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February 13, 2014

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

Re: Docket No.: 110306-TP: Request for emergency relief and Complaint of FLATEL, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida to resolve interconnection agreement dispute

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's Response to Flatel's Amended Complaint, which we ask that you file in the captioned docket.

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

Sincerely,

s/Tracy W. Hatch

Tracy W. Hatch

cc: All Parties of Record
Gregory R. Follensbee
Brian W. Moore

1099808

CERTIFICATE OF SERVICE
Docket No. 110306-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 13th day of February, 2014 to the following:

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Adam Teitzman
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s/Tracy W. Hatch
Tracy W. Hatch

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Emergency Relief and Complaint of FLATEL, Inc. Against BellSouth Telecommunications, Inc. d/b/a AT&T Florida to Resolve Interconnection Agreement Dispute	)))))	Docket No. 110306-TP Filed: February 13, 2014

AT&T FLORIDA'S RESPONSE TO FLATEL'S AMENDED COMPLAINT

BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Response to the letter filed by FLATEL, Inc. ("FLATEL") styled as an "Amended Complaint."[1] As explained herein, FLATEL has utterly failed to comply with the procedural filing requirements set forth in Rules 28-106.201 (contents of initial pleadings), 28-106.110, and 28-106.208, Florida Administrative Code. By its continued failure to abide by the procedural requirements, FLATEL's Amended Complaint also runs afoul of Section 120.569(2)(c), Florida Statues[2] and violates Commission Order No. PSC-12-0085-FOF-TP issued in this docket. Further, FLATEL's apparent substantive allegations are vague and ambiguous and fail to establish any claim for relief. For those reasons and the other reasons set forth below, the "Amended Complaint" should be dismissed. In the event it is not dismissed, AT&T Florida also briefly responds to what it understands to be the substantive allegations of the Amended Complaint.

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[1] Upon information and belief, AT&T Florida does not believe that the Complaint was properly filed by Abby Matari, FLATEL's CEO, as Mr. Matari is not a Florida Bar licensed attorney nor has he been designated a qualified representative by this Commission. *See In re: Applications for Qualified Representative Status*, Dockets Nos. 130008-TP and 140008-TP and www.flabar.org.

[2] Section 120.569(2)(c) provides in pertinent part: Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

I. INTRODUCTION

FLATEL has once again launched a desperate effort to forestall the inevitable consequences of breaching the payment terms of its Commission-approved interconnection agreement ("ICA" or "Agreement") with AT&T Florida. On December 30, 2013, FLATEL filed with the Commission a four-page, disjointed letter, styled as an Amended Complaint.[3] Although the Amended Complaint was filed under Docket 110306-TP, that docket was closed by the Commission on February 24, 2012. *See* Order No. PSC-12-0085-FOF-TP (Dismissing FLATEL's Complaint and Request for Emergency Stay). Moreover, FLATEL's Amended Complaint apparently seeks to amend a prior complaint that was rejected by Order No. 12-0085. A complaint may not be amended without leave of the Presiding Officer[4] and certainly not after the underlying complaint has been dismissed by the Commission.

Moreover, while a portion of FLATEL's original complaint was denied without prejudice, the Commission expressly noted, "Should FLATEL choose to file an amended petition, the petition shall conform to the pleading requirements of Rules 25-22.036 and F.A.C and 28-106.201, F.A.C., and identify all disputes for which FLATEL requires resolution."[5] FLATEL has again utterly failed to follow the requirements of Rules 28-106.201 or 25-22.036.[6] FLATEL's Amended Complaint fails to comply with Rule 28-106.201(d)-(g) by failing to provide: a statement of all disputed issues of material fact; a concise statement of the ultimate facts alleged; a statement of the specific rules or statutes justifying the relief sought; or a

[3] Docket No. 110306-TP is still apparently closed despite FLATEL's filing. It is not clear whether the Commission will reopen this docket or place FLATEL's new filing in a new docket.
[4] Rule 25-106.202, Florida Administrative Code.
[5] Order No. 12-0085, p. 6.
[6] Rule 28-106.201 contains the specific pleading requirements to be included in a petition. Similarly, Rule 25-22.036 contains pleading requirements specific to the Commission in addition to the pleading and procedural requirements of Chapter 28, Florida Administrative Code.

