discount is 20%. If a CLP resold that promotion to one of its end users that
 5 qualified for the promotion, the CLP would be billed \$32 (\$40 less the 20% resale
 6 discount) for the installation charge and \$16 per month (\$20 less the 20% resale
 7 discount) for the line. In order to receive the benefit of the promotional waiver of
 8 installation charges, the CLP would then submit a request to AT&T for a \$32
 9 credit. If the request is valid (i.e. if the promotion is available for resale and if the
 10 CLP's end user meets the criteria that an AT&T North Carolina end user would
 11 have to meet to qualify for the promotion), AT&T North Carolina provides the
 12 CLP a \$32 credit.

13
 14 Q. HAS THIS PROCESS BEEN IN PLACE THROUGHOUT THE 2003 TO 2007
 15 TIME FRAME AT ISSUE IN THIS DOCKET?

16
 17 A. This general process has been in place throughout that time period, but the
 18 process has become more mechanized over time.

19
 20 At the beginning of that time period, for instance, these promotional credit
 21 requests were received and processed manually. Beginning in the Fall of 2005,
 22 the process became increasingly mechanized. Today, the submission, validation,

1 and processing of these promotional credit requests is almost entirely
2 mechanized.¹

3

4 **II. DISCUSSIONS WITH DPI REPRESENTATIVES REGARDING**
5 **THE PROMOTIONAL CREDIT REQUEST PROCESS**
6

7 Q. IN RESPONDING TO AT&T'S DISCOVERY REQUESTS, DPI HAS
8 IDENTIFIED STEVE WATSON OF LOST KEY TELECOM INC. AS DPI'S
9 BILLING AND COLLECTIONS AGENT FOR PROMOTIONS. HAVE YOU
10 HAD ANY DISCUSSIONS WITH DPI'S BILLING AGENT, MR. WATSON,
11 ABOUT THE PROMOTIONAL CREDIT REQUEST PROCESS?

12

13 A. Yes.

14

15 Q. WHEN WAS THE FIRST TIME YOU DISCUSSED THE PROMOTIONAL
16 CREDIT REQUEST PROCESS WITH MR. WATSON IN HIS CAPACITY AS
17 DPI'S BILLING AGENT?

18

19 A. During a face-to-face meeting in Birmingham, Alabama, in August of 2004.

20

21 Q. WHAT WERE YOUR JOB RESPONSIBILITIES AT THAT TIME?

22

¹ As explained by AT&T North Carolina witness Nicole Bracy in her Direct Testimony, AT&T North Carolina manually reviews cashback promotional credit requests that are related to promotions that allow an end user to request the cashback offer only once in a given period of time.

1 A. In August 2004, I was the resale product manager. My job responsibilities at the
2 time included processing promotional credit requests submitted by CLPs.

3

4 Q. HOW DID YOUR AUGUST 2004 MEETING WITH DPI'S BILLING AGENT
5 COME ABOUT?

6

7 A. dPi's billing agent, Mr. Watson, asked me to meet with him and his son Chris.
8 Mr. Watson said that he had recently left his position with another carrier and was
9 starting a new business, Lost Key Telecom, Inc., that would work with a number
10 of CLPs to submit promotional credit requests to AT&T. Mr. Watson said he
11 wanted to discuss the format he intended to use in submitting these requests in
12 order to ensure that the proposed format included all of the information AT&T
13 needed to process the requests.

14

15 Q. DID YOU DISCUSS THE PROMOTIONAL CREDIT REQUEST PROCESS
16 WITH MR. WATSON DURING YOUR AUGUST 2004 MEETING?

17

18 A. Yes. I explained the form that needed to be submitted to seek promotional credit
19 requests, and Mr. Watson and I discussed how best to format the backup
20 information that would need to be submitted to support the request.

21

1 **III. INFORMING DPI THAT CASHBACK PROMOTIONS WERE NOT**
2 **AVAILABLE FOR RESALE**
3

4 **Q. WHAT TYPES OF PROMOTIONS DID YOU DISCUSS WITH MR. WATSON**
5 **DURING THE AUGUST 2004 MEETING?**

6

7 **A. Most of our discussions addressed promotions that did not involve cashback**
8 **offers. During the meeting, however, Mr. Watson specifically asked about**
9 **cashback promotions such as the ones at issue in this docket.**

10

11 **Q. WHAT DID MR. WATSON ASK ABOUT CASHBACK PROMOTIONS LIKE**
12 **THE ONES AT ISSUE IN THIS DOCKET?**

13

14 **A. Mr. Watson asked if cashback promotions were available for resale.**

15

16 **Q. HOW DID YOU RESPOND TO THAT QUESTION?**

17

18 **A. I told Mr. Watson that cashback promotions were not available for resale, and I**
19 **agreed to send him an email to that effect when I got back to my office.**

20

1 Q. DID YOU SEND DPI'S BILLING AGENT, MR. WATSON, AN EMAIL
2 STATING THAT CASHBACK PROMOTIONS WERE NOT AVAILABLE
3 FOR RESALE?

4
5 A. Yes. Exhibit KAS-1 is a copy of the email I sent Mr. Watson on August 26,
6 2004, stating that AT&T (then known as BellSouth) would not resell cashback
7 offers.

8
9 Q. AFTER THIS MEETING, DID AT&T BEGIN RECEIVING PROMOTIONAL
10 REQUESTS FROM DPI'S BILLING AGENT?

11

12 A. Yes. The following month, September 2004, I began receiving and processing
13 promotional credit requests submitted by Lost Key on behalf of various CLPs,
14 including promotional credit requests that Lost Key submitted on behalf of dPi.

15

16 Q. WERE ANY OF DPI'S PROMOTIONAL CREDIT REQUESTS FOR
17 CASHBACK PROMOTIONS?

18

19 A. No. None of these promotional credit requests were for any cashback promotions,
20 including those involved in this docket. In fact, I did not receive any promotional
21 credit requests for cashback promotions from dPi until July 2005.

22

1 Q. WHAT HAPPENED IN JULY 2005?

2

3 A. On July 21, 2005, Mr. Watson submitted a request on behalf of dPi for
4 promotional credits for a cashback promotion. Exhibit KAS-2 is a copy of an
5 email string that includes that request.

6

7 Q. WAS THE REQUEST REFLECTED IN EXHIBIT KAS-2 RELATED TO A
8 NORTH CAROLINA PROMOTION?

9

10 A. Yes. That request was related to a promotion in the State of North Carolina.

11

12 Q. HOW DID YOU RESPOND TO THIS REQUEST FOR PROMOTIONAL
13 CREDITS FOR A CASHBACK PROMOTION?

14

15 A. Consistent with my prior conversation and email, I sent Mr. Watson an email on
16 August 2, 2005 that the promotion was not available for resale. See Exhibit KAS-
17 2.

18

19 Q. DID MR. WATSON RESPOND TO YOUR EMAIL?

20

21 A. Yes. The next day, Mr. Watson sent me an email stating, among other things, that
22 "I will let DPI Teleconnect know about this promotion." See Exhibit KAS-2.

1 That was the last time I heard anything on the issue from Mr. Watson or dPi until
2 January 2007.

3

4 Q. IS THIS THE WAY MR. WATSON AND DPI TYPICALLY RESPONDED
5 WHEN THEY DISAGREED WITH AT&T'S HANDLING OF A
6 PROMOTIONAL CREDIT REQUEST?

7

8 A. Not at all. As I mentioned earlier, dPi submitted a number of promotional credit
9 requests for non-cashback promotions. On several occasions, and for various
10 reasons, AT&T did not believe that dPi was entitled to some or all of the
11 promotional credits they requested and, therefore, AT&T did not provide the
12 requested credits to dPi. On several such occasions, dPi quickly informed AT&T
13 that it did not agree with AT&T's decision not to provide the credits. Exhibit
14 KAS-3 is an example of correspondence between AT&T and dPi addressing dPi's
15 disagreement with AT&T's decision not to provide various non-cashback
16 promotional credits that dPi had requested.

17

18 Q. ARE YOU AWARE OF DPI'S SUBMITTING ANY OTHER REQUESTS FOR
19 PROMOTIONAL CREDITS FOR CASHBACK PROMOTIONS?

20

21 A. No. I continued to receive promotional credit requests from Lost Key through the
22 Fall of 2005, when Keith Deason (who is no longer employed by the company)
23 took over the role of processing these resale promotional credit requests. With the

1 sole exception of the July 2005 request discussed above, I never received any
2 request for credits for a cashback promotion from dPi.

3

4 **Q. WERE YOU INVOLVED IN THE RESALE PROCESS AFTER MR. DEASON**
5 **TOOK OVER THE ROLE OF PROCESSING PROMOTIONAL CREDIT**
6 **REQUESTS IN THE FALL OF 2005?**

7

8 **A. Yes. I was still the resale product manager, from the Fall of 2005 until he left the**
9 **company in October 2007. I worked closely with Mr. Deason to monitor and**
10 **assist his handling of promotional credit requests and to help resolve any**
11 **questions or issues he had. Although Mr. Deason brought various questions and**
12 **issues to me, none of them involved any request by dPi for promotional credits for**
13 **cashback promotions. Based on my experience and dealings in working with Mr.**
14 **Deason, he would have advised me if dPi had disputed AT&T's denial of**
15 **promotional credits for cashback promotions.**

16 **Q. WHEN DID YOU FIRST BECOME AWARE THAT DPI INTENDED TO**
17 **SEEK PAYMENT FOR CASHBACK PROMOTIONAL CREDIT**
18 **REQUESTS THAT IT HAD PREVIOUSLY SUBMITTED AND THAT**
19 **AT&T PREVIOUSLY HAD NOT PAID?**

20

21 **A. As discussed below, in January 2007, dPi sent AT&T a spreadsheet listing**
22 **what it purported to be "open disputes." Some cashback promotional credit**
23 **requests were included in these purported disputes. This was the first**

1 indication I had that dPi intended to seek payment for cashback promotional
2 credit requests that it had previously submitted and that AT&T had not paid.

3

4 Q. ARE YOU AWARE OF DPI HAVING DONE ANYTHING PRIOR TO
5 JANUARY 2007 TO INDICATE THAT IT DISPUTED AT&T NORTH
6 CAROLINA'S NONPAYMENT OF CASHBACK PROMOTIONAL
7 CREDIT REQUESTS PREVIOUSLY SUBMITTED BY DPI?

8

9 A. No.

10

11 **IV. TIMING OF THE PROMOTIONAL CREDIT REQUESTS AT**
12 **ISSUE IN THIS DOCKET.**

13

14 Q. WHAT IS EXHIBIT KAS-4?

15

16 A. Exhibit KAS-4 is a summary that, in part, demonstrates: (1) the time between the
17 billing periods associated with dPi's cashback promotional credit requests and the
18 date dPi submitted these requests to AT&T North Carolina; and (2) the time
19 between the billing periods associated with dPi's cashback promotional credit
20 requests and January 2007, which is the first time AT&T North Carolina became
21 aware that dPi intended to seek payment for cashback promotional requests that it
22 had previously submitted and that AT&T North Carolina had not paid.

23

24 Q. PLEASE EXPLAIN WHAT THE VARIOUS COLUMNS IN EXHIBIT KAS-4
25 DEPICT.

26

1 BY MR. TURNER:

2 Q. Ms. Seagle, have you ever testified in front of a
3 commission proceeding like this before?

4 A. No, I have not.

5 Q. Are you nervous?

6 A. Yes, I am.

7 Q. It will be fine.

8 A. Thank you.

9 Q. Do you have a brief summary of your testimony?

10 A. Yes, I do.

11 Q. Could you please present that summary to the
12 Commission?

13 A. Yes. My testimony today will address two things:
14 First, it's the discussion I had with dPi's billing agent
15 about cash back promotions; and second, the timing of the
16 promotional requests at issue in this proceeding.

17 My discussions initially took place with the
18 billing agent in August of 2004. The meeting was about
19 non-cash back promotions and at the end of the promotion
20 the billing agent asked if cash back promotions were
21 available for resale. I told him no and that I would send
22 him an e-mail confirming that answer, and I did when I got
23 back to the office.

24 I did not hear anything else from dPi regarding --

1 or Lost Key at the time regarding cash back promotions
2 until July of 2005. At that time I received a request for
3 a cash back promotion, which I emailed back and said this
4 is not available for resale at this time. Did not hear
5 anything else from the billing agent or dPi in -- until
6 January of 2007 when I was on a conference call dealing
7 with non-cash back promotions and other disputes and they
8 had included at that time cash back promotions.

9 The timing of the requests are outlined in my
10 Exhibit 4. It summarizes dPi's credit requests that are
11 issue in this docket and it shows that in many cases dPi
12 waited at least a year to submit the request after
13 purchasing the service and even more -- in even more cases
14 dPi waited more than a year to even suggest that it
15 disputed.

16 Q. Does that complete your summary?

17 A. Yes, it does.

18 Q. Ms. Seagle, I'm going to ask you to slow down just
19 a little bit --

20 A. Okay.

21 Q. -- for our court reporter because she's got to get
22 down everything you say.

23 A. All righty.

24 MR. TURNER: Mr. Chairman, Ms. Seagle's ready --

1 available for cross-examination.

2 COMMISSIONER CULPEPPER: All right.

3 Cross-examination, Mr. Malish?

4 MR. MALISH: Thank you, Ms. Seagle -- or Mr.
5 Chairman.

6 CROSS-EXAMINATION BY MR. MALISH:

7 Q. Ms. Seagle, I don't know if you're the right
8 person to ask this question, but I'm going to ask it
9 anyway and you can tell me if you're not.

10 Do you understand the purpose of the wholesale
11 discount that resellers like dPi get to be -- the purpose
12 behind that to be to lower the wholesale price below the
13 retail price that BellSouth charges its retail customers?

14 A. Would you clarify that, please?

15 Q. You understand the difference between retail and
16 wholesale?

17 A. Yes, I do.

18 Q. Okay. And you understand that the purpose behind
19 having the wholesale discount is to lower the wholesale
20 price below the retail price, correct?

21 A. To lower the -- yes. Yes, that's correct.

22 Q. Okay. Did you give any testimony about these
23 calculations of what the retail price -- I guess what the
24 wholesale price should be taking the promotions into

1 effect or was that only Mr. Bracy?

2 A. I gave testimony as to what the resale rate would
3 be and then if you apply the wholesale discount, what that
4 rate would be.

5 Q. Okay. So something like what's up here on the
6 board?

7 A. Yes.

8 Q. All right. I'll come back to that in a second.
9 One thing I do want to clarify with you, I think I
10 understand from your testimony that you had conversations
11 with Steve Watson of Lost Key on behalf of dPi. And what
12 you were saying to them is that BellSouth does not offer
13 these cash back promotions at resale, correct?

14 A. Yes. In August of 2004, Steve Watson asked me if
15 cash back promotions were available for resale and I told
16 him no, they were not.

17 Q. Okay. So -- and that it is consist -- you consist
18 -- whenever this came up, you said the same thing, they're
19 not available; we are not making that offer at wholesale?

20 A. Yes, that's true.

21 Q. Okay. Now, do you know -- have you looked at
22 Ms. Bracy's testimony? Do you know -- does she also
23 testify about this issue, the wholesale versus the retail
24 price and how the promotions are supposed to work?

1 A. I have read Ms. Bracy's testimony. I'm not
2 familiar with that part.

3 Q. I know that -- I know that one or both of you did,
4 and I don't know if it was both because I'd like to visit
5 with it a little bit, but I -- with one of y'all about it.
6 And I don't mind if it's you or her, but --

7 A. If we can find it in my testimony, I'll be happy
8 to --

9 Q. Yeah. If you'll --

10 A. -- tell you --

11 Q. -- show it to me. I'm sure you know your
12 testimony much better than I do.

13 MR. TURNER: Mr. Chairman, I want to make sure
14 everybody's on the same page. Can we get a little
15 clarification on exactly what Mr. Malish wants to discuss
16 so we can direct him to the right witness?

17 COMMISSIONER CULPEPPER: Well, I tell you what,
18 Mr. Malish, why don't you ask her some questions and she
19 either knows the answer to the questions or she doesn't
20 know the answers to the questions. And that -- maybe
21 we'll get -- get -- get the answers that you're looking
22 for or if she doesn't know, maybe they've got another
23 witness. But I think -- I think the thing to do right now
24 is start asking her some questions and let's find out what

1 she knows.

2 Q. I tell you what, let me do this. Let me -- I'll
3 be happy to do that. If I may use the blackboard, I'm
4 going to go over some stuff with you, all right?

5 A. Sure.

6 Q. I would have left that up there, but I'm not going
7 to have much space. Let me try to first off start with
8 the big principle. I believe you agree with me that --
9 that the main idea is that wholesale will be smaller than
10 retail, correct?

11 A. Yes.

12 Q. That's the -- that's the purpose that we're trying
13 to accomplish, right?

14 A. Yes.

15 Q. And -- so if I've got W, that's going to stand for
16 wholesale, okay?

17 A. Okay.

18 Q. And then R is retail.

19 A. Okay.

20 Q. You with me?

21 A. Uh-huh.

22 Q. And when we apply the -- these cash back
23 promotions, that's basically a -- at the retail level,
24 it's basically the tariff price less a -- less a

1 promotional discount, right?

2 A. That's not my understanding of a cash back
3 promotion, no.

4 Q. Well, is that not the net effect?

5 A. No.

6 Q. Tell you what, let's -- just assume something with
7 me, if you will, okay. All right. 'Cause this is -- this
8 is -- this is what they were demonstrating on the board
9 with the -- with how the cash back promotional is supposed
10 to work, all right?

11 A. All right.

12 Q. The way I got it is that wholesale is basically
13 equal to 80 percent or .8 times the retail price. We're
14 going to do some algebra here.

15 A. Yes.

16 Q. Okay. And then they were -- AT&T was trying to
17 explain how that really should be 80 percent applied first
18 to the tariff price and then also 80 percent applied to
19 the promotion.

20 A. If cash back promotions were available for resale.

21 Q. Yeah. We assume that. So we're going to say over
22 here that R, retail, equals tariff minus promotion. Look
23 appropriate?

24 A. Would you please repeat -- retail equals tariff

1 minus --

2 Q. Minus promotion.

3 A. -- promotion?

4 Q. When we're going through --

5 A. Yes.

6 Q. -- this hypothetical, okay. So that means that
7 wholesale equals .8 times -- we're going to replace --
8 because R is equal to T minus P, we're going to replace
9 it. So we're going to replace the bottom with T minus P.

10 Following me so far?

11 MR. TURNER: Mr. Chairman, could I ask that he
12 clarify whether he's just asking if she's following the
13 hypothetical or if she's agreeing that that's the right
14 way to do it because I think his questions are a little
15 hard to understand.

16 COMMISSIONER CULPEPPER: Well, he's just going
17 to have to ask a question and she's going to have to
18 answer it. Either she knows the answer or she doesn't
19 know the answer. So go ahead and ask her a question,
20 Mr. Malish.

21 Q. Do you -- first of all, do you agree with the
22 algebra here?

23 A. It would be easier for me if we were using
24 numbers.

- 1 Q. Well, we'll -- we'll get to some numbers.
- 2 A. Okay.
- 3 Q. We'll get to some numbers.
- 4 A. Tariff minus -- no. That is not necessarily
- 5 true --
- 6 Q. Well --
- 7 A. -- no.
- 8 Q. -- if we assume that -- that the retail -- well,
- 9 this is the process that we went through when we were
- 10 trying to decide --
- 11 A. Right.
- 12 Q. -- if the promotion applies. Assuming that the
- 13 appotion -- promotion applies and it's available for
- 14 resale, the retail price is going to be the T minus the P,
- 15 tariff minus promotion.
- 16 A. Right.
- 17 Q. You're assuming that with me?
- 18 A. Right.
- 19 Q. Okay. So then we do the algebraic substitution
- 20 and we have -- we substitute T minus P for R, right,
- 21 because it's the same idea?
- 22 A. See, I'm trying to work this out in my mind
- 23 because it's the tariff price minus the promotion for
- 24 retail and that's true.

1 Q. Okay.

2 A. In -- but when we give -- like if the retail price
3 is \$40 and we give a -- a resale discount makes it \$32,
4 then for the promotion --

5 Q. Yes.

6 A. -- and in addition, if the promotion is \$20, the
7 resale -- the resale value of that would be \$16.

8 Q. Right. We'll get to that.

9 A. So -- okay. It's easier for me when we use money.

10 Q. And we'll get to the money.

11 A. But your letters look right to me right now.

12 Q. We'll get to the money, but let's do the -- let's
13 do the --

14 A. Okay.

15 Q. -- let's do the analysis, the logical analysis
16 first, okay?

17 A. Okay.

18 Q. I mean, what was on the board before was, I think,
19 a retail of a hundred minus a promotion of -- excuse me,
20 of 120 minus a promotion of a hundred.

21 A. 100.

22 Q. That was what was on the board earlier. Remember
23 that?

24 A. Yes, I do.

- 1 Q. Okay.
- 2 A. So that would be --
- 3 Q. I'm just -- I'm just --
- 4 A. -- .20 -- yes. That --
- 5 Q. -- substituting variables, okay?
- 6 A. Okay. Yes, that's true.
- 7 Q. 'Cause it doesn't matter what numbers that we put
- 8 in, the -- the logic is the same.
- 9 A. Okay.
- 10 Q. Would you agree with me on that?
- 11 A. Yes.
- 12 Q. Okay. And so what we get to here is the idea that
- 13 what y'all are saying is that -- well, really, when -- if
- 14 we're going to give a -- if we're going to get the
- 15 promotion, it needs to be $.8T$ minus $.8P$, right? We
- 16 expand. First we give 80 percent of the tariff price.
- 17 And if we give 80 percent of the tariff price, we only
- 18 have to give 80 percent of the promotion.
- 19 A. Yes.
- 20 Q. Right?
- 21 A. Right.
- 22 Q. Okay. And what the -- you asked for dollars,
- 23 right? You asked for dollars. And when we were talking
- 24 about dollars earlier --

1 COMMISSIONER CULPEPPER: I tell you what,
2 Mr. Malish, before we get to the dollars, we're going to
3 take our lunch break. And when we come back after that
4 lunch break, we'll talk about your dollars at that point
5 in time.