statement of the relief sought stating precisely the action the petitioner wishes the agency to take. FLATEL fails to comply with Rule 25-22.036(3)(b)(1)-(4) by failing to identify: the rule, order or statute that has been violated; the actions that constitute the violation, the name and address of the person against whom the complaint is lodged; or the specific relief requested. Despite the Commission's specific admonishment in Order No. 12-0085 to comply with the rules, FLATEL has again clearly failed to comply. Pursuant to Section 120.569(2)(c), FLATEL's Amended Complaint must be dismissed for failure to substantially comply with the model rules and the Commission's rules. In view of FLATEL's continued disregard of the rules and the Commission's order, the Amended Complaint should be dismissed with prejudice.

Further, consistent with its persistent pattern of delay, FLATEL waited almost two years before attempting to seek resolution of its claims from the Commission, and then only under the threat of an impending trial of AT&T Florida's claims against it in AT&T Florida's federal court collection action, as described below.

II. COLLECTION ACTION IN FEDERAL COURT

On August 6, 2013, BellSouth Telecommunications, LLC, d/b/a AT&T Florida, AT&T Kentucky, AT&T North Carolina and AT&T South Carolina ("AT&T") filed a Complaint in Florida federal court, seeking monetary damages in the amount of $1,217,696.00, stemming from FLATEL's refusal to honor the payment obligations in its ICA with AT&T in Florida, Kentucky, North Carolina, and South Carolina. Notably, the amount owed by FLATEL in Florida is $1,040,074. The court set an aggressive schedule in the case, including a trial in June 2014.

On September 16, 2013, FLATEL filed an "Answer" in the federal court case, on a *pro se* basis. Because court rules do not allow corporate entities to file Answers pro se, on September 17, 2013, AT&T filed a Motion to Strike FLATEL'S Answer. On November 1, 2013, the court granted AT&T's motion to strike and directed entry of a default against FLATEL. On November 4, 2013, the clerk entered a default against FLATEL in accordance with the November 1, 2013 Order. On December 30, 2013, however, FLATEL appeared through counsel, as a result of which the court set aside the default and permitted the filing of an Answer and Affirmative Defenses on behalf of FLATEL on January 7, 2014.

On January 28, 2014, FLATEL filed a "Motion to Stay the Case and to Refer This Matter to Florida's Public Service Commission to Determine Certain Facts Regarding Plaintiff, BellSouth's Alleged Improper Business and Billing Practices." See Attachment A. The court has not decided FLATEL's federal court motion, but AT&T has opposed that motion to the extent that it seeks to delay AT&T, once again, from obtaining judgment against FLATEL for the over $1.2 million which it unilaterally withheld in direct violation of the payments terms of its ICAs, which expressly require FLATEL to pay *all* amounts billed by AT&T for services provided, including disputed amounts. It is also worth noting that, by AT&T's calculations, FLATEL would still owe AT&T over $300,000 even if FLATEL were right about the credit claims which it has listed in its Affirmative Defenses in federal court and its "Amended Complaint" here. See Attachment B (AT&T's Response to Flatel's Motion for Stay).

The determination of FLATEL's federal court motion also bears on this matter before the Commission. If the court decides to refer issues to this Commission, then FLATEL will have its opportunity to present its claims and arguments to the Commission at that time in a procedurally appropriate manner, rather than trying to shoehorn a purported "Amended Complaint" into a

docket that was closed a long time ago. For that reason as well, it is appropriate to dismiss FLATEL's "Amended Complaint."