6 But we're going to take our lunch recess now.
7 And as I told you earlier, we will reconvene at 2:30 this
8 afternoon.

9 MR. MALISH: Okay.

10 COMMISSIONER CULPEPPER: Stand in recess.

11 [LUNCH RECESS - 12:50 P.M. TO 2:30 P.M.]

12 COMMISSIONER CULPEPPER: All right. Well, let's
13 go back on the record. Ms. Seagle, if you'll come on back
14 up to the witness chair, please. And Mr. Malish, you can
15 resume your cross-examination of the witness.

16 MR. MALISH: Thank you, Mr. Chairman.

17 Q. Ms. Seagle, are you ready to do some more math?

18 A. If you insist. This is not really my testimony,
19 but I'll be happy to answer your quest -- what I can.

20 Q. Ms. Seagle, I'm going to give you a copy of this
21 O'Roark Cross-Examination No. 5 that has the math that Mr.
22 Turner was doing with Mr. O'Roark before, so that might
23 help you.

24 Earlier you said you would like to do this --

1 easier for you to look at this analysis with real numbers,
2 remember?

3 A. Yes, I remember that I work with numbers better.

4 Q. All right. Now, when -- when Mr. Turner was doing
5 this with Mr. O'Roark, they were looking at a tariff price
6 of \$120 here and \$100 here, remember that?

7 A. Yes, I do.

8 Q. Okay. And so that comes out to a situation I
9 think where this is, what, 96, and that is -- and the
10 promotion would be, what, 80?

11 A. Yes.

12 Q. For a net of 16?

13 A. Yes.

14 Q. And so it was -- as I understand it, it's -- it's
15 BellSouth's contention that this is the way the analysis
16 ought to work if we're going to give the promotion to the
17 CLEC.

18 A. That's -- you'd have to ask my attorney. I don't
19 know what BellSouth's contention is. I see what you wrote
20 on the board and it matches what was written on the board
21 previously.

22 Q. Okay. So -- so you don't have any opinion about
23 how this is supposed to work out or play out?

24 A. No, I really don't. I don't -- I don't know how

1 the numbers go. People smarter than me work on that.

2 Q. Okay. And who -- who should we talk to about
3 that? Would it be Ms. Bracy?

4 A. I don't know.

5 Q. But you're definitely not the one?

6 A. I'm not the one.

7 Q. All right. That's fine. We'll come back and
8 we'll visit about this with somebody else then.

9 A. Okay.

10 Q. All right. You know, I know it's your first time
11 and I'm --

12 A. It is.

13 Q. -- sorry to make you do algebra and math on your
14 first time, but thank you nonetheless. And we'll just --
15 we'll take this up with somebody else then.

16 A. Okay.

17 Q. Okay. Thank you.

18 MR. MALISH: I'll pass the witness.

19 COMMISSIONER CULPEPPER: All right.

20 Ms. Edmondson?

21 MS. EDMONDSON: Okay.

22 CROSS-EXAMINATION BY MS. EDMONDSON:

23 Q. Ms. Seagle, good afternoon.

24 A. Good afternoon.

1 Q. On page 9 of your testimony I wanted to ask you
2 about -- if I can get to it myself. Line 9 through 12 you
3 testified that for various reasons AT&T did not believe
4 that dPi was entitled to some or all of the promotional
5 credits requested and then, therefore, AT&T did not
6 provide the requested credits to dPi?

7 A. Yes.

8 Q. I was wondering about AT&T's practice. If a CLEC
9 makes a request for promotional credits and AT&T
10 determines that they're entitled to part of them, but not
11 all of them, do y'all issue them the part to which you
12 determine they're entitled or do you deny the entire
13 request?

14 A. We issue as a bill credit the part that they are
15 entitled to.

16 Q. Okay. And in your Exhibit KAS-1, which is an
17 e-mail from you, I believe, to Steve Watson --

18 A. Yes.

19 Q. -- you state that BellSouth is not required to
20 resell cash back promotional offers?

21 A. Yes.

22 Q. And that was BellSouth's policy at that time?

23 A. Yes, ma'am.

24 Q. And do you know exactly when the BellSouth and

1 AT&T merger occurred?

2 A. At the end of 2006.

3 Q. Okay. And is it correct that there was
4 subsequently a change in the policy regarding cash back
5 promotions?

6 A. Yes. That's my understanding.

7 Q. And do you know when that went into effect?

8 A. I don't know.

9 Q. And is it correct that the BellSouth policy was
10 changed and there was an adoption of AT&T's position to --
11 to grant the cash back promotions, the wholesale discount,
12 wholesale discount portion?

13 A. I was not resale product manager at the time, so I
14 don't know the details.

15 Q. Okay. But is it your understanding there was a
16 change in policy?

17 A. Yes. There definitely was a change in policy.

18 Q. Okay. And you were with BellSouth prior to the
19 merger?

20 A. Prior to the merger.

21 Q. Okay.

22 MS. EDMONDSON: That's all I have. Thank you.

23 COMMISSIONER CULPEPPER: Redirect examination?

24 MR. TURNER: Very briefly.

1 REDIRECT EXAMINATION BY MR. TURNER:

2 Q. Ms. Seagle, does your direct testimony talk about
3 how the resale discount should be calculated when cash
4 back promotions are involved?

5 A. No, it does not.

6 MR. TURNER: That's all I have.

7 COMMISSIONER CULPEPPER: All right. Questions
8 by the Commission?

9 (No response.)

10 All right. The Commission has no questions.
11 Ms. Seagle, thank you very much. You may stand down from
12 the witness chair. And you may call another witness, Mr.
13 Turner.

14 (Whereupon, the witness was dismissed.)

15 MR. TURNER: Thank you, Mr. Chairman. AT&T
16 North Carolina calls Nicole Bracy.

17 COMMISSIONER CULPEPPER: Ms. Bracy.

18 NICOLE BRACY; Being first duly sworn,
19 testified as follows:

20 DIRECT EXAMINATION BY MR. TURNER:

21 Q. Ms. Bracy, please state your name, your employer
22 and your business address.

23 A. My name is Nicole Bracy. I'm employed by AT&T
24 Operations. And my business address is 675 West Peachtree

1 Street. That's Atlanta, Georgia, 30375.

2 Q. Did you file or cause to be filed in this
3 proceeding direct testimony dated November 5, 2008,
4 consisting of nine pages?

5 A. Yes, I did.

6 Q. Do you have any revisions that you would like to
7 make to that prefiled direct testimony?

8 A. No, I do not.

9 Q. If I were to ask you the same questions that
10 appear in that prefiled direct testimony, would your
11 answers today be the same as they appear in the testimony?

12 A. Yes, they will.

13 Q. And you had one exhibit to that direct testimony
14 labeled NWB-1?

15 A. That's correct.

16 Q. Do you have any revisions to that exhibit?

17 A. No, I do not.

18 Q. Moving now to your rebuttal testimony, did you
19 file or cause to be filed in this proceeding rebuttal
20 testimony dated November 19, 2008, and consisting of four
21 pages?

22 A. Yes, I did.

23 Q. Do you have any revisions that you would like to
24 make to your prefiled rebuttal testimony?

1 A. No, I do not.

2 Q. And there was no exhibit to your rebuttal,
3 correct?

4 A. That's correct.

5 Q. If I were to ask you the same questions that
6 appear in your prefiled rebuttal testimony, would your
7 answers be the same as they're set forth in that
8 testimony?

9 A. They will.

10 MR. TURNER: Mr. Chairman, I would like to ask
11 that Ms. Bracy's prefiled direct testimony and single
12 exhibit along with the prefiled rebuttal testimony be
13 inserted into the record, along with its exhibit, as if
14 given live from the stand.

15 MR. MALISH: No objection.

16 COMMISSIONER CULPEPPER: All right. Basis of
17 your objection?

18 MR. MALISH: Oh, I said no objection.

19 COMMISSIONER CULPEPPER: No objection. Okay.
20 Didn't hear the "no." Sorry about that. Well, then, that
21 request is allowed and the witness' prefiled direct and
22 rebuttal testimonies are copied into the record word for
23 word as if given orally from the stand. The witness' one
24 exhibit is identified as marked when filed.

1 (Whereupon, the prefiled direct and rebuttal
2 testimony of Nicole Bracy will be reproduced in
3 the record at this point the same as if the
4 questions had been orally asked and the answers
5 orally given from the witness stand.)

6
7 (Whereupon, Exhibit NWB-1 was marked for
8 identification.)

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**AT&T NORTH CAROLINA
DIRECT TESTIMONY OF NICOLE W. BRACY
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. P-55, Sub 1744
NOVEMBER 5, 2008**

Q. PLEASE STATE YOUR NAME, YOUR POSITION, AND YOUR BUSINESS ADDRESS.

A. My name is Nicole Bracy. I am employed by AT&T Operations, Inc. as a Sr. Product Marketing Manager. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE SUMMARIZE YOUR BACKGROUND AND EXPERIENCE.

A. I received a Bachelor of Science degree in Accounting from Auburn University in 1989, and I received a Masters in Business Administration from Nova Southeastern University in 1994. I joined BellSouth Telecommunications, Inc. (now doing business as AT&T Southeast and AT&T North Carolina) in 2000 as a Contract Negotiator in Interconnection Services. In 2005, I became a Subject Matter Expert for Contract Negotiations. In 2008, I joined the Business Marketing Organization as a Senior Product Marketing Manager.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

1 A. The purpose of my testimony is to present facts regarding: (1) the amount of
2 cashback promotional credits dPi has requested from AT&T North Carolina for
3 billing periods prior to July 2007 (when, as AT&T North Carolina witness Scot
4 Ferguson discusses in his testimony, AT&T North Carolina operated under its
5 pre-merger policy on cashback promotions); (2) the amount of cashback
6 promotional credits dPi has requested from AT&T North Carolina for billing
7 periods from July 2007 to date; and (3) the amount of cashback promotional
8 credits requested from AT&T North Carolina to which dPi is entitled for billing
9 periods from July 2007 to date.

10

11 **I. FACTS REGARDING THE AMOUNT OF CASHBACK**
12 **PROMOTIONAL CREDITS DPI HAS REQUESTED FROM AT&T**
13 **NORTH CAROLINA FOR BILLING PERIODS PRIOR TO JULY**
14 **2007**

15

16 Q. IN YOUR CURRENT POSITION, DO YOU HAVE ACCESS TO AT&T
17 BUSINESS RECORDS THAT REFLECT THE AMOUNT OF CASHBACK
18 PROMOTIONAL CREDITS DPI HAS REQUESTED FROM AT&T
19 NORTH CAROLINA FOR BILLING PERIODS PRIOR TO JULY 2007?

20

21 A. Yes, I do.

22

23 Q. HAVE YOU REVIEWED THOSE RECORDS TO DETERMINE IF THEY
24 ARE CONSISTENT WITH DPI'S CONTENTION THAT DPI HAS
25 SOUGHT \$156,500 IN CASHBACK PROMOTIONAL CREDITS FROM

1 AT&T NORTH CAROLINA FOR BILLING PERIODS PRIOR TO JULY
2 2007?

3

4 A. Yes, I have.

5

6 Q. DO AT&T'S RECORDS SUPPORT THE \$156,500 AMOUNT CLAIMED
7 BY DPI?

8

9 A. No, they do not.

10

11 Q. COULD YOU EXPLAIN THE DIFFERENCES BETWEEN THE
12 AMOUNTS REFLECTED IN AT&T'S RECORDS AND THE AMOUNTS
13 CLAIMED BY DPI?

14

15 A. Yes. Exhibit NWB-1 to my testimony reflects those differences. Among
16 other things, my Exhibit shows whether or not AT&T has any record of the
17 promotional credit requests that dPi is seeking in this case.

18

19 In its discovery responses, dPi identified the promotional credit amounts it is
20 seeking in this case. See Exhibits A and D to DPI's Responses to AT&T
21 North Carolina's First Set of Interrogatories and Request for Production of
22 Documents ("dPi Exhibits A and D"). The first column of Exhibit NWB-1 is
23 the "Invoice#" information (or promotional credit request description) for the
24 North Carolina accounts identified in dPi Exhibits A and D.

25

1 The second column of Exhibit NWB-1 is the billing period for which the
2 credit was requested. This information is also taken directly from dPi
3 Exhibits A and D.

4
5 The third column of Exhibit NWB-1 is explained by AT&T witness Kristy
6 Seagle in her Direct Testimony.

7
8 The fourth column of Exhibit NWB-1 is based on my review of AT&T's
9 records of cashback promotional credit requests submitted by competing
10 local providers ("CLPs") like dPi. A "no" in that column indicates that
11 AT&T North Carolina has no records indicating that dPi submitted the
12 promotional credit request identified in the first column of Exhibit NWB-1.

13
14 The fifth and sixth columns of Exhibit NWB-1 are explained by AT&T
15 witness Kristy Seagle in her Direct Testimony.

16
17 The seventh column of Exhibit NWB-1 is the amount of cashback
18 promotional credit dPi claims to have sought in the request identified in the
19 first column of the Exhibit. That information is taken directly from dPi
20 Exhibits A and D. The eighth column is the sum total, by promotion type, of
21 the amounts set forth in the seventh column.

22
23 Q. ACCORDING TO AT&T'S RECORDS, WHAT AMOUNT OF
24 CASHBACK PROMOTIONAL CREDITS HAS DPI REQUESTED FROM

1 AT&T NORTH CAROLINA FOR BILLING PERIODS PRIOR TO JULY
2 2007?

3

4 A. AT&T's records indicate that for billing periods prior to July 2007, dPi
5 submitted \$154,550.00 in cashback promotions in North Carolina.

6

7 Q. HOW DID YOU CALCULATE THIS \$154,550.00 AMOUNT?

8

9 A. I added the "amount submitted" figures in the seventh column of Exhibit
10 NWB-1 for each of the requests that AT&T has a record of having been
11 submitted (as indicated in the fourth column of Exhibit NWB-1).

12

13 Q. PLEASE REMIND US WHAT THE \$154,550.00 AMOUNT
14 REPRESENTS?

15

16 A. That amount represents the total amount of cashback promotional credit
17 requests, according to AT&T's records, that dPi has submitted for billing
18 periods prior to July 2007.

19

20 Q. DOES THAT \$154,550.00 AMOUNT REFLECT THE RESALE
21 DISCOUNT PERCENTAGE ADOPTED BY THIS COMMISSION?

22

23 A. No, it does not.

24

25 Q. PLEASE EXPLAIN WHAT YOU MEAN BY THAT.

1
2 A. Assume that the cashback amount of a promotional offering was \$50. dPi
3 has requested a credit in the full amount of \$50. If dPi were entitled to any
4 cashback promotional credits for billing periods prior to July 2007 (and it is
5 not), it would not be entitled to the full amount of the cashback component of
6 the offering (\$50 in this example). At best, and assuming AT&T adopted its
7 current practice to review and validate credit requests that were submitted
8 years ago, dPi would only be entitled to the amount of the cashback
9 component of the offering after that amount has been reduced by the resale
10 discount percentage adopted by this Commission.

11
12 Q. DID AT&T PROVIDE DPI ANY OF THE CASHBACK PROMOTIONAL
13 CREDITS IT REQUESTED FOR BILLING PERIODS PRIOR TO JULY
14 2007?

15
16 A. No.

17
18 Q. WHEN DID YOU FIRST BECOME AWARE THAT DPI INTENDED TO
19 SEEK PAYMENT FOR CASHBACK PROMOTIONAL CREDIT
20 REQUESTS THAT IT HAD PREVIOUSLY SUBMITTED AND THAT
21 AT&T PREVIOUSLY HAD NOT PAID?

22
23 A. In early 2008.

24

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II. FACTS REGARDING THE AMOUNT OF CASHBACK PROMOTIONAL CREDITS DPI HAS REQUESTED FROM AT&T FOR BILLING PERIODS FROM JULY 2007 TO DATE.

Q. WHAT AMOUNT OF CASHBACK PROMOTIONAL CREDITS HAS DPI REQUESTED FROM AT&T NORTH CAROLINA FOR BILLING PERIODS FROM JULY 2007 TO DATE?

A. For billing periods from July 2007 through October 2008, dPi has requested \$202,676.17 in cashback promotional credits from AT&T North Carolina.

III. FACTS REGARDING THE AMOUNT OF CASHBACK PROMOTIONAL CREDITS FROM AT&T NORTH CAROLINA TO WHICH DPI IS ENTITLED FOR BILLING PERIODS FROM JULY 2007 TO DATE.

Q. IS DPI ENTITLED TO ALL OF THE \$202,676.17 IN CASH BACK PROMOTIONAL CREDITS IT HAS REQUESTED FROM AT&T NORTH CAROLINA SINCE JULY 2007?

A. No. At this time, AT&T has reviewed \$175,454.27 of these cashback promotional credit requests¹ to determine if they should be granted. This review revealed that dPi was entitled to \$117,803.79 of these requested credits and that dPi is not entitled to \$57,650.48 of these requested credits.

¹ As of the date of the filing of this testimony, AT&T North Carolina has not yet reviewed the remaining \$27,221.90 of the \$202,676.17 in cashback promotional credits that dPi has submitted for the billing period from July 2007 to October 2008.

1 Thus, dPi is entitled to approximately 67% of the \$175,454.27 of cashback
2 promotional credit requests, and dPi is not entitled to approximately 33% of
3 these cashback promotional requests.

4
5 **Q. PLEASE EXPLAIN HOW AT&T NORTH CAROLINA REVIEWS THE**
6 **CASHBACK PROMOTIONAL REQUESTS SUBMITTED BY**
7 **RESELLERS LIKE DPI FOR BILLING PERIODS AFTER JULY 2007.**

8
9 **A. For most of these requests, AT&T's mechanized systems extract information**
10 **(including service order number) from the cashback promotional credit**
11 **request submitted by the reseller (or the reseller's billing agent). The systems**
12 **then compare the contents of the service order submitted by the reseller to**
13 **requirements of the promotion to determine if the service order meets all of**
14 **the promotional requirements.**

15
16 For some cashback promotions, an end user may request the cashback offer
17 only once in a given period of time. When a CLP like dPi resells these types
18 of promotions, a manual (as opposed to mechanized) review is conducted to
19 determine if the end user has satisfied the same criteria an AT&T North
20 Carolina end user would be required to satisfy.

21
22 **Q. WHY WERE \$57,650.48 OF THE REQUESTS THAT HAVE BEEN**
23 **REVIEWED TO DATE DENIED?**

24

1 A. These cashback promotional credit requests were denied either because dPi
2 requested the full (as opposed to the discounted) amount of the cashback
3 component of the promotion or because the dPi end user did not meet at least
4 one of the requirements that an AT&T North Carolina end user would have to
5 meet to qualify for the promotion.

6

7 Q. HOW HAS DPI RESPONDED TO AT&T NORTH CAROLINA'S DENIAL
8 OF THESE \$57,650.48 IN REQUESTS?

9

10 A. dPi's billing agent has requested audit information for some (but not all) of
11 the cashback promotional requests that dPi has submitted since July 2007 and
12 that AT&T North Carolina has not paid. To my knowledge, however, dPi
13 has done nothing to suggest that it disagrees with AT&T North Carolina's
14 decision not to pay any of those requests.

15

16 Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

17

18 A. Yes.

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AT&T NORTH CAROLINA
REBUTTAL TESTIMONY OF NICOLE W. BRACY
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. P-55, Sub 1744
NOVEMBER 19, 2008

Q. PLEASE STATE YOUR NAME, YOUR POSITION, AND YOUR BUSINESS ADDRESS.

A. My name is Nicole Bracy. I am employed by AT&T Operations, Inc. as a Senior Product Marketing Manager. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. ARE YOU THE SAME NICOLE BRACY WHO FILED DIRECT TESTIMONY IN THIS DOCKET?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The primary purpose of my rebuttal testimony is to respond to dPi witness Brian Bolinger's unsubstantiated assertion that dPi is entitled to 100% of the promotional credit requests it seeks in this proceeding. As explained below, even if the Commission agreed with dPi (which it should not as explained by AT&T

1 witness Scot Ferguson), AT&T is unable to validate the oldest promotional credit
2 requests submitted by dPi.

3

4 Q. IN HIS DIRECT TESTIMONY (PAGE 5, LINES 7-8), DPI WITNESS
5 BRIAN BOLINGER STATES THAT "IN NORTH CAROLINA, DPI
6 QUALIFIED AND APPLIED FOR, BUT WAS NOT PAID,
7 APPROXIMATELY \$156,500 IN CASH BACK PROMOTIONS
8 [SUBMITTED PRIOR TO JULY 2007]." DO YOU AGREE WITH MR.
9 BOLINGER'S STATEMENT?

10

11 A. No. As an initial matter, AT&T has no record of a \$1,950 promotional credit
12 request that was purportedly submitted in April 2006 and is associated with
13 an April 2005 bill period (see Exhibit NWB-1 to my direct testimony).
14 Although AT&T has records for the remaining \$154,550 in promotional
15 credit requests that dPi seeks in this case, a substantial portion of such
16 records (\$33,900) are essentially worthless because AT&T would be unable
17 to validate such requests if ordered to do so by this Commission.

18

19 Q. CAN YOU DESCRIBE THE PROMOTIONAL CREDIT REQUESTS
20 THAT AT&T WOULD BE UNABLE TO VALIDATE?

21

22 A. Yes. If ordered to do so, AT&T could not use its current process for
23 validating promotional credit requests to validate the oldest promotional
24 credit requests involved in this matter (i.e. the promotional credit requests
25 that are associated with billing periods from November 2003 through

1 November 2005).¹ The oldest promotional credit requests involved in this
 2 matter were submitted on a billing adjustment request ("BAR") form.
 3 Validating a promotional credit submitted on a BAR form was a manual
 4 undertaking that would have required, among other things, a review of certain
 5 service order information to ensure that the dPi customer qualified for the
 6 promotion in question. (see the direct testimony of AT&T witness Kristy
 7 Seagle). Of course, no such validation took place because at the time when
 8 these BAR forms were submitted, AT&T did not offer cashback promotions
 9 for resale.

10

11 Q. WHY CAN'T AT&T MANUALLY VALIDATE THE OLDEST
 12 PROMOTIONAL CREDIT REQUESTS SUBMITTED BY DPI TODAY?

13

14 A. In addition to being extremely time-consuming, the service order information
 15 necessary to manually validate the vast majority of these extremely old
 16 promotional credit requests is not available. Specifically, AT&T no longer
 17 has service order information for the North Carolina promotional credit
 18 requests that are associated with billing periods that pre-date April 2005.
 19 This means that of the \$39,900 in promotional credits requests that were
 20 submitted using a BAR form (and cannot be validated using AT&T's current
 21 validation process), AT&T would be able to manually validate only \$6,000 of

¹ Specifically, AT&T cannot use its current cashback promotional credit validation process to validate any promotional credit request that is associated with a monthly billing period that pre-date January 2006 (see Exhibit NWB-1 to my direct testimony, column 2 - "Billing Period For Which the Credit was Requested"). These old promotional credit requests total \$39,900. All these old promotional credit requests were submitted on BAR forms.

1 such credits requests (this is the sum total of the promotional credit requests
 2 that are associated with billing periods from April 2005 through November
 3 2005). From a practical perspective, this means that even if the Commission
 4 agreed with dPi (and for the reasons set forth by AT&T witness Scot
 5 Ferguson the Commission should not), AT&T would be unable to manually
 6 validate \$33,900 of the promotional credit requests dPi is seeking in this
 7 matter. Stated differently, this means that using the current process for
 8 validating promotions, AT&T could validate only \$114,650 of the
 9 promotional credit requests dPi seeks in this case.² Of course, and as I noted
 10 in my direct testimony, even under today's current process, only about 67%
 11 of dPi's cashback promotional credit requests are validated. As such, it is
 12 reasonable to assume that dPi would not be eligible to receive all of the
 13 promotional credits it seeks in this case.

14

15 Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY?

16

17 A. Yes.

² This amount is derived by taking the amount dPi is seeking in this case (\$156,500) and subtracting: (i) the promotional credit requests submitted via BAR form (\$39,900); and (ii) the promotional credit request that AT&T has no record of (\$1,950).

1 BY MR. TURNER:

2 Q. Ms. Bracy, have you ever testified at a Commission
3 hearing before?

4 A. No, I have not.

5 Q. Have you prepared a brief summary of your
6 testimony?

7 A. Yes, I have.

8 Q. Would you please present it?

9 A. Yes. My testimony addresses the amounts in
10 dispute in this docket. First, I explain that while dPi
11 claims it submitted \$156,500 in cash back promotional
12 credit requests, AT&T's records reflect that dPi only
13 submitted \$154,550 in cash back credit requests.

14 Second, I explain that dPi requested credit for
15 full -- for the full face value of the cash back component
16 of the promotional offerings instead of requesting credit
17 for the face value of the cash back component less the
18 resale discount established by this Commission.

19 Third, I explain that even after AT&T began making
20 the cash back component of the promotional offerings
21 available for resale in mid-2007, AT&T has rejected nearly
22 one-third of dPi's cash back promotional credit requests
23 because dPi's end users did not satisfy the qualifications
24 of the promotion.

1 Finally, I explain that because of the age of
2 these claims, AT&T is unable to validate the oldest
3 promotional credit requests submitted by dPi.

4 MR. TURNER: Mr. Chairman, Ms. Bracy is
5 available for cross-examination.

6 COMMISSIONER CULPEPPER: All right.
7 Cross-examination, Mr. Malish?

8 MR. MALISH: Thank you.

9 CROSS-EXAMINATION BY MR. MALISH:

10 Q. Ms. Bracy, how are you?

11 A. I'm good. How are you?

12 Q. Good. And I'll try not to be mean to you, okay,
13 'cause I know it's your first time doing this.

14 First of all, looking up at the board, do you
15 remember -- you've been here the whole time and you saw
16 the -- and listened to the testimony of Ms. Seagle,
17 correct?

18 A. Correct.

19 Q. And also of Mr. O'Roark beforehand, right?

20 A. Correct.

21 Q. And you heard the openings and all of that, right?

22 A. Yes.

23 Q. Okay. And you heard me visit with Ms. Seagle
24 about the purpose behind the wholesale discount, right?

1 A. Right.

2 Q. And the -- and she agreed with me that the purpose
3 of that is to bring the wholesale rate below the retail
4 rate?

5 A. I don't know that I understood her to say...

6 Q. Do you understand that that's the purpose of
7 having a wholesale rate is that it will be less than the
8 retail rate?

9 A. Well, I don't address the purpose of -- but
10 restate your question.

11 Q. Well, do you understand the purpose of having the
12 wholesale rate, the rate for resellers, is to bring that
13 wholesale rate below, in other words less, than the retail
14 rate?

15 A. I think in most cases.

16 Q. Okay. And would you agree, as Ms. Seagle said,
17 that prior to 2007, prior to June of 2007, BellSouth did
18 not offer the same promotional cash back offers to dPi and
19 CLECs like dPi that BellSouth made to retail customers?

20 A. I recall her saying that BellSouth's position was
21 that cash back offerings were not available --

22 Q. Right.

23 A. -- for resale.

24 Q. Besides her saying that, do you also agree that

1 that's what --

2 A. That's my understanding.

3 Q. All right. Okay. And you saw me start to go
4 through the math here with -- or the -- or the logic?

5 MR. MALISH: If I may approach?

6 COMMISSIONER CULPEPPER: Sure.

7 Q. You saw me start to go through the analysis here
8 of how the promotion is in theory supposed to work if we
9 first assume that CLECs like dPi are supposed to get the
10 benefit of the promotion?

11 A. I saw that, yes.

12 Q. All right. And would you agree with me generally
13 that if you first assume that dPi is supposed to get the
14 benefit of that promotion that we -- we're looking at a
15 situation where the retail price is the tariff minus the
16 promotion?

17 A. Say that again.

18 Q. Well, let's start -- let's go back to this.
19 Wholesale, that's the price that resellers pay, right?
20 And that's approximately a 20 percent discount from
21 retail, correct?

22 A. Well, I'm -- I'm having trouble because my
23 testimony does not address that.

24 Q. Your testimony addresses how the promotion should

1 be calculated, whether it should be all of the hundred
2 dollars or a fraction of it, right?

3 A. No.

4 Q. No.

5 A. My testimony only addresses the credit requests
6 that dPi submitted and that they do not reflect the resale
7 discount, not how.

8 Q. So you don't have an opinion on how -- if dPi is
9 entitled to a promotion, what the amount is; is that
10 correct?

11 A. Restate that again.

12 Q. You don't have an opinion or you're not offering
13 any testimony about how the promotion credit should be
14 awarded to dPi if we assume that dPi is entitled to it; is
15 that correct?

16 A. Not how it was calculated, no.

17 Q. Okay. So this business that Mr. -- that Mr.
18 Turner went through with Mr. O'Roark where they did the
19 calculations, right, you have -- you have nothing to say
20 on that one way or the other? You have no idea whether
21 that's correct or incorrect; is that true?

22 A. Not the calculation. I don't get into the
23 calculation. Like I said, I -- my testimony addressed
24 that they requested the full face value without deducting

1 the discount.

2 Q. And you -- but you don't have an opinion as to
3 whether that was correct or incorrect; is that true?

4 A. Well, it's our -- our -- our position that at best
5 that's what they are entitled to.

6 Q. All right. So do you understand where that
7 position comes from?

8 A. I've heard the discussion during the hearing, yes,
9 but as far as getting into the details and --

10 Q. Is there somebody -- so basically are you telling
11 us that you're just regurgitating what you were told the
12 way that this is supposed to work, but you don't have any
13 independent appreciation or understanding of how it's
14 supposed to work and I should ask those kinds of questions
15 to somebody else?

16 A. I believe that is --

17 MR. TURNER: I object to the characterization.
18 I don't think that's at all what the witness said.

19 COMMISSIONER CULPEPPER: Well, it could have
20 been asked a little bit better maybe, Mr. Turner, but I'm
21 going to let the witness answer the question if she has an
22 answer for it.

23 A. I mean, I think that gets into some of the legal
24 issues, but I do -- like I said, I understand that that's

1 AT&T's position, that at best that dPi is entitled to the
2 face value less the discount.

3 Q. But you don't necessarily know why that might be,
4 why that happens to be? Is that something I should ask
5 Mr. Ferguson instead?

6 A. I don't know. Either -- maybe our legal counsel.

7 Q. Okay. Let me double check my notes then if you
8 can't offer on this subject.

9 And Ms. Bracy, I would like to direct your
10 attention briefly to your rebuttal testimony.

11 A. Okay.

12 Q. Specifically page 3. And you have a footnote
13 there at the bottom of page 3 and I would like to visit
14 with you about. And I'm not going to read it to you, I'm
15 just -- generally you say that the submissions that dPi
16 made to try to get the benefit of these credits were made
17 on bar forms; is that correct?

18 A. Yes, that's correct.

19 Q. And I just want to make sure that isn't that the
20 -- wasn't that the procedure at the time? Is that -- when
21 you want to make a request, it's supposed to be on a bar
22 form, right?

23 A. That was the procedure at the time.

24 Q. Okay. So there's nothing wrong with them using

1 that procedure? That's the -- that's the procedure that
2 BellSouth has created for doing this, correct?

3 A. They submit it on bar forms, yes.

4 Q. Okay.

5 MR. MALISH: Mr. Chairman, I think I don't have
6 any more questions for this witness because my
7 understanding is that she's not prepared or offering any
8 testimony on how this -- on how they get to their position
9 on what the -- on how the promotion should be calculated
10 for dPi if, in fact, dPi is entitled to it. And it may be
11 that Mr. Ferguson can talk about that, the next witness
12 up.

13 I would like to be able to recall Ms. Bracy if,
14 in fact, he cannot do that. Is -- is that something that
15 we can arrange here?

16 COMMISSIONER CULPEPPER: Absolutely we can
17 arrange it.

18 MR. MALISH: All right. In that case, I will --
19 I will pass the witness.

20 COMMISSIONER CULPEPPER: All right. Ms.
21 Edmondson, you have any questions of the witness?

22 MS. EDMONDSON: Yes, please.

23 CROSS-EXAMINATION BY MS. EDMONDSON:

24 Q. Good afternoon, Ms. Bracy.

1 A. Good afternoon.

2 Q. On page 9 of your direct testimony -- let me turn
3 to it myself -- you mention that dPi's billing agent has
4 requested audit information. Has that been provided by
5 AT&T to dPi's billing agent?

6 A. Yes. We -- we -- we've provided some and we've
7 started providing detailed information this year.

8 Q. What's the time frame? How long does it take
9 y'all to respond to those requests?

10 A. Well, now it takes us less than a month.

11 Q. Okay. In your rebuttal you discuss how you -- how
12 -- about validating promotional credit requests. Is it
13 true you cannot validate promotional credit requests
14 associated with billing periods that predate April 2005?

15 A. Yes, that's correct.

16 Q. And why is that?

17 A. Because the service order information is no longer
18 available.

19 Q. And where is it?

20 A. We don't have it on the systems anymore.

21 Q. Is it destroyed or been deleted?

22 A. One or the other, yes.

23 Q. What is the retention policy for AT&T as far as
24 records, electronic or hard copies?

- 1 A. I don't know that, ma'am.
- 2 Q. Were these electronic or paper requests?
- 3 A. From what I understand, these were the paper
4 requests that came in on the bar forms.
- 5 Q. Do you know how long you retain them?
- 6 A. No, I don't. Because we don't -- we don't use
7 those bar paper forms. We have electronic mechanized
8 systems now.
- 9 Q. Okay. When did -- okay. So you -- and so you
10 were requested -- dPi asked for them in 2008 for 2005
11 promotion credits?
- 12 A. From what I understand in -- in 2007 or 2008.
- 13 Q. So that maybe you had records going back about
14 three years?
- 15 A. Yes. Maybe a little more than three years. Maybe
16 four years.
- 17 Q. So if you can't validate it, then it's your policy
18 that it -- it should be denied?
- 19 A. Yes.
- 20 Q. Are you aware of anything in the interconnection
21 agreement that requires you -- that deals with how long
22 records should be retained?
- 23 A. I'm not aware of anything.
- 24 Q. All right.

1 MS. EDMONDSON: That's all I have.

2 COMMISSIONER CULPEPPER: Redirect examination?

3 MR. TURNER: Very briefly.

4 REDIRECT EXAMINATION BY MR. TURNER:

5 Q. Ms. Bracy, I'm concerned that there may be a
6 little confusion there and I would like us to try to clear
7 it up.

8 A. Okay.

9 Q. The records that you would need to man -- to
10 validate these service orders, is the bar form, the paper
11 bar form the record that you would need?

12 A. No. It's the service order information.

13 Q. And the service order information that you would
14 need, in what form is it generally kept?

15 A. Electronically.

16 Q. So having the bar forms is not the issue, it's
17 having the electronic data that show the service order
18 information that's the issue. Do I understand it right?

19 A. That's correct.

20 MR. TURNER: That's all I have.

21 COMMISSIONER CULPEPPER: All right. Questions
22 by the Commission?

23 (No response.)

24 Thank you very much, Ms. Bracy. You may stand

1 down from the witness chair.

2 MR. MALISH: I actually have some recross on
3 some of the things that -- is that permissive --
4 permissible?

5 COMMISSIONER CULPEPPER: On --

6 MR. MALISH: On this issue of the bar forms and
7 the --

8 COMMISSIONER CULPEPPER: Is it based on
9 Ms. Edmondson's questions?

10 MR. MALISH: It -- it flows from them.

11 COMMISSIONER CULPEPPER: All right. I'll permit
12 it. Go ahead.

13 RE CROSS EXAMINATION BY MR. MALISH:

14 Q. Ms. Bracy, how long have you been in the section
15 that handles the processing of these credit -- of these
16 credit requests?

17 A. I started in January of '08.

18 Q. Of '08. So you were not there back in '07 and
19 before when these would have been submitted --

20 A. That's correct.

21 Q. -- the first go-round?

22 Do you know what information is contained on the
23 bar form?

24 A. In general, yes.

1 Q. And I'm talking about back in '07 before you got
2 there.

3 A. In general, not in detail, no.

4 Q. My understanding is that the bar form is basically
5 we have a claim and then dPi has to go through and itemize
6 that by telephone number, laying out in significant detail
7 what it is for that telephone number that allows them to
8 say that we want a credit based on service provided to
9 this telephone number. Is that your understanding of how
10 it works or how it did work?

11 A. Yes.

12 Q. All right. And -- yeah. Does -- does BellSouth
13 or AT&T retain the billing records as opposed to the
14 service order records that go back and cover the time in
15 question from 2003 to 2005?

16 A. I don't know.

17 Q. Okay. You didn't look for those, did you?

18 A. Billing records, no.

19 Q. All right. And your testimony is from -- is from
20 2008, correct?

21 A. That's right.

22 Q. And if dPi provided some materials since then,
23 billing records and stuff like that, you have not reviewed
24 those? If they provided those in discovery, you haven't

1 reviewed those, have you?

2 A. No, I haven't reviewed them.

3 Q. Okay. So as of 2008 is when you're saying you did
4 not have the stuff going that far back for you to
5 double-check and make sure that what they asked for was
6 correct or incorrect; is that true?

7 A. Say that again, I'm sorry.

8 Q. I'll ask a different question. You don't have the
9 -- I guess -- I guess y'all don't have the information to
10 say that billing adjustment requests made by dPi were
11 invalid either, do you?

12 A. For the time periods that I state in the -- in my
13 testimony, we don't have the service order information to
14 -- to validate --

15 Q. All right.

16 A. -- whether they are eligible.

17 Q. So you have no way of saying whether they're valid
18 or invalid, one way or the other?

19 A. Not unless we have the service order.

20 Q. All right. Okay. Do you know what is on the
21 billing records that are provided by AT&T to dPi, which is
22 used by dPi or by its agent to create the request for
23 credit?

24 A. No. I -- I haven't seen that.

1 Q. Okay. So you don't know what the information is
2 that they are -- you did not look at the billing
3 information from AT&T which was used by dPi to create the
4 request for credit?

5 A. No.

6 Q. Okay.

7 MR. MALISH: I'll pass the witness.

8 COMMISSIONER CULPEPPER: Okay. Ms. Edmondson,
9 do you have any questions based on that cross-examination?

10 MS. EDMONDSON: No, thank you.

11 COMMISSIONER CULPEPPER: Any redirect based on
12 that cross-examination?

13 MR. TURNER: Verily briefly.

14 COMMISSIONER CULPEPPER: Go right ahead.

15 FURTHER REDIRECT EXAMINATION BY MR. TURNER:

16 Q. Are you familiar with the line connection waiver
17 charge docket?

18 A. Briefly.

19 Q. Did dPi in that docket submit requests for line
20 connection waiver charges and get them denied by AT&T?

21 A. Yes.

22 Q. Did the Commission find that those requests were
23 invalid?

24 A. Yes, from my understanding.

1 Q. And as I understand it, you don't have the
2 information that you need to validate whether or not it's
3 entitled to these cash back promotion requests for the
4 time period you testified about, right?

5 A. Correct.

6 MR. TURNER: That's all I have.

7 COMMISSIONER CULPEPPER: All right. That now
8 appears it does conclude your testimony, Ms. Bracy, and
9 you may stand down.

10 All right. Call another witness.

11 MR. TURNER: AT&T calls Scot Ferguson.

12 SCOT FERGUSON; Being first duly sworn,

13 testified as follows:

14 DIRECT EXAMINATION BY MR. TURNER:

15 Q. Mr. Ferguson, would you state your name, your
16 employer and your business address for the record, please?

17 A. Yes. My name is Scot Ferguson. I work for AT&T
18 Operations, Incorporated. My office address is 675 West
19 Peachtree Street, Atlanta, Georgia, 30375.

20 Q. And did you file or cause to be filed in this
21 proceeding direct testimony dated November the 5th, 2008,
22 and consisting of 25 pages?

23 A. Yes, I did.

24 Q. Do you have any revisions that you would like to

1 make to your prefiled direct testimony?

2 A. No.

3 Q. If I were to ask you the same questions that
4 appear in the prefiled direct testimony, would your
5 answers today be the same as they appear in the prefiled
6 testimony?

7 A. Yes.

8 Q. And you had two exhibits to your direct testimony
9 labeled PLF-1 and PLF-2?

10 A. Yes.

11 Q. Do you need to make any revisions to either of
12 those exhibits?

13 A. No.

14 Q. Moving to your rebuttal testimony, did you file or
15 cause to be filed in this proceeding rebuttal testimony
16 dated November the 19th, 2008, and consisting of 8 pages?

17 A. Yes.

18 Q. Do you have any revisions that you would like to
19 make to your prefiled rebuttal testimony?

20 A. No.

21 Q. And if I were to ask you the same questions that
22 appear in your prefiled rebuttal testimony, would your
23 answers be the same as they appear in the testimony?

24 A. Yes.

1 Q. You had one exhibit to your rebuttal testimony
2 labeled Rebuttal Exhibit PLF-1?

3 A. Yes.

4 Q. Do you have any revisions to that exhibit?

5 A. No.

6 MR. TURNER: Mr. Chairman, I would like to ask
7 that Mr. Ferguson's prefiled direct and prefiled rebuttal
8 testimony, along with their associated exhibits, be
9 inserted into the record of these proceedings as if given
10 live from the stand.

11 COMMISSIONER CULPEPPER: All right. The
12 witness' prefiled direct and rebuttal testimonies are
13 admitted into evidence as if given word for word orally
14 from the stand. The witness' direct exhibits and rebuttal
15 exhibits are identified as marked when filed.

16 (Whereupon, the prefiled direct and rebuttal
17 testimony of Scot Ferguson will be reproduced in
18 the record at this point the same as if the
19 questions had been orally asked and the answers
20 orally given from the witness stand.)

21
22 (Whereupon, Exhibits PLF-1 and PLF-2 and
23 Rebuttal Exhibit PLF-1 were marked for
24 identification.)

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N.C. Utilities Commission**

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AT&T NORTH CAROLINA

DIRECT TESTIMONY OF P.L. (SCOT) FERGUSON

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1744

NOVEMBER 5, 2008

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH AT&T OPERATIONS, INC. ("AT&T"), AND YOUR BUSINESS ADDRESS.

A. My name is Scot Ferguson. I am an Associate Director in AT&T Operations' Wholesale organization. As such, I am responsible for certain issues related to wholesale policy, primarily related to the general terms and conditions of interconnection agreements throughout AT&T's operating regions, including North Carolina. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE SUMMARIZE YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from the University of Georgia in 1973, with a Bachelor of Journalism degree. My career spans almost 35 years with Southern Bell, BellSouth Corporation, BellSouth Telecommunications, Inc., and AT&T. In addition to my current assignment, I have held positions in sales and marketing, customer system design, product management, training, public relations, wholesale customer and regulatory support, and wholesale contract negotiations.

1 Q. BRIEFLY SUMMARIZE WHAT IS AT ISSUE IN THIS COMPLAINT
2 PROCEEDING.

3
4 A. The issue is whether dPi Teleconnect, L.L.C. ("dPi") is entitled to retroactive
5 credits for cashback promotional offerings dating from November 2003 through
6 July 2007. AT&T North Carolina ("AT&T") believes dPi is not entitled to these
7 credits because: (1) AT&T's decision not to offer the cashback portion of the
8 promotions at issue for resale is reasonable and nondiscriminatory; (2) AT&T's
9 decision not to offer the cashback portion of the promotions at issue for resale did
10 not (and does not) harm competition in North Carolina; (3) dPi's request is
11 discriminatory and, if granted, would disadvantage dPi's competitors; and (4)
12 dPi's request is not timely and is not in compliance with the terms of the
13 Interconnection Agreement ("ICA" or "Agreement") between the parties.

14
15 Q. PLEASE EXPLAIN HOW YOUR TESTIMONY IS ORGANIZED.

16
17 A. My testimony explains AT&T's position with respect to cashback promotions and
18 discusses specific policy reasons why the North Carolina Utilities Commission
19 ("Commission") should deny dPi's Complaint. I begin my testimony with a
20 general overview of AT&T's resale obligations pursuant to the federal
21 Telecommunications Act of 1996 (the "Act") and how AT&T and dPi have
22 incorporated such obligations into their Agreement. Next I discuss the details of
23 the promotions at issues in this complaint. Then I discuss AT&T's general
24 position on the resale of the cashback portion of its promotions prior to July 2007
25 and after July 2007. Next, I discuss why AT&T's decision not to resell the

1 cashback promotions at issue in this docket is reasonable and nondiscriminatory.
2 Finally, I explain that dPi's complaint is untimely and does not comply with the
3 terms of the parties' Agreement.
4

5 I. AT&T'S RESALE OBLIGATIONS
6

7 Q. COULD YOU BRIEFLY EXPLAIN THE SOURCE OF AT&T'S RESALE
8 OBLIGATIONS?
9

10 A. Yes. I am not a lawyer, and our attorneys can address the specific details of
11 AT&T's resale obligations in post-hearing briefs and, if necessary, during oral
12 argument. In order to put the remainder of my testimony in perspective, however,
13 I will provide a high-level overview of AT&T's resale obligations, subject to
14 further explanation by our attorneys.
15

16 In general, the Act requires AT&T, subject to certain conditions and limitations,
17 to offer for resale at wholesale rates any telecommunications service it provides at
18 retail to subscribers who are not telecommunications carriers. *See generally*, 47
19 U.S.C. §§251(b)(1); 251(c)(4).
20

21 The FCC issued an order and adopted rules implementing these provisions,¹ and
22 this Commission has issued an order establishing resale wholesale discount rates
23 that apply when AT&T is obligated to offer services for resale in North Carolina.²

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC

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Q. AS A PRACTICAL MATTER, WHAT DOES ALL OF THAT MEAN?

A. That means that when dPi makes an appropriate request to resell telecommunications services that AT&T sells to its own end users and that are available for resale, AT&T must sell those telecommunications services to dPi at discounted wholesale prices so that dPi, in turn, can resell the services to dPi's customers.

For example, assume that AT&T's tariffed installation charge for a particular telecommunications service that is available for resale is \$40 and that AT&T's tariffed monthly rate for the service is \$20. Assume further that the resale discount is 20%.³ If dPi purchases the same service to resell to one of its own qualifying end users, AT&T would bill dPi \$32 for the installation charge (the \$40 tariffed rate less the 20% resale discount) and \$16 for the monthly rate (the \$20 tariffed rate less the 20% resale discount).

Rcd 15499, ¶ 863-984 ("*Local Competition Order*"). See also, 47 C.F.R. §§ 51.601-51-617.

² *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50, *Recommended Arbitration Order*, dated December 23, 1996, at p. 43.

³ These rates are hypothetical. The actual resale discount rate adopted by this Commission is 21.5 % for residential services and 17.6 % for business service. *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50, *Recommended Arbitration Order*, dated December 23, 1996, at p. 43. I am using these hypothetical rates in this instance for illustrative purposes.

1 **II. THE PARTIES' INTERCONNECTION AGREEMENTS**

2

3 **Q. HOW DO AT&T AND DPI WORK THESE RESALE OBLIGATIONS INTO**
4 **THEIR BUSINESS RELATIONSHIP?**

5

6 **A. Like other obligations that arise under Section 251 of the Act, these resale**
7 **obligations are addressed in interconnection agreements into which the parties**
8 **entered pursuant to Section 252 of the Act.**

9

10 **Q. DID THE PARTIES ENTER INTO ONE OR MORE AGREEMENTS THAT**
11 **WERE IN EFFECT DURING THE NOVEMBER 2003 – JUNE 2007 TIME**
12 **PERIOD AT ISSUE IN THIS DOCKET?**

13

14 **A. Yes. In fact, because the time period covers almost four years, there were two**
15 **different agreements in effect during that time period, both of which were the**
16 **result of voluntary negotiation (as opposed to arbitration).**

17

18 **The first of these two interconnection agreements was executed in March 2003.**
19 **The agreement is available on the web at the following address:**
20 **http://cpr.bellsouth.com/clec/docs/all_states/800f5a53.pdf. The relevant**
21 **provisions of that Agreement (i.e., the General Terms and Conditions Section, the**
22 **Resale Attachment, and the Billing Attachment) are set forth in Exhibit PLF-1.**

23

24 **The second of these two agreements was executed in April 2007, and remains in**
25 **effect. The agreement is available on the web at the following address:**

1 http://cpr.bellsouth.com/clec/docs/all_states/80296813.pdf The relevant
2 provisions of the parties' current Agreement (i.e., the General Terms and
3 Conditions Section, the Resale Attachment, and the Billing Attachment) are set
4 forth in Exhibit PLF-2.

5

6 **III. THE PROMOTIONS AT ISSUE IN THIS PROCEEDING**

7

8 Q. WHAT PROMOTIONS ARE THE SUBJECT OF THIS COMPLAINT
9 PROCEEDING?

10

11 A. This case involves the following three AT&T cashback promotions:

12

13 AT&T's \$100 Cashback for 1FR + 2 Custom Calling or TouchStar
14 Features⁴;

15

16 AT&T's \$100 Cashback for Complete Choice, Area Plus with Complete
17 Choice and Preferred Pack; and

18

19 AT&T's \$50 Cashback 2-Pack Bundle Plan.

20

21 Q. PLEASE DESCRIBE THE \$100 CASHBACK FOR 1FR + 2 CUSTOM.
22 CALLING OR TOUCHSTAR FEATURES PROMOTION.

⁴ In North Carolina, the promotion was entitled "Community Caller Plus and Two Vertical Features." It allowed eligible residence subscribers who ordered and subscribed to Community Caller Plus and two (2) qualifying vertical features to receive a \$100 coupon redeemable for a check.

- 1
- 2 A. This promotion was available to qualifying AT&T end users from August 25,
3 2003 to January 31, 2005. The promotion was offered to new residential end
4 users who did not currently subscribe to AT&T's local service and who purchased
5 basic residential service plus at least two (2) qualifying Custom Calling or
6 TouchStar features. When an AT&T end user ordered and qualified for this
7 promotion, AT&T mailed the end user a \$100 Cashback coupon. The end user
8 had to redeem the coupon within 90 days of receipt in order to receive a \$100
9 check.
- 10
- 11 Q. PLEASE DESCRIBE THE \$100 CASHBACK FOR COMPLETE CHOICE,
12 AREA PLUS WITH COMPLETE CHOICE AND PREFERRED PACK
13 PROMOTION.
- 14
- 15 A. For the time period involved in this complaint, this promotion was available to
16 qualifying AT&T end users from June 1, 2003, and continued past July 2007.
17 The promotion was offered to returning AT&T end users who did not currently
18 subscribe to AT&T's local service and had not had AT&T local service for at
19 least 10 days prior to their service request. In addition, the end user qualified for
20 the promotion when he/she purchased AT&T's Complete Choice service offering,
21 Area Plus with Complete Choice service offering or PreferredPack Plan service
22 offering. When an AT&T end user ordered and qualified for this promotion,
23 AT&T mailed the end user a coupon for \$100 cashback. The end user had to mail
24 in the completed coupon, along with the end user's first month's bill showing the
25 purchase of eligible services, in order to receive a check for \$100.

1

2 Q. PLEASE DESCRIBE THE \$50 CASHBACK 2-PACK BUNDLE PLAN
3 PROMOTION.

4

5 A. For the time period involved in this complaint, this promotion was available to
6 qualifying AT&T end users from December 15, 2005 to April 30, 2007. On May
7 1, 2007, this promotion was modified to reduce the cashback reward to \$25. The
8 promotion was offered to reacquisition end users who purchased AT&T's 2-Pack
9 service offering plus an affiliate service (such as long-distance, DirecTV,
10 FastAccess DSL, or Cingular wireless service). Such customers received the \$50
11 cashback coupon and optional voicemail service. AT&T's 2-Pack service
12 offering is a packaged offering that combines AT&T's basic telephone service
13 with specific features. When an AT&T end user ordered and qualified for this
14 promotion, AT&T mailed the customer a coupon that the customer had to redeem
15 in order to receive a \$50 check (or, after April 30, 2007, a \$25 check).

16

17 Q. DO THESE THREE PROMOTIONS HAVE A COMMON CHARACTERISTIC
18 THAT IS RELEVANT TO THIS PROCEEDING?

19

20 A. Yes. The primary component of each of these three promotions is a cashback
21 offering. That is, if an AT&T end user purchased certain services at the tariffed
22 rate and met other eligibility criteria (such as the end user's having left AT&T and
23 is now a returning customer), the end user could receive a specified amount of
24 cashback from AT&T, provided the customer returned the requisite coupon
25 within the allowable time period.

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IV. AT&T'S POSITION ON RESALE OF CASHBACK PROMOTIONS

Q. WHAT IS AT&T'S POSITION ON THE RESALE OF CASHBACK PROMOTIONS?

A. That depends upon the time frame involved. As explained in more detail below, prior to July 2007, AT&T's position (which originally had been BellSouth's position) was that the cashback portion of a promotion was *not* available for resale. Assume, for example, that AT&T offered a cashback promotion between January 1, 2007, and May 1, 2007 by which an end user who purchased a particular service with a tariffed monthly rate of \$40 would get \$20 cashback from AT&T. AT&T's position was that a reseller could purchase the service for \$32 (the \$40 tariffed rate less the hypothetical 20% resale discount discuss earlier in my testimony), but AT&T would not provide the reseller any portion of the \$20 cashback amount.

From July 2007 forward, AT&T will make available the cashback portion of a promotion to requesting CLPs, assuming the CLPs' end users purchase the requisite services and meet any other eligibility criteria associated with the promotion. Assume, for example, that AT&T offered a promotion between January 1, 2008, and May 1, 2008, by which an end user who purchased a particular service with a tariffed monthly rate of \$40 would get \$20 cash back from AT&T. AT&T's position is that a reseller can purchase the service for \$32 (the \$40 tariffed rate less the hypothetical 20% resale discount), and that AT&T

1 will provide the reseller a \$16 cashback credit (the \$20 retail cashback amount
2 less the hypothetical 20% resale discount), assuming of course that the services
3 involved in the promotion are telecommunications services that are subject to the
4 resale requirement and the Competing Local Provider's ("CLP") end user met the
5 same qualifications an AT&T end user would have to meet to participate in the
6 promotion.

7

8 Q. IT MAY APPEAR THAT AT&T CHANGED ITS POSITION IN JULY 2007
9 BASED ON A FOURTH CIRCUIT COURT OPINION THAT AFFIRMED
10 ORDERS ISSUED BY THIS COMMISSION. IS THAT WHAT HAPPENED?

11

12 A. No, as explained below, the change in position in July 2007 was not the result of a
13 court decision that affirmed two promotion-related orders issued by this
14 Commission in Docket No. P-100, Sub 72b. Instead, it was the result of a
15 decision by the recently-merged AT&T to standardize its resale position across
16 the 22 states in which it operates as an incumbent local exchange carrier
17 ("ILEC").

18

19

20

**A. AT&T'S POSITION ON RESALE OF CASHBACK
PROMOTIONS PRIOR TO JULY 2007**

21

22 Q. WHAT WAS THE BASIS OF AT&T'S POSITION REGARDING THE
23 AVAILABILITY FOR RESALE OF CASHBACK PROMOTIONS PRIOR TO
24 JULY 2007?

25

1 A. As I mentioned before, I am not a lawyer and cannot address the details of the
2 legal basis for the position, and AT&T's attorneys can address those details in
3 post-hearing briefs and, if necessary, during oral argument. At a high level,
4 however, AT&T's position was that the cashback portion of such promotions was
5 not a telecommunications service that is subject to the resale obligations of federal
6 law because only "telecommunications services" are subject to the Act's resale
7 obligations, and that the "cashback" component of such promotions was a one-
8 time marketing expense that did not reduce the retail price of the of the
9 telecommunications service. The customer continued to be billed the full retail
10 price for such service.

11

12 Q. HAS THIS COMMISSION OR ANY COURT ADDRESSED AT&T'S
13 POSITION THAT CASHBACK PORTIONS OF PROMOTIONS ARE NOT
14 TELECOMMUNICATIONS SERVICES THAT ARE SUBJECT TO THE
15 RESALE PROVISIONS OF THE ACT?

16

17 A. Yes. As alluded to earlier, the United States Court of Appeals for the Fourth
18 Circuit addressed this issue while reviewing orders issued by this Commission in
19 Docket No. P-100, Sub 72b.⁵ At a high level, the Court affirmed this
20 Commission's determination that, unless a reasonable and nondiscriminatory
21 restriction on resale applies, while the promotion itself need not be provided to
22 CLPs, the value of incentives such as gift cards, checks, coupons for checks, or
23 similar types of marketing incentives extending for more than 90 days must be

⁵ *BellSouth Telecommunications, Inc. v. Sanford, et al.*, 494 F.3d 439 (4th Cir. 2007) ("*BellSouth v. Sanford*").

1 reflected in the retail rate used for computing the wholesale rate that is to be
2 charged to CLPs. AT&T's attorneys will address the specifics of the rulings, and
3 how it applies to the dispute at issue in this docket, in post-hearing briefs and, if
4 necessary, in oral arguments.

5

6 Q. WHAT IS AT&T'S POSITION ON THIS RULING?

7

8 A. Although AT&T does not agree with the *BellSouth v. Sanford* decision, AT&T
9 certainly will comply with this ruling in North Carolina and South Carolina – the
10 two states within the Fourth Circuit in which an AT&T entity is an ILEC. In
11 states that are in other judicial circuits, however, AT&T maintains its position that
12 the cashback portion (i.e. non-telecommunications service portion) of a
13 telecommunications service promotion is not subject to the Act's resale
14 requirements.

15

16 Q. DID THE FOURTH CIRCUIT ADDRESS ANY OTHER ASPECT OF
17 CASHBACK PROMOTIONS WHEN IT REVIEWED THIS COMMISSION'S
18 ORDER?

19

20 A. Yes. In reviewing this Commission's Orders, the Fourth Circuit noted that this
21 Commission did not decide how to treat any particular incentive or promotion. It
22 also noted that this Commission indicated that it was inclined to allow AT&T to
23 restrict the resale of the cashback promotional offering that was addressed in the

1 Commission's Orders.⁶ Again, AT&T's attorneys will address the specifics of
2 these rulings, and how they apply to the cashback promotional credit requests at
3 issue in this docket, in post-hearing briefs and, if necessary, in oral arguments.

4
5
6
7

B. AT&T'S POSITION ON RESALE OF CASHBACK PROMOTIONS FROM JULY 2007 FORWARD

8 Q. WHY DID AT&T, IN JULY 2007, ADOPT A NEW POSITION REGARDING
9 CASHBACK PROMOTIONS ON A GOING-FORWARD BASIS?

10

11 A. Before the merger between AT&T and BellSouth was completed in December
12 2006, AT&T provided service to a 13-state region and BellSouth provided service
13 to a 9-state region. For ease of discussion, I will refer to the AT&T 13-state
14 region company as "pre-merger AT&T" and the BellSouth 9-state region
15 company as "pre-merger BellSouth."

16

17 As noted above, pre-merger BellSouth did not make cashback and other non-
18 telecommunications portions of promotional offerings available to resellers. Pre-
19 merger AT&T, on the other hand, did (although it was not obligated to do so). In
20 short, the two companies had different positions regarding the availability of
21 cashback promotional offerings to CLPs.

22

23 Those different positions presented operational issues in the post-merger AT&T.
24 One of the company's Merger Commitments, for instance, allows CLPs to "port"
25 an interconnection agreement from one state in the merged company's 22-state

⁶ *BellSouth v. Sanford*, 494 F.3d at 453.

1 ILEC territory into another state in the territory. Rather than allowing a CLP to
2 port a California agreement into North Carolina but not providing a cashback
3 promotion that was available in California to the same CLP in North Carolina, the
4 merged company made a business decision to adopt the pre-merger AT&T resale
5 position throughout its 22-state ILEC territory. This adoption of a unified
6 position was not a suggestion that the pre-merger BellSouth position was not
7 legally permissible. Instead, it was a voluntary change that reflected the need to
8 modify business practices to facilitate operation as one corporate entity.

9
10 **V. AT&T'S POSITION ON THE REASONABLE &**
11 **NONDISCRIMINATORY NATURE OF ITS CASHBACK POLICY**

12
13 **Q. HAS THIS COMMISSION ADDRESSED WHAT MIGHT CONSTITUTE A**
14 **REASONABLE AND NONDISCRIMINATORY (AND, THEREFORE,**
15 **PERMISSIBLE) RESTRICTION ON THE RESALE OF A CASHBACK**
16 **PROMOTIONAL OFFERING?**

17
18 **A. Yes. This Commission provided some guidance as to some factors that should be**
19 **considered in determining whether a given restriction on resale is reasonable and**
20 **nondiscriminatory.**

21
22 **Q. WHAT ARE SOME OF THE FACTORS THIS COMMISSION DISCUSSED?**
23

1 A. This Commission noted that resellers remain entitled to the wholesale discount on
2 the telecommunications portion of a promotion and are free to offer, at their own
3 expense, promotional inducements to their own customers.⁷

4

5 Q. IS THAT TRUE IN THIS CASE?

6

7 A. Yes. As explained above, AT&T made the telecommunications portion of the
8 promotions at issue in this docket available to dPi at the wholesale discount rate
9 established by this Commission. dPi is free to provide or not provide additional
10 inducements to its own end users at its own expense.

11

12 Q. WHAT ELSE DID THIS COMMISSION SAY ABOUT RESTRICTIONS ON
13 RESALE?

14

15 A. This Commission observed that if resellers did not complain about a resale
16 restriction, then such disinterest or indifference would tend to indicate that a given
17 resale restriction was reasonable and nondiscriminatory.⁸

18

19 Q. HAS ANY RESELLER OTHER THAN DPI FILED A COMPLAINT WITH
20 THIS COMMISSION REGARDING AT&T'S DECISION NOT TO MAKE

⁷ *Order Ruling on Motion Regarding Promotions* at 13. Docket No. P-100, Sub 72b (Dec. 22, 2004).

⁸ *Order Ruling on Motion Regarding Promotions* at 13. Docket No. P-100, Sub 72b (Dec. 22, 2004).

1 THE CASHBACK PORTION OF PROMOTIONAL OFFERS AVAILABLE
2 FOR RESALE?

3

4 A. No.

5

6 Q. WHAT ELSE DID THIS COMMISSION SAY ABOUT RESTRICTIONS ON
7 RESALE?

8

9 A. The Commission suggested that the pro-competitive effects of restricting the
10 cashback portion of a telecommunications service promotion outweighed any
11 alleged anti-competitive effects.⁹

12

13 Q. IS THAT TRUE IN THIS CASE?

14

15 A. Yes. Promotions clearly are pro-competitive, and consumers clearly benefit from
16 such offerings. Further, AT&T's promotions are generally not targeted for dPi's
17 primary customer base which, as I understand it, is typically a high-credit-risk
18 customer that prepays dPi for service. Thus, any perceived anti-competitive
19 effects would not apply to dPi's customer base anyway.

20

21 In any event, dPi is seeking a little over \$156,500 in this case, and the amount
22 sought covers about a four-year period (2003 to 2007). dPi has served customers

⁹ *Order Ruling on Motion Regarding Promotions* at 13. Docket No. P-100, Sub 72b (Dec. 22, 2004).

1 in North Carolina since 2003, and is still serving customers in North Carolina at
 2 the end of 2008. Further, dPi has presented no evidence that it has lost business
 3 or has been unable to compete with AT&T. This suggests that the pro-
 4 competitive aspects of the promotions involved in this docket outweigh any
 5 alleged anti-competitive concerns raised by dPi. If dPi is concerned about its
 6 ability to compete in light of AT&T's promotions not having been available to
 7 CLPs, it is curious why dPi waited years to file a complaint.

8

9 Q. ARE THERE ANY OTHER FACTORS THAT THE COMMISSION SHOULD
 10 CONSIDER IN DETERMINING WHETHER A RESTRICTION ON RESALE
 11 OF THE PROMOTIONS AT ISSUE IN THIS CASE IS (OR WAS)
 12 REASONABLE AND NONDISCRIMINATORY?

13

14 A. Yes. With promotions of the type at issue in this case, where the end user is
 15 offered an incentive in the form of a coupon redeemable for a check, AT&T must
 16 consider various eligibility criteria -- some objective and some subjective -- to
 17 determine if the promotion is available to a particular end user. For example, the
 18 \$100 Cashback for 1FR + 2 Customer Calling or TouchStar Features promotion is
 19 available only to new residential end users not currently subscribing to AT&T
 20 service.

21

22 As I understand it, for a CLP that primarily serves the pre-paid market, it is
 23 typical for its customer base to prepay for service for several months, discontinue
 24 payment for some period of time, then resume its payments. To the extent dPi's
 25 customers are prepay customers, dPi could claim that any such customer is a

1 "new" customer eligible for the promotion, when such an end user would not be
2 considered eligible for AT&T's retail promotion. For the \$100 Cashback for
3 Complete Choice, Area Plus with Complete Choice and Preferred Pack promotion
4 and the \$50 Cashback 2-Pack Bundle promotion, the AT&T end user must be a
5 returning end user that AT&T has reacquired.

6
7 With a prepay customer base, it is virtually impossible for AT&T to determine
8 with any certainty whether a CLP's end user meets that requirement. Again, a
9 CLP could claim the promotion for those customers that fail to prepay for service
10 one month and resume payment the following month, when those customers are
11 not "reacquisition" customers intended to be eligible for the promotion. In sum,
12 the difficulties in determining promotion eligibility is another reason why
13 AT&T's prior position was reasonable and nondiscriminatory.

14

15 Q. IN DOCKET NO. P-100, SUB 72b, DID THIS COMMISSION DETERMINE
16 WHETHER AT&T'S DECISION NOT TO RESELL THE CASHBACK
17 PORTION OF ANY OF THE PROMOTIONS AT ISSUE IN THIS DOCKET
18 WAS OR WAS NOT REASONABLE AND NONDISCRIMINATORY?

19

20 A. No. That said, this Commission observed that if it were asked to determine
21 whether AT&T's (then known as BellSouth) restriction on the resale of the
22 cashback portion of its \$100 Cashback for IFR + 2 Custom Calling or TouchStar
23 Features was reasonable and nondiscriminatory, it would be inclined to find that

1 the restriction was indeed reasonable and nondiscriminatory and, therefore, that
2 the cashback portion of the promotions was not subject to resale.¹⁰

3

4 Q. DOES THIS COMMISSION'S PRIOR RULINGS OFFER ANY GUIDANCE
5 REGARDING THE CASHBACK PROMOTIONS THAT ARE AT ISSUE IN
6 THIS CASE?

7

8 A. In my view, they do. dPi seems to suggest in its Complaint that the *BellSouth v.*
9 *Sanford* decision invalidated pre-merger BellSouth's position regarding cashback
10 promotions, but that is not the case. After reviewing extensive comments from all
11 interested parties, this Commission made clear that restrictions on resale of
12 promotions offered for more than 90 days were not *per se* prohibited. Rather, this
13 Commission made it clear that if called upon to review a resale promotion
14 restriction that was alleged to be unreasonable and discriminatory, it would
15 require an ILEC to demonstrate that such restriction was reasonable and
16 nondiscriminatory.¹¹

17

18 Additionally, without deciding the issue, this Commission observed that it would
19 be inclined to find that the pro-competitive aspects of restricting the resale of a
20 cashback promotion tended to outweigh any asserted anti-competitive aspects of
21 restricting the resale of such a promotion. The Fourth Circuit affirmed that
22 decision.

¹⁰ *Order Ruling on Motion Regarding Promotions* at 13. Docket No. P-100, Sub 72b (Dec. 22, 2004).

¹¹ *Id.*; *Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay* at 3 Docket No. P-100, Sub 72b (June 3, 2005).

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24

Q. DID AT&T'S DECISION NOT TO RESELL THE CASHBACK PORTION OF THE THREE PROMOTIONS AT ISSUE IN THIS DOCKET HARM COMPETITION?

A. No. Again, the total amount of cashback promotional credits (without being reduced by the wholesale discount) that dPi purports to have requested in North Carolina in the nearly four years between November 2003 and July 2007 is \$156,500. dPi is still doing business in North Carolina. dPi, therefore, cannot credibly claim that its inability to obtain cashback promotional credits years ago somehow impeded its ability to compete in the local market in North Carolina.

Q. IS DPI'S REQUEST DISCRIMINATORY IN ANY WAY?

A. Yes. Pre-merger BellSouth applied its policy not to resell the cashback component of promotions across the entire CLP community (and no member of the CLP community other than dPi has initiated a complaint with this Commission regarding that policy). dPi is now requesting special treatment to be paid credits that no other CLP has been paid. Such a request obviously benefits only dPi.

Tellingly, dPi has refused to answer any discovery requests regarding whether or not it intends to pass on the monies it seeks from AT&T to its end users. This strongly suggests that dPi is simply looking for windfall profits from AT&T in

1 this case. Such a windfall would not benefit any dPi end user or promote any
2 form of competition in the local marketplace in North Carolina.

3
4 **VI. AT&T'S POSITION ON THE SPECIFIC DPI CASHBACK**
5 **PROMOTIONAL CREDIT REQUESTS AT ISSUE IN THIS**
6 **DOCKET.**

7
8 Q. ARE THERE ANY ADDITIONAL REASONS THAT THE COMMISSION
9 SHOULD DENY DPI'S REQUEST FOR PROMOTIONAL CREDITS IN THIS
10 DOCKET?

11
12 A. Yes. In addition to the reasons set forth above, the Commission should deny
13 dPi's request for cashback promotional credits because dPi waited too long to
14 request these credits.

15
16 Q. PLEASE EXPLAIN WHAT YOU MEAN BY THAT.

17
18 A. For one thing, as AT&T witness Ms. Seagle shows in her Direct Testimony, in
19 many cases dPi waited two years or more from the time it purportedly resold a
20 promotion to an end user to request a credit from AT&T for the cashback portion
21 of that promotion. Additionally, dPi was aware that AT&T would not pay dPi's
22 cashback promotional credit requests years before it filed its complaint in this
23 docket.

24

1 Q. IN ITS COMPLAINT, DPI CLAIMS THAT AT&T DID NOT TELL DPI THAT
2 IT DID NOT INTEND TO GRANT DPI'S CASHBACK PROMOTIONAL
3 CREDIT REQUESTS. DO YOU AGREE?
4

5 A. No. As AT&T witness Ms. Seagle shows in her Direct Testimony, in August
6 2004, AT&T informed Lost Key, dPi's billing agent, that AT&T did not grant
7 credits on cashback promotions. Ms. Seagle's Direct Testimony also shows that
8 AT&T specifically rejected dPi's requests for cashback promotional credits in
9 2005.
10

11 Q. DID DPI TIMELY DISPUTE THE DENIAL OF CASHBACK PROMOTIONAL
12 CREDIT REQUESTS AS REQUIRED BY THE PARTIES'
13 INTERCONNECTION AGREEMENT?
14

15 A. No. As the testimony of Ms. Seagle makes clear, dPi knew that AT&T had
16 denied dPi's cashback promotional credit requests. If dPi was dissatisfied with
17 not receiving its requested cashback-related bill credits, then dPi had a contractual
18 obligation to dispute the denial of its previously submitted cashback-related bill
19 credit requests. The billing portion of the parties' current Agreement requires dPi
20 to electronically submit all billing disputes to AT&T using the form specified by
21 AT&T.¹²
22

¹² Attachment 7, Section 2.1. See Exhibit PLF-2.

1 Likewise, dPi's prior Agreement also required dPi to submit billing disputes on a
 2 form specified by AT&T and to clearly explain the basis for submitting a
 3 dispute.¹³ Further, the current Agreement makes clear that if dPi is not satisfied
 4 with AT&T's resolution of a submitted dispute, or if no response to the billing
 5 dispute has been received by dPi, then dPi has a contractual obligation to escalate
 6 the matter by following the escalation process outlined on AT&T's
 7 interconnection services website or the matter shall be considered denied and
 8 closed. AT&T's wholesale website has extensive guidelines regarding how a
 9 CLP should submit a billing dispute and what steps a CLP should take to escalate
 10 a billing dispute. These guidelines can be viewed at the following address:

11 http://wholesale.att.com/reference_library/guides/html/billing.html.

12
 13 Q. DID DPI FOLLOW THIS PROCESS?

14
 15 A. To my knowledge, no. That is, dPi has never disputed the denial of cashback
 16 promotional credit requests in the manner required by the parties' Agreement. As
 17 AT&T witness Ms. Seagle shows in her Direct Testimony, the first time AT&T
 18 was made aware of dPi's concern with its cashback policy was in January 2007.

19
 20 Q. DOES THE PARTIES' INTERCONNECTION AGREEMENT ADDRESS
 21 WHEN DPI IS REQUIRED TO SUBMIT A BILLING DISPUTE?

22

¹³ Attachment 7, Section 2, attached hereto in Exhibit PLF-1

1 A. Yes. The parties' Agreement requires dPi to submit a billing dispute within 12
2 months of an actual amount billed that is subject to dispute.¹⁴

3
4 Q. DID DPI COMPLY WITH THIS REQUIREMENT?

5
6 A. Not for the majority of the credit requests at issue in this docket. dPi filed its
7 complaint in April 2008. dPi's discovery responses indicate dPi submitted three
8 cashback promotional credit requests in North Carolina within 12 months of April
9 2008. These three credit requests total \$32,900. This means that the remainder of
10 the credit amounts dPi is seeking in this case (\$123,600) relates to allegedly
11 disputed billings that are older than 12 months. Under the parties' Agreement,
12 dPi is barred from pursuing such credits. To allow dPi to pursue such credits
13 would be tantamount to re-writing the parties' voluntarily executed Agreement.

14
15 Q. IS THERE ANY REASON FROM A COMPETITIVE PERSPECTIVE WHY
16 DPI'S REQUEST FOR CREDITS DATING BACK TO 2003 SHOULD BE
17 GRANTED?

18
19 A. No. From a competitive perspective, there is no benefit to the
20 telecommunications market or to the consumer to go back in time and consider
21 giving special treatment to dPi. Prior to July 2007, AT&T applied uniformly
22 across all CLPs its policy of not granting cashback promotions. Granting dPi the
23 relief it seeks in its complaint does nothing more than give dPi an after-the-fact

¹⁴ Attachment 7, Section 2.2. See Exhibit PLF-2.

1 cash windfall that: a) it does not deserve; b) AT&T is not obligated to provide;
2 and, c) apparently will not benefit dPi's customers. dPi does not need such a
3 windfall to compete in the local market because dPi has been competing with
4 AT&T for a number of years. dPi has every incentive to try to gain promotion
5 credits wherever it can (including for non-qualifying customers) because it has no
6 expense in offering the promotion. Bestowing dPi with a windfall would only
7 serve to line dPi's pockets and does not benefit dPi's customers.

8

9 Under AT&T's new unified resale policy, dPi is receiving cashback promotional
10 credits today based upon current cashback promotions. Therefore, dPi's current
11 customers can benefit from any credit dPi receives, if dPi chooses to pass it on to
12 its own customers.

13

14 Q. IS THERE ANY OTHER POLICY REASON TO DENY DPI'S REQUEST FOR
15 CASHBACK PROMOTIONAL CREDITS IN THIS DOCKET?

16

17 A. Yes. The highly competitive telecommunications market moves at a very fast
18 pace, and investors demand that companies competing in that market move
19 quickly and decisively. AT&T cannot meet those demands if its competitors can
20 wait almost half a decade after becoming aware of a policy to challenge that
21 policy and seek monetary relief as a result of that challenge.

22

23 Q. DOES THAT CONCLUDE YOUR DIRECT TESTIMONY?

24

25 A. Yes.

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AT&T NORTH CAROLINA

REBUTTAL TESTIMONY OF P.L. (SCOT) FERGUSON

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1744

NOVEMBER 19, 2008

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH AT&T OPERATIONS, INC. ("AT&T"), AND YOUR BUSINESS ADDRESS.

A. My name is Scot Ferguson. I am an Associate Director in AT&T Operations' Wholesale organization. As such, I am responsible for certain issues related to wholesale policy, primarily related to the general terms and conditions of interconnection agreements throughout AT&T's operating regions, including North Carolina. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. ARE YOU THE SAME SCOT FERGUSON WHO FILED DIRECT TESTIMONY IN THIS DOCKET?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The primary purpose of my rebuttal testimony is to respond to dPi's requested relief as set forth in the direct testimony of dPi witness Brian Bolinger. As

1 explained herein, if the Commission agrees that dPi is entitled to retroactive
 2 promotional credits (and for the reasons stated in my direct testimony it should
 3 not), then the Commission should order the parties to negotiate in good faith in an
 4 attempt to mutually agree upon the benefit that the cashback promotions involved
 5 in this case may have had on the retail rate of telecommunications services resold
 6 by dPi years ago.

7
 8 Q. IN HIS DIRECT TESTIMONY (PAGE 5, LINES 16-18), DPI WITNESS
 9 BRIAN BOLINGER STATES THAT THE NORTH CAROLINA UTILITIES
 10 COMMISSION SHOULD "ENTER AN ORDER DIRECTING BELLSOUTH
 11 [AT&T] TO PAY THE [PROMOTIONAL] CREDITS TOGETHER WITH
 12 INTEREST AT THE CONTRACT RATE [FOR THE PROMOTIONAL
 13 CREDIT REQUESTS SUBMITTED BY DPI PRIOR TO JULY 2007]." DO
 14 YOU AGREE WITH DPI'S SUGGESTED RESOLUTION OF THIS MATTER?

15
 16 A. No. For the reasons set forth in my direct testimony, the North Carolina Utilities
 17 Commission ("Commission") should deny dPi's request for retroactive cashback
 18 promotional credits. Exhibit 1 to Mr. Bolinger's testimony shows that dPi is
 19 seeking cashback promotional credits for billings that occurred as far back as five
 20 years ago (specifically, for billing periods ranging from November 2003 through
 21 June 2007). Mr. Bolinger offers no justification for dPi's request for an after-the-
 22 fact monetary windfall.

23
 24 Further, dPi has refused to answer any discovery request regarding whether it
 25 intends to pass on to its customers any amounts it receives from AT&T in this

1 case. This leads to the clear implication that dPi intends to pocket whatever
2 monetary relief it may be awarded in this matter. In short, no basis from either an
3 ability-to-compete or a pro-consumer perspective has been offered by dPi for the
4 Commission to award dPi a cash windfall for billings that took place years ago.

5
6 That said, if the Commission agrees with dPi (even though it should not), the
7 Commission should not require AT&T simply to pay the promotional credits dPi
8 seeks in this proceeding, plus interest. As AT&T witness Nicole Bracy explains
9 in her rebuttal testimony, the records necessary to manually validate a significant
10 portion of the promotional credits dPi seeks in this case are not available. To state
11 the obvious, AT&T should not be required to pay out promotional credits it
12 cannot validate.

13
14 Further, in addressing promotions, this Commission has ruled that gifts or
15 incentives that are offered for more than 90 days effectively lower the retail rate
16 that is subject to the wholesale discount,¹ and therefore are subject to resale unless
17 an ILEC can demonstrate that a restriction on resale is reasonable and
18 nondiscriminatory.² The Commission recognized that determining the "real"
19 retail rate of a telecommunications service (i.e. the retail rate less the value or
20 benefit of a promotional gift) is a matter upon which an ILEC and a CLP should
21 attempt to mutually agree.³

22

¹ *Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay*, Docket No. P-100, Sub 72b, at page 5.

² *Id.* at 2.

³ *Id.* at 6.

1 Accordingly, if the Commission rules that dPi is entitled to retroactive
 2 promotional credits, then the Commission should direct the parties to negotiate in
 3 good faith in an attempt to mutually agree upon the benefit (or value) that the
 4 cashback promotions at issue in this docket had on the retail rate of the
 5 telecommunications services resold by dPi years ago. If the parties are unable to
 6 reach an agreement, then the Commission can resolve the matter. Such an
 7 approach is completely consistent with the Commission's rulings in Docket No.
 8 P-100, Sub 72b.

9
 10 Q. BUT ISN'T THERE AN EXISTING METHODOLOGY UNDER WHICH
 11 PROMOTIONAL CREDIT REQUESTS ARE SUBMITTED, REVIEWED,
 12 AND, WHERE APPROPRIATE, PAID?

13
 14 A. Yes, and that process by which AT&T currently reviews and validates (approves
 15 or denies) cashback promotional credit requests is not in dispute. Again, we are
 16 talking about promotional credit requests associated with billing periods that are
 17 several years old and which were submitted at a time when dPi was fully aware
 18 that AT&T did not resell such promotions. Accordingly, any comparison
 19 between how cashback promotions are handled today (which is not in dispute)
 20 and dPi's requested relief is an "apples-to-oranges" comparison.

21
 22 Q. DID THIS COMMISSION OR ANY COURT RULE THAT AT&T WAS
 23 UNDER AN OBLIGATION TO RESELL THE SPECIFIC PROMOTIONS
 24 INVOLVED IN THIS CASE DURING THE TIMEFRAME AT ISSUE?

25

1 A. As I explained in my direct testimony, no. Additionally, during the relevant time
 2 period involved here (2003 through 2007), AT&T (then known as BellSouth)
 3 filed many promotions, including cashback promotions, with the Commission. In
 4 approving several such promotions, the Commission advised AT&T that any
 5 conclusions reached in Docket No. P-100, Sub 72b would be applied on a
 6 prospective basis only. To be consistent with such approvals, the Commission
 7 should deny dPi's request for retroactive promotional credit requests. An
 8 example of a promotion approval letter is attached to my rebuttal testimony as
 9 Rebuttal Exhibit PLF-1.

10

11 Q. MR. BOLINGER STATES (PAGE 4, LINE 6) THAT "THE SIZE OF THE
 12 PROMOTIONS [WAS] SO LARGE THAT THE END RESULT IS THAT THE
 13 NET AMOUNT [AT&T'S] RETAIL CUSTOMERS QUALIFYING FOR THE
 14 PROMOTIONS [PAID] FOR THE SERVICE IS FAR LESS THAN THE
 15 WHOLESALE AMOUNT." DO YOU AGREE?

16

17 A. No, and Mr. Bolinger offers no support for this unsubstantiated claim. Further,
 18 the fact that dPi continues to compete in the local market makes this claim
 19 dubious at best. In any event, the Commission does not need to engage in such
 20 speculation regarding the "real" retail rate of services provided years ago. Again,
 21 if the Commission rules that dPi is entitled to retroactive promotional credits
 22 (which it should not), then the Commission should direct the parties to negotiate a
 23 mutually-agreeable value of the impact that the cashback promotions involved in
 24 this docket may have had on the price of retail telecommunications services resold
 25 by dPi years ago.

1

2 Q. MR. BOLINGER ASSERTS (PAGE 2, LINE 17) THAT "BELLSOUTH IS
3 REQUIRED BY LAW AND BY CONTRACT TO MAKE AVAILABLE FOR
4 RESALE ANY PROMOTION THAT BELLSOUTH MAKES AVAILABLE TO
5 ITS CUSTOMERS FOR AN EXTENDED PERIOD OF TIME." DO YOU
6 AGREE?

7

8 A. No, because Mr. Bolinger's statement is incomplete. I am not an attorney, and
9 AT&T's attorneys can address AT&T's resale obligations to the extent necessary
10 in AT&T's post-hearing brief. That said, I am familiar with this Commission's
11 orders in Docket No. P-100, Sub 72b. As I understand those orders, the
12 Commission decided that a restriction on the resale of cashback promotions is
13 permissible so long as an ILEC demonstrates that such a restriction is reasonable
14 and nondiscriminatory.

15

16 In my direct testimony, I explained why AT&T's decision to not offer for resale
17 the promotional credit requests involved in this case was reasonable and
18 nondiscriminatory. Regarding the parties' contract, Mr. Bolinger failed to cite
19 any portion of the parties' interconnection agreement which states that AT&T (or
20 BellSouth) would make retail cashback promotions available for resale. The
21 reason is simple - no such language is contained in the parties' current or prior
22 interconnection agreement.

23

1 Q. MR. BOLINGER IMPLIES (PAGE 4, LINE 14) THAT AT&T CHANGED ITS
2 PROMOTIONS CREDIT POLICY BECAUSE OF A DECISION BY THE 4TH
3 CIRCUIT COURT. IS HE CORRECT?

4

5 A. No. As I described at length in my direct testimony, in 2007, the recently-merged
6 AT&T⁴ made a business decision to standardize its position regarding the
7 availability for resale of cashback promotions where it operates as an incumbent
8 local exchange carrier.

9

10 Q. MR. BOLINGER DESCRIBES AN OCCASION IN OCTOBER 2007 (PAGE 4,
11 LINE 22) WHEN HE "ESCALATED AND ATTEMPTED TO RESOLVE THIS
12 ISSUE" WITH AT&T. EVEN IF TAKEN AT FACE VALUE, DID THE
13 EFFORT DESCRIBED IN HIS TESTIMONY CONSTITUTE AN
14 ESCALATION FOR DISPUTE RESOLUTION IN ACCORDANCE WITH THE
15 TERMS OF THE INTERCONNECTION AGREEMENT BETWEEN THE
16 PARTIES?

17

18 A. No. As I explained in my direct testimony, the parties' interconnection agreement
19 establishes a formal process that dPi must follow to escalate a dispute. That
20 process is applicable to disputes over denied promotional credit requests and can
21 be found in both the interconnection agreement and on AT&T's wholesale
22 website. The scenario described by Mr. Bolinger (mentioning the denial of
23 cashback promotional credit requests in connection with settlement discussions

⁴ The AT&T/BellSouth merger was approved by the Federal Communications Commission on December 29, 2006.

1 regarding other disputes between the parties) simply does not constitute a
2 submission of a dispute (or an escalation of a dispute) under the parties'
3 interconnection agreement.

4

5 Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY?

6

7 A. Yes, but I reserve the right to supplement my rebuttal testimony if additional
8 information becomes available.

1 BY MR. TURNER:

2 Q. Mr. Ferguson, have you prepared a brief summary of
3 your testimony?

4 A. I have.

5 Q. Please present it.

6 A. Certainly. Good afternoon, Commissioners. My
7 testimony addresses a number of policy matters. In my
8 summary, however, I'm going to focus on only two of -- two
9 aspects of my testimony.

10 First, in the interconnection agreements between
11 the parties, dPi agrees not to submit billing disputes for
12 amounts billed more than 12 months earlier. In many
13 cases, dPi did not honor that agreement.

14 Secondly, AT&T's decision not to make these cash
15 back offerings available for resale during the time period
16 addressed by dPi's complaint was a reasonable and
17 nondiscriminatory restriction on resale that is permitted
18 by federal law. AT&T North Carolina made the
19 telecommunications portion of the promotion available to
20 dPi at the wholesale discount rate established by this
21 Commission. It simply did not also provide the cash back
22 portion of those offerings to dPi. Significantly, AT&T
23 North Carolina did not make the cash back portion of these
24 offerings available to any other reseller in North

1 Carolina, yet dPi is the only reseller to file a complaint
2 with the Commission.

3 Additionally, not receiving the cash back
4 component of these offerings did not hamper dPi's ability
5 to compete. DPi does not compete with AT&T North Carolina
6 for customers because dPi targets a higher credit risk
7 customer base that typically cannot receive service from
8 anyone other than another prepaid provider. And while dPi
9 does compete with other prepaid providers, dPi is on an
10 even playing field with those providers because no
11 reseller received cash back promotional credits from AT&T
12 North Carolina at -- during the time period at issue here.

13 And that concludes my summary.

14 MR. TURNER: Mr. Chairman, Mr. Ferguson is
15 available for cross.

16 COMMISSIONER CULPEPPER: All right. Mr. Malish,
17 cross-examination of the witness.

18 MR. MALISH: Thank you, Mr. Chairman.

19 CROSS-EXAMINATION BY MR. MALISH:

20 Q. Mr. Ferguson, I'd like to start off with I guess
21 some basic questions. Do you understand the FCC has --
22 has stated that retail offers that are made by AT&T in
23 general are supposed to be made available to resellers
24 like dPi?

1 A. In general and under certain limitations and
2 conditions, yes.

3 Q. All right. And so the key examination here is the
4 fact that the offer has to be made, right?

5 A. At a high level I will agree with that.

6 Q. All right. Now, looking at the offers that AT&T
7 makes, AT&T makes lots of offers, lots of different offers
8 available to its resale -- or retail customers, doesn't
9 it?

10 A. That is correct, yes.

11 Q. And I don't know how many, but the tariff is
12 fairly extensive and there's different things that people
13 can choose to accept?

14 A. That's correct. And I couldn't tell you how many
15 either.

16 Q. Right. And the fact that some people choose to
17 accept offers does not preclude other people from making a
18 different choice; is that correct?

19 A. That is true.

20 Q. All right. And so the fact that if you make an
21 offer available to some retail customers and some retail
22 customers accept that offer, but other retail customers
23 don't accept that offer, that does not affect AT&T's
24 obligation to make that same offer available in general to

1 CLECs, does it?

2 A. Again, at a high level, that's generally correct.

3 Q. Okay. Now, talking in specific about these cash
4 back promotions, would you agree with Ms. Bracy and Ms.
5 Seagle that prior to 2007, prior to June of 2007,
6 BellSouth simply did not make those promotions -- did not
7 make those promotional offers available to resellers like
8 dPi?

9 A. I agree with that. I think I've seen that it's
10 pre-July of '07. I don't know that that's a -- maybe a
11 distinction without a difference, but let's just say
12 for --

13 Q. Pre-July is fine with me.

14 A. Okay.

15 Q. Now, as I understand it, since 2007, since July of
16 2007, BellSouth or AT&T doing business as BellSouth has
17 made these cash back offers available to CLECs like dPi?

18 A. That's correct. That's my understanding.

19 Q. All right. And at some point in your -- in your
20 testimony you say that that's something we do, but we
21 don't -- we're not obligated to do that; is that true?

22 A. Yes, I said that and I think we still believe
23 that.

24 Q. Okay. And so are y'all giving these away for --

1 just because you're nice people or why is this now being
2 done if it's not required to be done?

3 A. Well, I think I explained in my testimony that
4 after the merger of AT&T and BellSouth, we simply made a
5 business decision to consolidate the promotions processes,
6 and because one party was doing it one way and another
7 party was doing it the other way, we consolidated and
8 created one -- one process whereby we do now give the
9 promotions on cash back offerings.

10 Q. And for all of the -- all of the CLECs out there,
11 this adds up to millions of dollars a year, doesn't it?

12 A. I haven't seen any -- you know, any total numbers,
13 but based on what I've seen regarding dPi's request and
14 what they think they are entitled to, I can imagine that
15 it could, yes.

16 Q. Okay. I'm looking at page 15 of your testimony
17 right now. And specifically lines 15 through 17.

18 A. May I join you there?

19 Q. Please.

20 A. Page 15 --

21 Q. Uh-huh.

22 A. -- line 15?

23 Q. Line 15 through 17 --

24 A. Okay.

1 Q. -- where you're noting that the Commission
2 observes that if resellers did not complain about a resale
3 restriction, then such disinterest or indifference would
4 tend to indicate that a given reseller restriction was
5 reasonable and nondiscriminatory.

6 And what I would like to ask you is it appears to
7 me that what you're doing there is -- is making an
8 observation about what the Commission may have said at one
9 point in time. And what I would like to know is ask if
10 that's AT&T's position also?

11 A. I believe we could -- I believe I could agree that
12 that is one of the -- one of the tests that AT&T would use
13 to discuss with this Commission the fact that the
14 offerings at issue here are reasonable and
15 nondiscriminatory. I think that's one of the tests.

16 Q. Might it also not be a -- is the fact that
17 somebody doesn't come to the Commission complaining with a
18 case like dPi has brought here, might that also be an
19 indicator of just a lack of resources to -- to start a
20 legal proceeding?

21 A. I won't agree that it is, but I could say that it
22 might be.

23 Q. Okay. If it is true that the lack of complaint
24 indicates that a given resale restriction is reasonable

1 and nondiscriminatory, if we accept that at face value and
2 that's a proposition that AT&T also adopts, wouldn't the
3 converse also be true? In other words, if someone does
4 bring a case, wouldn't that tend to indicate that the
5 restriction is unreasonable and discriminatory?

6 A. Well, in this case I think that's what you've done
7 and we're here to defend that it is -- continues to be
8 reasonable and nondiscriminatory. So I think if nobody
9 has brought one, that's an indicator; and if somebody does
10 bring one, that puts it upon us to prove that it's
11 reasonable and nondiscriminatory and that's why we're
12 here.

13 Q. Okay. I'm looking generally at your testimony on
14 page 16 and it's lines 14 through 20. And you're talking
15 there about how promotions are pro-competitive.

16 A. Yes.

17 Q. Are you aware that one of the purposes of the
18 Federal Telecommunications Act was to eliminate
19 monopolies, for example, like the one that BellSouth had
20 in wireline telephone service here in North Carolina?

21 A. I don't think I'll agree with it the way you've
22 characterized it. I will say that I would tend to think
23 that the '96 Act, the purpose of it was to develop
24 widespread competition within the telecom industry.

1 Q. If the Supreme Court of the United States has said
2 that that was one of the purposes, would you disagree with
3 the Supreme Court then?

4 A. I don't believe I would disagree with them. I
5 just have a different characterization of it that I think
6 probably gets to the same point.

7 Q. Okay. You understand that when the FTA was put
8 into effect in areas in which BellSouth provided service,
9 it was basically the monopoly for wireline services?

10 A. I'm sorry, please repeat that.

11 Q. You understand that when the FTA was enacted, the
12 Federal Telecommunications Act of 1996 was enacted in
13 those areas in which BellSouth was doing business or had
14 the territorial jurisdiction, it was the monopolist in
15 that area?

16 A. We were -- I think there was a time when the Bell
17 system was considered a monopoly. And I would say that
18 after the breakup of the Bell system back in the mid '80s'
19 even the remaining ILECs were considered to be -- to have
20 certain amount of market power.

21 Were they still monopolies? I don't know if they
22 were considered to be monopolies in the sense that
23 monopolies have previously been characterized. They were
24 a dominant ILEC.

1 Q. Do you have any idea what -- what BellSouth's --
2 in North Carolina what BellSouth's line count for wireline
3 services is?

4 A. I do not.

5 Q. All right. Do you have any idea what the CLECs'
6 line count is in those areas in which BellSouth is the --
7 provides service?

8 A. In the State of North Carolina?

9 Q. Yeah.

10 A. I do not. I know that there are reports that are
11 done every month that provide that information. I believe
12 they're publicly available.

13 Q. Okay. Do you have any idea whether there are more
14 CLECs or less CLECs than there were in -- what is this,
15 2000 -- 1999 versus 2009?

16 A. Are you talking about actual CLEC companies or
17 CLEC lines? We were talking about lines --

18 Q. Now I'm talking about CLEC companies.

19 A. Actually -- actual companies. I would -- I don't
20 know. I don't know for a fact, but I would suspect there
21 are fewer --

22 Q. Okay.

23 A. -- with all of the mergers, acquisitions, et
24 cetera, that have taken place in the last ten years.

1 Q. Okay. Okay. Mr. Ferguson, I would like to visit
2 with you about the math now 'cause --

3 A. Let's do math.

4 Q. Third in line. All right. Third times the charm.
5 First of all, do you agree that the basic premise beside
6 -- behind the -- AT&T having the obligation to offer
7 services to resellers at wholesale is that the wholesale
8 rate will be less than the retail rate?

9 A. I can agree with that generally.

10 Q. All right. And would you agree with me -- if we
11 first assume that dPi is entitled to the promotion, that
12 the -- we'll calculate the retail rate by taking the
13 tariff minus the promotion?

14 A. As long as we factor in discounts and up to this
15 point I can agree with that.

16 Q. Okay. And so what -- what I've done here is I've
17 said there's a wholesale -- a wholesale rate is generally
18 -- or what you used in your -- in your direct testimony, a
19 figure of 20 percent. We know that's basically
20 rounding --

21 A. Yes.

22 Q. -- the 20 percent.

23 A. It's 21 and a half here in North Carolina.

24 Q. So when we're calculating, the wholesale rate is

1 basically .8 times the retail rate. Have I got that
2 roughly good there?

3 A. I'll agree.

4 Q. All right. And then -- so now we're talking about
5 a situation because we can -- we can interchange the
6 resale rate with the tariff rate by promotion, we can
7 express that as a wholesale rate equals .8 times tariff
8 minus promotion, right?

9 A. I can -- so far I can agree with you to a -- at --
10 at a high level.

11 Q. All right. And then you -- when you do the
12 extrapolation and you do the math and the algebra, that's
13 a situation where -- where the wholesale rate is going to
14 be .8 -- 80 percent of the tariff rate minus 80 percent of
15 the promotion, right?

16 A. Yes.

17 Q. This is the math that Mr. Turner went through with
18 Mr. O'Roark.

19 A. Yes. And I -- and I fully agree with the way
20 Mr. -- Mr. Turner went through that exercise, yes.

21 Q. Okay. And this is a situation where -- where
22 we're saying that the monthly rate is \$120 and the
23 promotion is \$100, and so if we're going to be fair about
24 this, we've got to apply the 80 percent to the tariff to

1 bring it down to 96. And we're not going to apply --
2 we're not going to give the CLEC the entire \$100, we're
3 going to give them 80 percent of the \$100 cash back to get
4 it to 80, so that their net price is 16, right?

5 A. Yes.

6 Q. That's how that's working, right?

7 A. Yes.

8 Q. And that's how y'all are saying it should work,
9 y'all being AT&T?

10 A. Well, I think we're saying that's the way it
11 should work because that's the way the Fourth Circuit and
12 this Commission said it should work. That's -- that's our
13 understanding of it.

14 Q. That was the example that they gave, particular
15 example that they gave in -- in Sanford?

16 A. Yes, it is. And --

17 Q. And it's based on this sort of analysis, right?

18 A. To the best of my knowledge it is. Subject to
19 check, I'll agree with that. But this -- this calculation
20 here and those figures that were used and our
21 understanding is that that represents, in AT&T's opinion,
22 a worst-case scenario. That's how much -- the max that we
23 would have to provide. There was room left in -- in all
24 of these rulings about other calculations, about other

1 values, about whether or not the parties should negotiate
2 whatever that meaningful value was --

3 Q. Right.

4 A. -- and it could be something different than that.

5 Q. Okay. I understand.

6 A. But in AT&T's opinion, that would be --

7 Q. The worst case?

8 A. -- the worst-case scenario.

9 Q. And I wanted to go through this analysis because
10 this is the analysis that Mr. Turner brought from Sanford,
11 right?

12 A. Yes.

13 Q. All right. This is actually making assumption
14 that your monthly rate is going to be about \$120, right?

15 A. Well, those were the numbers that were used. I
16 don't know if I --

17 Q. What I'd like to --

18 A. -- would call it an assumption or not.

19 Q. What I would like for you to do with me is let's
20 assume some different numbers, all right, because I think
21 in your direct testimony you use an assumption of monthly
22 service costing \$40 a month. Do you remember that in your
23 direct?

24 A. Yes. I think it was the same one we used in

1 somebody else's testimony. Just a general --

2 Q. Okay. We're just going to use \$40 to make the
3 math easier, all right? We're just --

4 A. For you or for me?

5 Q. For all of us.

6 A. Okay.

7 Q. All right. Let me change it. So let's assume now
8 that the monthly service charge is \$40, okay. The
9 promotion we know is -- we'll use the \$100 because we know
10 there's a \$100 cash back, right. And y'all still want to
11 apply -- you're saying worst-case scenario is if we owe
12 anything, it's going to be \$40 times, you know, the resale
13 discount. And the same thing to the 100, correct?

14 We're going to reduce the 100 -- you want to
15 reduce the 100 by the wholesale discount?

16 A. You can keep on. I'll -- I'll say -- I'll say
17 when.

18 Q. That that's what you want to -- that's what y'all
19 are suggesting -- this should be the worst-case scenario,
20 right?

21 A. At this -- at this point, I'll go with it. But
22 I'll tell you this, Mr. -- I am sorry.

23 Q. Okay.

24 A. I'll tell you this, if it -- if it doesn't end up

1 being along the same lines as what we've already worked
2 out here, then there's some fuzzy math and I'm not going
3 to agree with it.

4 Q. Okay. That's fine. First of all, let's see what
5 happens when the monthly rate is \$40 minus 100. Would you
6 agree with me that that ends up with a credit going back
7 to the customer of \$60, a net effect?

8 A. That's what it looks like.

9 Q. Okay. If we do the math here though, I have .8
10 times 40 as being 32. Would you agree?

11 A. Sure.

12 Q. All right. And this is easier, right? This is
13 80, right?

14 A. Uh-huh.

15 Q. And y'all want to pay 32 minus 80. Yes?

16 A. Again, the numbers don't work out --

17 Q. Well, now this is just math, right? This is --

18 A. Now it's just math.

19 Q. Yeah.

20 A. But I'm not going to --

21 Q. So this results in a situation where the net is
22 minus \$48, right? See what's going on here? In other
23 words, the retail customer is getting a net benefit of
24 basically a \$60 credit, right? We just did this. This is

1 -- when the -- when the monthly service charge is \$40 but
2 the cash back kickback is 100, the net to the customer is
3 minus 60, right?

4 A. By the math, that's what it appears to be. I
5 don't know how that would possibly be applied in --

6 Q. Well, if --

7 A. -- real life.

8 Q. -- if you apply the formula over here the way
9 y'all want to apply it, that results in a situation where
10 dPi is getting only a credit of \$48 on the bill, a net of
11 minus 48. Do you see how that's playing out?

12 A. I see the math.

13 Q. So that that's a situation -- you would agree with
14 me that the customer is getting back more money than dPi,
15 wouldn't you?

16 A. As I said earlier, there is discussion out there
17 that maybe this isn't the way to go, that there are other
18 ways to figure this, and that was allowed by both the
19 Fourth Circuit and this Commission as to look at true
20 value in negotiating that. We're not -- we're not sure
21 that 100 percent or even 100 percent discounted is the
22 actual value. It could be something different than that.

23 Q. All right. I mean, you would agree with me that
24 basically what's happening in this scenario, if we apply

1 it the way that y'all were talking about having it apply
2 earlier, is a situation where bottom line is that dPi, the
3 reseller, is effectively paying \$12 more per line than the
4 retail customer is?

5 A. I see what the math has shown. I don't agree with
6 what you just said as a characterization of what is really
7 taking place. Because, again, this is a hypothetical.

8 Q. So this is supposed to be the worst-case scenario,
9 though. This is the worst-case scenario where --

10 A. I've already -- sorry.

11 Q. -- the worst-case scenario where -- where the
12 wholesale rate is now \$12 more than the retail rate.

13 A. I understand what the math shows under those
14 circumstances. I'm just telling you that under practical
15 application -- I don't believe it's been decided yet and I
16 believe that something like this, that anomaly there
17 compared to what we've seen earlier from Mr. Turner, I
18 believe that would be taken into consideration when we
19 made our case.

20 Q. Okay. What -- let's just do the math and see what
21 it would look like, this just 32 minus --

22 MR. TURNER: I'm going to ask you to leave
23 that --

24 MR. MALISH: Oh. Let me leave that.

1 Q. I'll just come over here. We can do -- if we do
2 32 minus 100, that's, what, 78?

3 A. 68.

4 Q. 68.

5 A. But you could -- you can keep doing math and you
6 can keep making it look worse and you can go the other
7 way, make it look better, so --

8 Q. Sure.

9 A. -- again, I'm not going to agree that this is the
10 way that we would agree to handle it. Again, open for
11 negotiations and whatever else comes of it to determine
12 what we might --

13 Q. Can you agree with me that the formula, the way
14 that y'all propose to make this work, only works in
15 situations where the amount of the kickback is less than
16 the amount of the service?

17 A. I don't know that -- again, if you want to do more
18 math, you can. I don't know off the top of my head how
19 that would work. So no, I won't agree with you that
20 that's the case.

21 Q. All right. Looking at -- let's say the customer
22 is getting this \$60 kickback, right? Presumably the
23 wholesale rate in general is supposed to be 20 percent
24 less than that, right?

1 A. That's the theory, yes.

2 Q. So 20 percent of 60 would be -- what would that
3 be? Another 12, right?

4 A. 20 percent of 60 is 12.

5 Q. All right. So if we're going to make this
6 20 percent lower for dPi, they really should be getting a
7 credit back of \$78 instead of 68?

8 A. Or 72.

9 Q. 72, excuse me --

10 A. But --

11 Q. -- rather than 68.

12 A. But again, you know, I mean, we can do this until,
13 you know, much later --

14 Q. Yeah.

15 A. -- but it's not going to change the math and it's
16 not going to change our position that in a circumstance
17 where we are supposed to give the promotion, it has not
18 been determined what that is. It is open for discussion.

19 Q. Okay.

20 A. And that things like this would certainly be
21 factored in --

22 Q. Okay.

23 A. -- so, yes, the numbers are funky.

24 Q. Now, you've given some testimony about the timing

1 and the appropriateness of the timing of dPi's putting in
2 for the credits. And I want to talk about that a little
3 bit. And this has to do with the two contracts that are
4 involved between the parties.

5 So first I want to clarify. You agree with me
6 there were two contracts during -- between dPi and AT&T
7 between the period of 2003 to the present?

8 A. Yes, I do agree with that.

9 Q. And -- and you've got both of them as attachments
10 to your testimony?

11 A. Relevant parts, yes.

12 Q. Right. And we have -- one basically goes through
13 2003 up through -- up to the point in time that it's
14 replaced by the second one, correct?

15 A. Somewhere in 2007, I believe.

16 Q. Right. Now, would you agree with me that the
17 first contract does not contain a one-year limitations
18 period for submitting disputes?

19 A. I will agree that in the billing attachment and --
20 there is no 12-month requirement.

21 Q. All right. The 12-month requirement that you
22 discuss in your testimony comes in the second contract,
23 which is Exhibit PLF-2?

24 A. That is correct. And it's roughly in the same

1 attachment seven, Section 2.2. And as we've heard earlier
2 I believe from our attorneys over here, there are also
3 provisions in that current agreement that say that that is
4 the ruling agreement. So in our mind the 12-month -- the
5 12-month requirement is in place and has been in place and
6 rules over all orders and -- issued prior to that
7 agreement going into effect.

8 Q. Okay.

9 MR. MALISH: And Mr. Chairman, I would like to
10 approach the witness.

11 MR. TURNER: May I approach as well?

12 COMMISSIONER CULPEPPER: Sure. You want to tell
13 us what you're going to show him?

14 MR. MALISH: Yes, I am. I'm going to look at
15 the second exhibit, which is PLF-2. If you don't mind
16 looking at this with me.

17 Q. Okay. So first of all, I want to verify that
18 we're looking at Exhibit PLF-2 to your testimony, which is
19 the -- which is the resale agreement between dPi and
20 BellSouth, right?

21 A. Yes.

22 Q. All right. And this -- I'd like to direct your
23 attention to page 2, the paragraph that -- that starts
24 with "Effective Date." Do you see that?

1 A. I do.

2 Q. And I'm going to read that out loud and I want you
3 to tell me if I've read it correctly, okay?

4 A. All right.

5 Q. "Effective Date is defined as the date that the
6 agreement is effective for purposes of rates, terms and
7 conditions and shall be (30) days after the date of the
8 last signature executing the agreement. Future amendments
9 for rate changes will also be effective (30) days after
10 the date of the last signature executing the amendment."
11 Did I read that correctly?

12 A. Yes.

13 Q. Now, I'd like for you to look with me at the
14 signature page so we can find out what the actual
15 effective date is. And I'm looking here at what is
16 labeled just signature page. At the bottom there is a
17 notation that says CCS -- CCCS250421. And I don't know if
18 this is actually page 21 or what it is, but I'm showing
19 the last date that this was signed as being signed on 4/12
20 of '07 by Christen Shore [phonetic] from BellSouth. Do
21 you agree?

22 A. Yes.

23 Q. So that would make the effective date 30 days from
24 April the 12th or May the 12th of 2007, correct?

1 A. Yes.

2 Q. All right. Now, I'd like to direct your attention
3 to page 3 of your Exhibit PLF-2. And particularly under
4 "Term of the Agreement" I'd like for you to look on with
5 me as I read from Section 2.1, which is talking about the
6 term of the agreement, all right?

7 A. Okay.

8 Q. Says, "Notwithstanding any prior agreement of the
9 Parties, the rates, terms and conditions of this Agreement
10 shall not be applied retroactively prior to the Effective
11 Date." Did I read that correctly?

12 A. You did.

13 Q. Now, generally speaking, the 12-month period that
14 you're referring to and in which the -- for the
15 limitations period, that is found in attachment seven of
16 the second -- of the second contract?

17 A. Yes.

18 Q. And I have up here -- the notation that I have up
19 here is that is attachment seven, page 9. And I assume
20 that you're looking at this language in Section 2.2?

21 A. That is correct.

22 Q. All right. And that's just generally saying that
23 you have 12 months from the time something happens to file
24 a dispute and so on and so forth?

1 A. Twelve months from the time that it -- something
2 is billed, yes.

3 Q. All right. And the other information -- the other
4 part that y'all are looking at as saying that, well, now,
5 this changes the -- the limitations for everything that
6 ever happened, you're looking at the language under
7 Section 30 of page 20 of the general terms and conditions;
8 is that true?

9 A. Section 30.1, yes.

10 Q. All right. Where it talks about orders placed
11 under prior agreements between the parties shall be
12 governed by the terms of this agreement and so forth?

13 A. Yes.

14 Q. All right. When this agreement, the second
15 agreement was signed, were there still orders that were
16 pending -- I mean, let's say this was signed on a
17 Wednesday, right?

18 A. Okay.

19 Q. Hypothetical. Doesn't matter which particular
20 day. There were -- or let's say it went into effect on a
21 Wednesday, right?

22 A. Okay.

23 Q. There would be orders from the Tuesday before that
24 would not necessarily have been processed, correct?

1 A. Based on what I think I heard Ms. Bracy say, it's
2 within a month, but -- are you talking about processing
3 credit requests --

4 Q. No. I'm talking about --

5 A. -- or talking about the actual orders being
6 worked?

7 Q. Orders being worked.

8 A. That's possible.

9 Q. And likewise, there may be -- there may be
10 services that are being rendered the day before this new
11 contract went into effect, the basic nature of which do
12 not change when the contract changes, right?

13 A. Generally I can agree with that.

14 Q. In other words, if dPi is buying a service to
15 resell to John Doe on Wednesday, that service is going to
16 continue -- excuse me, on Tuesday -- that's going to
17 continue on Wednesday, even though the contract has
18 changed, right?

19 A. That is correct.

20 Q. And similarly, there may be changes in the pricing
21 structure, other bits of the non-recurring costs, for
22 example, that may change between the day before this goes
23 into effect and the day that it does go into effect?

24 A. It's my understanding that the pricing folks would

1 make such changes in the rate tape and --

2 Q. Okay.

3 A. -- make that happen effective with some certain
4 date.

5 Q. All right. Generally speaking, how would you
6 characterize -- what would you say that this second
7 contract does? Just the terms and conditions under which
8 AT&T will provide service to dPi for it to resale?

9 A. Yeah. Generally speaking, it's the one that's
10 currently in effect and has been since the -- oh, I
11 believe, it was -- or early to middle 2007.

12 Q. Okay.

13 A. Supercedes the previous one in all aspects.

14 Q. Okay.

15 (Brief pause.)

16 Q. I would like to clarify something that I see on
17 page 23 of your direct, basically lines 1 through 3.

18 MR. TURNER: Mr. Malish, could you repeat that
19 page number?

20 MR. MALISH: 23, lines 1 through 3.

21 Q. And are you with me?

22 A. Yes, I am.

23 Q. You're talking there about dPi's being required to
24 submit billing disputes on a form specified by AT&T and to

1 explain the basis for submitting the dispute.

2 I'm assuming you're talking about the bar form,
3 the B-A-R form there?

4 A. Yes.

5 Q. All right. And I -- it's unclear to me, but I'm
6 assuming you're -- you're not saying that that wasn't
7 done, are you?

8 A. Excuse me, let me back up just a minute. I don't
9 believe I'm saying that it was not done. I believe I'm
10 just stating that this is the process.

11 Q. Okay. That's -- I just wanted to clarify that. I
12 thought you might be saying that AT&T -- or dPi is not
13 entitled and one reason is because they didn't submit this
14 on a bar form. But that was done?

15 A. Yeah. And --

16 Q. Okay.

17 A. -- again, I don't believe that's what I'm
18 saying --

19 Q. Okay.

20 A. -- because I'm not the process person as far as
21 actually having been there to see what was truly submitted
22 or not submitted. I'm just talking the process.

23 Q. Okay. And then further down in that paragraph,
24 basically lines 4 through 9, if you want to read that and

1 then let me know, I'll ask my question. And read that to
2 yourself.

3 A. Four through nine?

4 Q. Yeah. Well, that sentence that --

5 A. Okay.

6 Q. -- starts on 3, line 3.

7 A. Okay. Okay. I've read it.

8 Q. Okay. And I'm taking that that you're -- that
9 you're making the argument or you're taking the position
10 that, you know, dPi shouldn't be allowed to recover
11 credits because they didn't follow the escalation process.
12 Is that a fair characterization of what you're attempting
13 to say there?

14 A. I would say that the timeliness of how they -- the
15 timeliness and how they proceeded through the dispute
16 process was -- was probably not within the guidelines.

17 Q. And that's a reason to deny their claim?

18 A. That's part of the reason, yes.

19 Q. All right. The escalation process, that's just if
20 you're unhappy you talk to somebody higher up in the chain
21 of command and -- until you get to an impasse or you get a
22 deal?

23 A. Yes. In general, that's the truth.

24 Q. And you're saying that they didn't follow that?

1 A. Well, again, I -- I think others have said that.

2 I --

3 Q. Okay.

4 A. -- I'm just sort of referring to other people's
5 testimony after I have said what the basic requirements of
6 the process were according to the interconnection
7 agreement.

8 Q. Yeah. But from our perspective we think we did
9 that, but we're hearing you to say that you didn't do
10 that. But I want to just say let's assume -- let's assume
11 that they didn't do it the way that AT&T would have liked
12 for it to have taken place, the escalation process.

13 What I'd like to get to is why would that matter?
14 Because as I understand it, in 2004 your position was
15 we're just not making cash back promotions available for
16 resale period, correct?

17 A. That is correct.

18 Q. In 2005 your position was we're not making resale
19 -- making available for resale cash back promotions
20 period?

21 A. Correct.

22 Q. In 2007 you're position was -- AT&T's position was
23 for periods prior to June of 2007, we are not making
24 resale promotions available. period?

1 A. Yes, that's correct.

2 Q. And that position hasn't changed, right? I mean,
3 you're still making that claim here now; AT&T is still
4 making that claim?

5 A. Well, that's -- that's kind of, again, a little
6 misleading. We're making the claim now about the credit
7 requests in the time period prior to June -- or prior to
8 July of '07.

9 Q. Right.

10 A. Since July of '07 we have been giving --

11 Q. Right.

12 A. -- the credit requests when they qualified for
13 it --

14 Q. And I --

15 A. -- after they were validated.

16 Q. And I was talking just about the period before
17 June 2007, that your position has remained constant up to
18 this day that for amounts and credits that were requested
19 prior to June of 2007, y'all just aren't going to make it
20 available for resale period?

21 A. I -- I think we've given an awful lot of good
22 reasons why we shouldn't have to, yes.

23 Q. And so no amount of escalation would have changed
24 the answer to that, would it?

1 A. I don't believe that we would have changed policy
2 for one CLEC's -- one CLEC's request. That would be
3 discriminatory to other CLECs.

4 Q. Okay. And so the -- the -- you know, the fact
5 that if we -- if we -- if the Commission were to find
6 that, yes, the escalation process wasn't done correctly,
7 that really wouldn't have changed the outcome, whether
8 they had followed it or not? The outcome would be the
9 same, y'all would say no?

10 A. Well, we might have said no, but had you followed
11 it correctly, your next step way back when might have been
12 to be here before the Commission.

13 Q. Okay.

14 A. You had that -- you had that going for you in the
15 interconnection agreement. You had that capability were
16 you not satisfied.

17 Q. Okay. I'd like to turn your attention now to page
18 3 of your rebuttal.

19 A. I'm there.

20 Q. All right. I'm going to try to paraphrase you
21 there reading what you have in the first four lines. I
22 guess we can go back to page 2, last two lines on page 2,
23 lines 24 through 25, and then that idea continues on to
24 the next page.

1 I -- I see your contention as being that if -- if
2 we -- if AT&T is forced to pay this -- these promotional
3 credits to A -- to dPi, dPi is not going to go back and
4 refund that to the customers from that time frame and
5 therefore we shouldn't have to do this -- do -- shouldn't
6 have to make the payment to dPi. Fair paraphrase?

7 A. That's what it says from about a year ago. And I
8 believe you're aware, as I am, that in Mr. O'Roark's
9 deposition back in August with Mr. Turner, we asked him
10 questions about that and I think we have come to
11 understand that things have changed with dPi and since his
12 testimony was filed.

13 Q. Okay. So do you -- does that mean you want to
14 change your testimony here?

15 A. I don't want to change it. I just want to say
16 that we are -- while we don't -- it's not conclusive what
17 dPi plans to do, we are aware that with the prompt payment
18 offering there are ways that you folks -- or that your
19 client attempts to get some of the money back into the
20 hands of the consumer. But regardless of whether they're
21 getting any of the money back into the hands of consumer,
22 I will say that they're still not pricing their service
23 anywhere near what AT&T does and leads us to the
24 conclusion that we're not competing with dPi on either

1 price or its market, target market, that we're -- that
2 we're going for.

3 Q. Well, to return to my line of inquiry, there's
4 nothing in the law that says that any discount that dPi
5 gets from AT&T it has to turn around and give right back
6 to its own customers, is there?

7 A. I'm not a lawyer. I'm not aware of any law that
8 says that. I know that that's what AT&T does is to get
9 the money and back in the hands of the consumer. And
10 whether or not dPi does, has to, should, that's -- that's
11 inconclusive to me.

12 Q. I'm looking at generally page 3 of your rebuttal,
13 the middle paragraph. And -- and the complaint here I
14 take it is that, you know, our records are incomplete for
15 time periods that far back and it makes it hard for us to
16 validate the request that dPi has made. Is that a fair
17 characterization?

18 A. Yes. I think generally that's what we're talking
19 about here. If you -- if you'd gone so far past our
20 retention time frame and we don't have records, how in the
21 world could we be expected to pay out money that we can't
22 validate and pay it out on one of our competitor's say-so
23 with nothing else to show for it? They don't have the
24 records either.

1 Q. Now, that statement sort of basically assumes that
2 it's a situation where AT -- where dPi is entitled to --
3 to get the promotion to begin with, right?

4 A. What I just said, is that what you're --

5 Q. Yes.

6 A. -- referring to?

7 Q. Because if AT -- because if dPi is just not
8 entitled to it to begin with, doesn't matter if the
9 records are there or not, right?

10 A. Well, I tell you, that's one of the reasons we --
11 we never were real good about -- or wanting to keep the
12 records. We weren't planning to give promotions for cash
13 back and therefore didn't have a process and didn't
14 maintain the records beyond our normal retention time
15 frame.

16 Q. Okay.

17 COMMISSIONER CULPEPPER: Okay. Hold on just a
18 second, Mr. Malish.

19 (Discussion held off record.)

20 Well, I think this would be a good time to take
21 that break.

22 MR. TURNER: Here, here.

23 MR. MALISH: I'm pretty close to being done.

24 COMMISSIONER CULPEPPER: So -- well, that's

1 okay. We're going to see about that when we come back
2 after this 10-minute break. So we're going to take a --
3 be in recess now for 10 minutes and start back at
4 approximately 4:00 p.m.

5 (RECESS - 3:52 P.M. TO 4:00 P.M.)

6 COMMISSIONER CULPEPPER: All right. Let's go
7 back on the record. Mr. Ferguson, if you'll come on back
8 up to the witness chair. And Mr. Malish, when he gets
9 situated, you may resume your cross-examination.

10 MR. MALISH: Thank you, Mr. Chairman.

11 Q. When we left off, Mr. Ferguson, we were looking at
12 page 3 of your rebuttal and paraphrasing, I think, that
13 what you're saying there at the end of the middle
14 paragraph on the page is that even if AT&T is otherwise
15 required by law to pay these promotional credits, it
16 shouldn't be required -- it shouldn't be required under
17 these particular circumstances because of its difficulty
18 in validating the numbers?

19 A. Yes. In general, I think I was saying that we
20 shouldn't have to pay what we can't prove.

21 Q. Okay. Now, let's take a look at the reason why
22 this is so delayed. And would you agree with me that the
23 reason that these didn't get processed more fully earlier
24 is because y'all refused to extend it; AT&T refused to

1 extend it?

2 A. When you say "extend," please explain.

3 Q. Extend the promotional cash back credits to dPi.

4 A. Well, I would assume that if we tell dPi that
5 we're not going to accept their credit requests, then
6 that's the answer. And that when they finally decide that
7 that's not an answer they want or their third-party
8 billing company decides that's not an answer that they
9 want dPi to have, then all of that comes together at some
10 point in time, which is well after they were told they
11 weren't going to get the promotional credits granted to
12 them.

13 Q. Okay.

14 A. And that's where the beginning of the delay began,
15 I assume.

16 Q. All right. But in any event, AT&T knew, I guess,
17 at least in 2004 and 2005 that dPi wanted these, right,
18 because dPi asked for them back then?

19 A. Well, what I recall is that I believe Ms. Seagle
20 testified that they were told they weren't going to get
21 them when they asked about them.

22 Q. Right.

23 A. And that's -- that's all I know. That's what I
24 know.

1 Q. And there were some that were actually submitted
2 in 2005, right?

3 A. I would have to look at somebody else's testimony
4 on that one. I didn't --

5 Q. Okay.

6 A. I didn't really discuss that. I don't recall.

7 Q. All right. I'm going to skip down to page 5 of
8 your rebuttal. We're talking about the value of the
9 impact of the cash back promotions.

10 A. Which line?

11 Q. You're -- you actually mention the value issue in
12 lines 22 and 23, but just generally speaking, I want to
13 talk about the value of -- of the promotion.

14 A. Okay.

15 Q. Now, the promotion, of course, is an offer,
16 correct, of \$100 cash back under certain circumstances,
17 right?

18 A. Yes.

19 Q. All right. That's the offer. And if the offer is
20 accepted by the person to whom its offered, then we can
21 figure out what the value of that is, that's \$100 if they
22 accept the offer, right?

23 A. Generally, yes, I can agree with that.

24 Q. Okay. So as long as the offer is accepted or once

1 the offer is accepted, we know what the value of that
2 particular offer was?

3 A. Again, generally I can agree with that.

4 Q. Okay. On your rebuttal on page 6, the paragraph
5 from lines 16 through 22 --

6 A. Yes.

7 Q. -- I read that to suggest that because there's no
8 language in the party's interconnection agreement, which
9 -- where it specifically states that we're entitled to
10 cash back promotions, that somehow that indicates that
11 they're not available for resale?

12 A. Well, generally I would agree with that. And this
13 being rebuttal, I was responding to Mr. Bolinger's claims
14 to the contrary.

15 Q. Okay.

16 A. He brought it up, I responded to it.

17 Q. Okay. But, you know, that's -- cash back
18 promotions are still not in the contract that's in place
19 from 2007 forward, correct?

20 A. To the best of my knowledge, yes, you're right.

21 Q. And nevertheless, AT&T is paying those as
22 promotions as we sit here today, right?

23 A. Yes. Because of change in policy as to whether we
24 will pay them out, but yes.

1 Q. For whatever reason, the fact that that specific
2 language -- there's no specific language in the contract
3 about cash back promotion doesn't change the fact that
4 y'all pay them, right?

5 A. It doesn't, but it also -- but it does give us
6 support to a degree to not have to pay it because we're
7 not bound by the interconnection agreement to pay them.

8 Q. All right. But no -- none of your promotions are
9 specifically mentioned in the language of the contract --

10 A. No specific promotions are mentioned, but
11 promotions are discussed.

12 Q. All right. You also spoke at some point in your
13 testimony about we can't pay dPi because if we did that,
14 that would be discrimination against everybody else,
15 right?

16 A. Well, that's talking around what I -- what I
17 believe I said, yes. I -- I think I did say that for the
18 Commission here to grant dPi some special circumstances
19 would be in effect discriminatory other -- to other CLECs
20 in that it might be not supported by the interconnection
21 agreement --

22 Q. All right.

23 A. -- that was voluntarily negotiated and entered
24 into between the parties.

1 Q. This -- this goes back to the sort of -- the
2 offers are out there and some people may choose to accept
3 them and some people don't and if the people that don't
4 choose to accept them aren't really being discriminated
5 against, right?

6 A. That would be correct. The offer is out there for
7 everyone --

8 Q. Right.

9 A. -- that qualifies.

10 Q. So if AT -- so if dPi is the person who steps up
11 and says I want it and I'm entitled to it and I qualify
12 for it and you should pay me and you do and nobody else
13 steps up and says the same thing so you don't pay them,
14 that's not discrimination, is it?

15 A. Legally I can't answer whether that would be
16 construed as discrimination. But I would say this, that
17 if it was brought to this Commission and this Commission
18 decided that the language of the interconnection agreement
19 between these parties, which is fairly standard language,
20 allowed them to get what we don't believe they're entitled
21 to, I think just by definition that decision may have a
22 whole lot of ramifications with other interconnection
23 agreements that are already in place.

24 Q. Okay. Well, if the law suggests that these cash

1 back promotions should have been made available to CLECs,
2 then -- then is the fact that you follow the law in some
3 cases, for example, by paying them to dPi somehow a
4 justification for not paying them in others?

5 A. I'm not a lawyer. I'm not going to speculate on
6 -- on how -- what you just talked about relates to us
7 according to law. I'll let my attorneys do that.

8 Q. Okay.

9 A. But it would be my opinion as a lay person that
10 the law and the orders that we have seen up to this point
11 allow for certain restrictions on cash back offerings if
12 they can be proven to be reasonable and nondiscriminatory.
13 So that's why we're here and that's what we are trying to
14 put forth to this Commission is that AT -- BellSouth, now
15 AT&T, in restricting the certain cash back offerings was
16 well within its rights because they were reasonable and
17 nondiscriminatory under the circumstances of those
18 particular promotions.

19 Q. Okay. Okay. Do you think that having a higher
20 price of service -- dPi's having a higher price of service
21 than AT&T's prices that it makes available at retail makes
22 it harder for dPi to compete for the -- for customers in
23 general?

24 A. Well, I don't -- I don't believe that dPi is

1 competing for customers in general. I think dPi is
2 competing with a very -- as described earlier, a niche
3 market. And they are not pricing their services to be
4 priced competitive or less than AT&T's. And because the
5 pricing isn't even close and because the target market
6 base that they're seeking isn't even close to what AT&T
7 can support, then I think that meets the test -- one of
8 the tests of it being reasonable and nondiscriminatory.
9 We're just simply not competing --

10 Q. Mr. Ferguson --

11 A. -- with dPi.

12 Q. -- if you don't mind, I'd like to direct your
13 attention back to the question that I asked, which is does
14 it make it harder for dPi to compete for those customers
15 that -- you know, the regular customer in the world?

16 A. The regular -- let me help -- you're going to have
17 to help me clarify. The --

18 Q. Sure.

19 A. -- regular customer, is that --

20 Q. You're average Joe.

21 A. -- a non-credit challenged customer?

22 Q. Yes.

23 A. I don't believe, again -- I think I did answer
24 this question. I don't believe that dPi does compete for

1 that customer.

2 Q. I -- well, you're --

3 A. So you're talking a hypothetical, aren't you?

4 Q. Yeah. Well, we can call it a hypothetical if you
5 want, but --

6 A. Well, I would rather not --

7 Q. -- if we're going to call it -- if we're going to
8 call it a hypothetical, that's fine. You're disagreeing
9 with me as to whether they compete for average Joe, that's
10 fine.

11 A. Yes. And at a -- at the price --

12 Q. And so let's say -- and let's say -- let's assume
13 as a hypothetical that they are or would like to, okay.
14 With that as the hypothetical, isn't the fact that y'all
15 are selling at a retail rate that's lower than what dPi
16 can provide, you know, at wholesale, if you accept that as
17 the hypothetical as well, doesn't that make it hard, if
18 not impossible, for them to compete for that customer?

19 A. If they kept their pricing structure the same,
20 absolutely. But I would ask dPi were they to get into the
21 non-credit challenged customer, would they not take our
22 North Carolina 1FR local residence line for \$19.95, which
23 they would get at 21.5 percent less, would they not sell
24 to that market at a different rate than what they're

1 selling their -- their credit challenged customers with.
2 If they did that, then they could certainly compete with
3 us because other resellers are competing daily with us at
4 that lower rate, not the credit challenged market.

5 Q. Okay.

6 A. They would have the same opportunity as any other
7 reseller CLEC and certainly they would be compete -- able
8 to compete against AT&T and other ILEC providers.

9 Q. So it sounds like the answer to my hypothetical
10 trying to compete for average Joe, if they are -- if dPi
11 is paying more for the service that it gets from you than
12 you are charging your customers at retail, it makes it
13 hard for dPi to compete for those customers? Within the
14 boundaries within that hypothetical, I think the answer
15 has to be yes.

16 A. Well, I'll just -- I'll just say this: You are
17 getting the 1FR line from us for 19.95 that you are
18 bumping up to your \$39.99 basic rate. And I'm just
19 suggesting to you that if you were selling to a different
20 market, the same one that AT&T is able to sell to, then
21 you would be competing. I don't believe you're going to
22 be able to compete -- using the same price line, but
23 charging a higher price, you're only going to get the
24 customers who need to come to you because you are the

1 provider of choice for that niche.

2 Q. Well, I'm going to go around here and go around
3 the circle one more time. If y'all are providing the 1FR,
4 whatever you're calling it, for 19.99 at retail, but then
5 you're giving \$100 cash back so that these folks are
6 getting it for, you know, basically negative \$80 --

7 A. That's a one-time -- that's a one-time deal.
8 That's not an ongoing monthly rate --

9 Q. But --

10 A. -- effecting thing.

11 Q. But we don't get that, dPi doesn't get that and
12 so, you know, at best they're getting \$20 minus 20
13 percent, or whatever, 14 -- \$14. The competition -- the
14 price point at which we're competing is negative 80 for
15 AT&T versus 14 for dPi, right, even in this best case
16 scenario that we're talking about?

17 A. Well, when you're talking about entirely different
18 markets --

19 Q. All right..

20 A. -- that you're -- that you're dealing with --

21 Q. All right.

22 A. -- I just don't think it's apples to apples.

23 Q. Okay. Thank you.

24 MR. MALISH: I'll pass the witness.

1 COMMISSIONER CULPEPPER: Ms. Edmondson, you have
2 any questions of the witness?

3 MS. EDMONDSON: Yes, a few.

4 CROSS-EXAMINATION BY MS. EDMONDSON:

5 Q. This is just -- I -- in your -- at the end of your
6 testimony before Exhibit PLF-1 there was a bill from the
7 Grove Park Inn. Was that supposed to be in there? To
8 Candace Finley. Is that an error?

9 MR. TURNER: We were hoping somebody would pay
10 it.

11 A. I am -- I am totally unaware of what you're
12 talking about.

13 Q. Okay. It's on the Commission website. I thought
14 it was, but I looked really hard to find the significance
15 of it.

16 A. Subject to check, that ain't mine.

17 Q. Okay. Just checking. All right. Good afternoon,
18 Mr. Ferguson.

19 A. How are you?

20 Q. You are associate director in AT&T's operations
21 wholesale organization?

22 A. AT&T Operations, Incorporated, in the wholesale
23 department of that, yes.

24 Q. How long have you been in that position?

1 A. I guess I've been in that position about five
2 years, but for the five years leading up to that I was in
3 a very similar position involved in virtually the same
4 kind of thing.

5 Q. And you were -- that position was -- it would have
6 been BellSouth operations wholesale --

7 A. BellSouth Telecommunications, Incorporated, up
8 till the merger in late '06.

9 Q. And you discussed in your direct and rebuttal how
10 AT&T made a business decision to standardize its position
11 regarding payment of these promotions?

12 A. Yes.

13 Q. And what was your involvement in that decision?

14 A. None.

15 Q. And so when you -- how do you -- what's the basis
16 of your knowledge to testify whether the Sanford decision
17 had any bearing on that decision?

18 A. Well, as a policy witness with AT&T, it's my job
19 to understand what the policies are, how they were
20 developed and yet not get a law degree at the same time.
21 I just -- I -- I -- I discuss with my attorneys. I
22 discuss with others who have been in a similar position or
23 were involved in the development of policy and just learn
24 my way through it that way.

1 But again, as policy, it's not as if you had to be
2 there, in our -- in my opinion, you don't have to be there
3 to understand what it is and where it came from and to
4 talk about it.

5 Q. The decision to standardize this policy occurred
6 in July 2007?

7 A. I -- you know, I don't know that that was the
8 exact date. It was -- but leading up -- from somewhere
9 between the end of '06 when the merger took place and
10 July '07, that was one of a list of items on the merger
11 list of things to do to -- to get done within the first
12 year.

13 We had -- we had a number of initiatives to
14 accomplish in the first year after the -- after the
15 merger. And on the wholesale side, that was one of a list
16 to be done. And it was accomplished in about six months.

17 Q. And you agreed, I believe, with Mr. Malish that
18 the decision to go with the AT&T position would probably
19 cost more to AT&T overall than adopting the BellSouth
20 position not to pay?

21 A. Well, I think that was -- that's, yes, a fairly
22 good conclusion.

23 Q. Do you know the basis for that decision?

24 A. Not really. Not to talk about it, do not. I

1 mean --

2 Q. Besides standardizing for the 22-state region.

3 A. A business decision and all that goes -- you know,
4 I've been part of business decisions and I know what goes
5 into making decisions like that. I would just
6 characterize it as whatever was going to take place, it
7 was all determined, you know, what's the best way to go.
8 All the factors were considered and determined -- that was
9 the final determination.

10 Q. But you don't know what the factors were?

11 A. Not totally, no.

12 Q. Were you familiar with the retention policies of
13 BellSouth and then AT&T during the time of the claims
14 involved in this matter?

15 A. Generally I am. In terms of service orders and
16 local service requests that CLECs submit to BellSouth and
17 AT&T and how long they're kept in the systems, yeah, I
18 have general understanding about the fact that we don't
19 save everything and two years seems to be roughly a
20 general retention policy based on a recent search for --
21 for information that I did in a similar docket to this
22 one.

23 I think I discovered that two years in general.
24 Sometimes you get lucky. Sometimes you find it more, but

1 the policy is in general two years.

2 Q. Now, are you familiar -- Ms. Seagle's testimony
3 had an e-mail from 2004 attached to it; isn't that
4 correct?

5 A. Do you mind if I look? I have --

6 Q. Sure.

7 A. I have her testimony right here.

8 Q. I think it was number one.

9 A. KAS-1?

10 Q. I think so. Now, I am doing that from memory.

11 A. I have -- I have her exhibits.

12 Q. Okay. I'm doing that from memory, so it could
13 well be faulty.

14 (Brief Pause.)

15 Q. You -- that does look like it's from 2004?

16 A. I'm sorry. I was -- was KA -- I thought you were
17 trying to determine whether KAS-1 was the one I was --

18 Q. I'm sorry. Is that -- that is from 2004 or it
19 appears to be?

20 A. Yes.

21 Q. Are you generally involved with the -- are you
22 involved with the negotiation of interconnection
23 agreements?

24 A. I used to be directly involved with certain

1 sections of negotiations. I was later involved with
2 settlements based on issues related to interconnection
3 agreements. And the fact that I sit among all of the
4 negotiators doesn't -- doesn't give me negotiating
5 involvement, but I'm aware of an awful lot of -- about the
6 negotiation of interconnection agreements.

7 Q. I've been involved with them some too, but -- and
8 I'm trying to recall, is my recollection that generally
9 the agreements of BellSouth and then AT&T generally have a
10 choice of law provision that says that Georgia law will
11 prevail? Is that your recollection? In general. I'm not
12 saying for each and every one.

13 A. Yes. I mean, I -- that would not be one of my
14 areas of expertise, choice of law, but I know that the --
15 I know that there's a paragraph in there about State of
16 Georgia in terms of contract law. And if I'm wrong there,
17 I would say subject to check, but that's what I recall
18 that it's mostly pertaining to.

19 Q. Are your record retention policies for both
20 electronic and written documents, are they maintained in
21 writing?

22 A. Yes. We have retention policies based on
23 different types of -- it's not so much the medium, but
24 it's the subject, whatever the subject of the record is.

1 For example, interconnection agreements, we maintain them
2 for a certain amount of time, past the time that they
3 expire just for historical -- just for circumstances like
4 this because sometimes it does take a while to get to
5 court or to get to a Commission hearing, and so you -- we
6 typically hold onto those settlement documents or
7 confidential settlements that we sometimes have with our
8 CLECs or other customers. We have a retention time for
9 them. Service orders, LSRs, billing records, everything
10 has its own guideline and a policy.

11 Q. Do you know if they take into account the statute
12 of limitations applicable to that particular
13 interconnection agreement?

14 A. I don't know that for a fact, but I -- as
15 extensive as those policies are, I have a hard time
16 believing that the legal department did not have a huge
17 hand in developing those guidelines and was very cognizant
18 of the appropriate statute of limitations.

19 Q. Do you know whether any record retention policies
20 are provided, either given to CLECs or available on your
21 interconnection website?

22 A. I do not know.

23 Q. Would you be willing as a late-filed exhibit to
24 provide the retention -- record retention policies for

1 electronic and written documents that were applicable to
2 the billing records in this dispute?

3 A. I would defer to my attorneys to answer that. I'm
4 not familiar --

5 MR. TURNER: We will provide it as a late-filed
6 exhibit.

7 COMMISSIONER CULPEPPER: Thank you.

8 MS. EDMONDSON: That's all I have. Thank you.

9 COMMISSIONER CULPEPPER: Redirect examination?

10 MR. TURNER: Thank you, Mr. Chairman.

11 REDIRECT EXAMINATION BY MR. TURNER:

12 Q. Mr. Ferguson, I have a few topics; but I think we
13 can get through this in a rather short and sweet manner.

14 You were asked -- early in the cross, Mr. Malish
15 talked to you about your testimony, the lack of complaint
16 was noticed by the Commission as a potential factor that
17 is reasonable and nondiscriminatory. Mr. Malish asked you
18 if the converse would be true. I want to follow up on
19 that.

20 I know you might not know the actual numbers, but
21 just as a general percentage, what would you say the one
22 CLEC dPi is as a percentage of the CLECs that are
23 authorized to do business in North Carolina?

24 A. As a company, one out of 100, one percent.

1 Q. Thank you. Mr. Malish asked you some questions
2 about the number of CLEC lines in North Carolina and the
3 number of AT&T lines in North Carolina. Even if we limit
4 ourselves solely to wireline local exchange services, are
5 CLECs and AT&T the only ones that provide that service in
6 North Carolina today?

7 A. No, they are not.

8 Q. Give us some examples, just a couple, of other
9 types of providers that provide those services in North
10 Carolina today.

11 A. There is -- there's another ILEC who provides in a
12 good part of North Carolina -- and pardon me if I don't
13 know who they are today, but they originally were Carolina
14 Telephone and I think they later became EMBARQ maybe.

15 Q. How about cable companies?

16 A. There are cable companies. Can't name them, but I
17 know there are cable companies in North Carolina and then
18 there are independent companies.

19 Q. How about VoIP providers?

20 A. There are VoIP providers.

21 Q. Did the cable companies and VoIP providers provide
22 local exchange service in North Carolina back in 1996 when
23 Mr. Malish was asking you a lot of questions about the
24 inception of the Act?

1 A. I don't believe that you could categorize them as
2 -- either they didn't -- they either didn't exist or they
3 certainly weren't enough of a major player to be
4 recognized.

5 Q. Given that, does AT&T have a monopoly in North
6 Carolina anymore?

7 A. Well, I never felt like they had a total monopoly
8 to begin with, but certainly no more.

9 Q. Mr. Malish asked you some questions about
10 validation. Do you remember that?

11 A. Generally.

12 Q. When you were referring to validation in your
13 testimony, I want to make sure I understand that. Are you
14 wanting to validate -- are you talking about validating
15 the fact that dPi asked for a credit or are you talking
16 about validating something more than that?

17 A. It starts with understanding that they're asking
18 for a credit on a given account and then it's taking a
19 look deeper into it to see whether the end user qualifies
20 as if they were an AT&T end user. And because they have
21 to qualify under normal circumstances under promotions,
22 they would have to qualify as if they were an AT&T end
23 user.

24 Q. Mr. Malish asked you some questions about value.

1 And he asked you if the offer is accepted, if the cash
2 back offer of \$100 is accepted, its value is 100. If the
3 offer is denied, not accepted, what's its value?

4 A. Still \$100.

5 Q. If I'm a customer and I just don't want the cash
6 back, what's the value of that cash back to me?

7 A. As the end user customer, it apparently means
8 nothing to you.

9 Q. If I'm a customer that receives the coupon, do all
10 of our customers turn that coupon in?

11 A. No, they do not.

12 Q. Are those the types of things that you need to
13 consider in determining the value of the coupon?

14 A. Yes, it is. That's one of the things. And I
15 think as I mentioned, that I would be -- I assume that as
16 -- that would be just one of the tests that we would use
17 to determine what the value would be, just one of the
18 tests.

19 MR. TURNER: Mr. Chairman, for my final round of
20 questions, may I approach the witness and give him a copy
21 of what has already been marked as O'Roark
22 Cross-Examination Exhibit No. 4?

23 COMMISSIONER CULPEPPER: Yes, sir. You may do
24 so.

1 Q. This is the chart that talks about if a \$25
2 reduction is given in the form of a price reduction, how
3 that plays out. Take a look at it and tell me when you're
4 ready for me to ask a question.

5 A. Mr. Turner, which page are we starting --

6 Q. Look at the whole chart and we'll get to it.

7 A. Okay. All right.

8 Q. We're going to come to that, but I want you to
9 look at the board here. This is the algebra that Mr.
10 Malish worked through. And at the end of the day on the
11 board here, we have a retail customer getting a \$60 price
12 break, right?

13 A. I believe he called it a credit.

14 Q. Well, I'm calling it a price break. You got a \$60
15 price break right here on the retail side, all right?

16 A. Okay.

17 Q. And you got a \$48 price break on the wholesale
18 side, right?

19 A. Okay.

20 Q. Go with us to Exhibit 1.

21 A. What was the value of the price break that the
22 retail customer got in Cross-Exhibit 4 that you have in
23 your hand?

24 A. On page 1?

1 Q. Well, when we went through this, between page 1
2 and page 2, how much of a price break did the retail
3 customer get? Retail price went from 75 to 25, right?
4 I'm sorry, 75 to 50, so what was the retail price break
5 that customer got?

6 A. \$25.

7 Q. Okay. And then the next page on 3, what was the
8 amount of the price reduction or price break that the CLEC
9 got as a result of that \$25 reduction for the retail
10 customer?

11 A. \$19.63.

12 Q. So on a face value, the retail customer got a
13 greater pass -- cash -- price break than the wholesale
14 customer, right?

15 A. Just by pure numbers, that's what it appears.

16 Q. And when we look on the board what's happening is
17 the retail customer is getting a greater price break than
18 the wholesale customer, right?

19 A. That's what those numbers would appear to
20 indicate, yes.

21 Q. The difference in 60 and 48 is the 20 percent
22 wholesale -- resale discount, right?

23 A. \$12, yes.

24 Q. And our example on this page, the difference

1 between the price break that the whole -- retail customer
2 got and the wholesale customer got was the same 20 percent
3 of retail discount, right?

4 A. Subject to check, I would say that the difference
5 between 19.63 and \$25 is, you know, roughly 20 percent.

6 MR. TURNER: That's all I have. Thank you, sir.

7 COMMISSIONER CULPEPPER: Questions by the
8 Commission?

9 CHAIRMAN FINLEY: A couple of questions.

10 COMMISSIONER CULPEPPER: Chairman Finley.

11 CHAIRMAN FINLEY: Let's see here.

12 EXAMINATION BY CHAIRMAN FINLEY:

13 Q. Mr. Ferguson, with respect to the cash payment
14 that AT&T makes under the 1FR + 2 cash back, is that
15 payment in your view a promotion or a credit or do you
16 have an opinion on that?

17 A. And let me clarify. You said that what AT&T pays
18 its retail end users, it's a -- it's a promotion, but it's
19 -- I think we've categorized it more like a marketing
20 incentive as opposed -- it credits nothing. It has no
21 effect on the AT&T retail end user's bill. No credits for
22 one-time charges, no credits for monthly charges. It's
23 just me walking over to you and handing you a check for
24 \$100; has nothing to do with your phone bill.

1 Q. Okay. The algebra and the math that the various
2 lawyers have taken the various witnesses through on the
3 blackboard over there, my understanding is that the cash,
4 \$50, \$100, whatever it happens to be, is a one-time
5 payment to the retail customer, right?

6 A. That is correct.

7 Q. And it's not a recurring monthly credit or
8 promotion; is that right?

9 A. That is correct. None of the cash back promotions
10 at issue here are anything other than a one-time payment.
11 We -- we have other obviously non-cash back promotions
12 that might credit a bill, might do away with a monthly
13 charge for a month or two or whatever. All kinds of
14 variables. But on cash back, it has nothing to do with
15 phone bill. It's simply giving a check for \$100 for them
16 to use however they see fit.

17 Q. Does that make any difference in the calculations
18 and the various positions of the parties in your opinion?
19 I think you alluded to it once in one of your answers
20 earlier.

21 A. Well, it's a one-time thing and, you know, some of
22 this math can get to the point where it looks like it's an
23 ongoing benefit month after month after month. It really
24 doesn't work out that way because it's a one-time

1 situation.

2 And again, value, we would -- you know, it's
3 subject to -- subject to open discussion, I think, further
4 down the road as to what value compared to -- you know,
5 for a retail end user of AT&T who's typically going to
6 have phone service for a longer time than maybe the type
7 of customer that dPi has, you know, there's -- economists
8 need to be called in for a discussion of that sort of
9 overall value as far as I'm concerned.

10 Q. All right. Have you read the Sanford case from
11 the Fourth Circuit by chance?

12 A. Yes. I've -- to say I've read it totally and
13 understood it would not be the case, but I have -- I have
14 gone through the relevant parts that I've used in my
15 testimony.

16 Q. Well, if I wanted AT&T to explain to me the
17 difference between the opinions of Judge Niemeyer and
18 Judge Williams, I take it you would defer to somebody else
19 on that?

20 A. Most rapidly.

21 Q. Okay.

22 CHAIRMAN FINLEY: That's all I have. Thanks.

23 COMMISSIONER CULPEPPER: Questions based on
24 Chairman Finley's questions, Mr. Turner?

1 MR. TURNER: No, sir. Thank you.

2 COMMISSIONER CULPEPPER: Mr. Malish?

3 MR. MALISH: No, Mr. Chairman.

4 COMMISSIONER CULPEPPER: Ms. Edmondson?

5 MS. EDMONDSON: No.

6 COMMISSIONER CULPEPPER: All right. That would
7 conclude your testimony, Mr. Ferguson. You may stand down
8 from the witness chair.

9 THE WITNESS: Thank you, sir.

10 (Whereupon, the witness was dismissed.)

11 MR. MALISH: Mr. Chairman --

12 COMMISSIONER CULPEPPER: Mr. Malish.

13 MR. MALISH: -- the -- we talked or there's been
14 talk about AT&T submitting a late-filed exhibit about
15 retention policies. If it is -- if it is helpful to the
16 Commission making its decision, we could submit a
17 late-filed exhibit also on -- on the -- how the -- how the
18 -- how dPi submits those requests for credit on the bar
19 forms as well.

20 It's actually already before the Commission in
21 an earlier case, so, I mean, you could take judicial
22 notice of -- I could give you the cite, I just don't have
23 that at my fingertips. But, you know, how they -- how
24 they figure out what to ask for has been addressed at the

1 Commission before.

2 COMMISSIONER CULPEPPER: Well, Mr. Malish, you
3 can tender any kind of late-filed exhibit you would like
4 to the Commission. AT&T may or may not have any
5 objections to that. You can tender your exhibit, they can
6 tender their objections. We'll handle the matter as we
7 see fit after we have all of that or you can address --
8 you will have the opportunity to perhaps address whatever
9 matters you wish to address in your post-hearing filings
10 that you will have an opportunity to file sometime
11 subsequent to today.

12 MR. MALISH: Very good.

13 COMMISSIONER CULPEPPER: All right. All right.

14 MR. TURNER: Mr. Chairman, that concludes our
15 case. I would like to ask to move the admission of all of
16 our direct and rebuttal testimony and exhibits to the
17 extent I haven't already done so into the record.

18 COMMISSIONER CULPEPPER: That motion is allowed.

19 (Whereupon, Exhibits KAS-1 through KAS-5, NWB-1,
20 PLF-1, PLF-2 and Rebuttal PLF-1 were admitted
21 into evidence.)

22 Anything further from the Respondent?

23 MR. TURNER: No, sir. Thank you.

24 COMMISSIONER CULPEPPER: Any showing from the

1 Public Staff?

2 MS. EDMONDSON: No.

3 COMMISSIONER CULPEPPER: All right. That would
4 appear to conclude the evidentiary hearing then. Appears
5 that we will be on the lookout for the late-filed exhibit
6 regarding the retention records that was requested by
7 Public Staff. And you've indicated, Mr. Turner, that you
8 have no problem with your client filing that late-filed
9 exhibit --

10 MR. TURNER: Yes, sir.

11 COMMISSIONER CULPEPPER: -- as well as any of
12 the late-filed exhibits that you might wish to file on
13 behalf of your client. If you want to do that, we'll
14 consider them. And, of course, Mr. Malish, you have the
15 right -- and Public Staff -- to file any responses to any
16 such filings at that time.

17 We've talked about AT&T filing a reply to dPi's
18 November 12, 2009, response to the -- I think it was
19 November 6, 2009, Motion to Compel. Certainly you're not
20 obligated to do that, but we've talked about that and that
21 might be a way to bring the issue of our ruling on your
22 Motion to Compel --

23 MR. TURNER: Yes, sir.

24 COMMISSIONER CULPEPPER: -- might further guide

1 us in how we should rule on that.

2 The only other matter that I know about that we
3 need to talk about would be the -- a date for the filing
4 of post-hearing filings in the form of either briefs
5 and/or proposed orders. And I'm not going to set a time
6 for that at this point in time because I want to see about
7 what late-filed exhibits might be filed; I want to see the
8 reply, if any, to the response about the Motion to Compel
9 and then the ruling on that may affect a subsequent ruling
10 or Order on the post-hearing filing deadlines. So we'll
11 -- we'll reserve that matter to a future date.

12 Now, does anybody know of anything else that we
13 would need to consider at this point in time before I
14 would adjourn this docket, Mr. Turner?

15 MR. TURNER: No, sir.

16 COMMISSIONER CULPEPPER: Mr. Malish?

17 MR. MALISH: No, sir.

18 COMMISSIONER CULPEPPER: All right. Ms.
19 Edmondson?

20 MS. EDMONDSON: No.

21 COMMISSIONER CULPEPPER: All right. Thank you
22 very much, counsel. We stand adjourned.

23 MR. MALISH: Thank you very much for y'all's
24 consideration.

(Whereupon, the hearing was adjourned.)

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The undersigned Court Reporter certifies that this is the transcription of notes taken by her during this proceeding and that the same is true, accurate and correct.



Candace Covington
Court Reporter II

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