III. FLATEL'S AMENDED COMPLAINT FAILS TO SUPPORT ANY CLAIM FOR RELIEF

In addition to being procedurally improper, FLATEL's Amended Complaint is substantively incorrect. Although it is unclear exactly what relief it is requesting from the Commission, FLATEL appears to be arguing that AT&T Florida has somehow acted improperly in the denial of FLATEL's requests for promotional credits and the timing in which credits were applied to FLATEL's account. By its continued failure to pay billed amounts due pursuant to its contract, FLATEL is implicitly claiming that its disputes somehow "suspend" its obligations to pay for the services that it received. There is no such provision in its contract. To the contrary, in its contract FLATEL agreed that payment for "all services provided by [AT&T], including disputed charges, is due on or before the next bill date". (ICA, Attachment 7 "Billing", at Sections 1.4 and 1.4.1).

Further, FLATEL cites no rules, statutes or orders that support any of its individual claims. FLATEL's only citation to authority to support its claims is a vague reference to Section 364.162, Florida Statues and the Communications Act of 1934. But, FLATEL fails to identify any provision of the Communications Act of 1934 that AT&T Florida has supposedly violated. Moreover, Section 364.162 was repealed effective July, 2011.[7] In addition, to the extent that Section 364.162 was effective during the time period over which FLATEL's claims stretch, FLATEL does not explain or even suggest how AT&T Florida's actions pursuant to its contract constitute a violation of the provisions of Section 364.162. Finally, the provisions of Section

[7] *See* Laws of Florida 2011, c.2011-36, §24.

364.162 were initially adopted in 1995[8] and were later supplanted by the provisions of the federal Telecommunications Act of 1996. The Telecom Act of 1996 is what governs the duties of AT&T Florida and how those duties are incorporated in its contract with FLATEL. Significantly, FLATEL fails to even mention the Telecom Act of 1996, let alone identify any violation of the Act. By so doing, FLATEL has completely failed to abide by the procedural rules governing administrative proceedings as well as Section 120.569(2)(c) and has further failed to provide any support for any of its claims.

The failure to cite valid authority provides another reason to dismiss FLATEL's Amended Complaint now, without further proceeding. To the extent, however, that this submission could be considered to be AT&T Florida's initial response to the Amended Complaint, AT&T Florida summarizes its responses to what it understands to be FLATEL's allegations as follows:

1) Timing of Promotional Credits – AT&T Florida denies any allegation that its process for reviewing claims for promotional credits is improper. There is no provision in the ICA, the Telecom Act of 1996 or in Florida law that provides FLATEL with the ability to dictate the procedures by which AT&T Florida processes promotional claims.

Additionally, there is no requirement that AT&T Florida employ the same method for providing promotion credits for its wholesale customers as it does for its retail customers. AT&T Florida has access to its retail customer records and thus has the ability to easily determine whether the customer is entitled to the credit, gift card, or other applicable promotion item. For its wholesale customers, AT&T Florida employs a claim submission and review process to assess the validity of the promotional claims submitted.

[8] *See* Laws of Florida 1995, c.1995-403, §16.

This review process, which is not discriminatory, is necessary to allow AT&T Florida the opportunity to assess the legitimacy of the thousands of claims it receives. As the Commission knows, AT&T Florida has had serious issues with some CLEC wholesale customers submitting promotion claims that do not meet the qualifications of the promotion and for which the CLECs were not entitled, and AT&T Florida needs a mechanism to ensure its wholesale customers meet the terms and conditions of promotions. *See, e.g., In re: Complaint by DPI-Teleconnect, L.L.C. against BellSouth Telecomms., Inc. for dispute arising under interconnection agreement*, Docket No. 050863-TP, Order No. PSC-08-0598-FOF-TP, at 7-9 (Sept. 16, 2008) (seeking credits for promotion that required features that CLEC did not purchase).

2) PAMA7 and PAMA8 Promotional Credits – AT&T denies any allegation that it has failed to grant otherwise appropriate promotional claims related to PAMA7 or PAMA8. All promotional credit requests are reviewed to determine whether the request is appropriate. Prior to issuing a final bill to FLATEL in April of 2012, AT&T Florida applied all appropriate credits to FLATEL's account. FLATEL identifies no rule, order or contract provision that supports its claim that some promotional credits were improperly denied.

3) and 4) Cash Back Promotions – AT&T denies any allegation that it has failed to grant otherwise appropriate promotional claims related to Cash Back Promotions. FLATEL's contention that it is entitled to the full retail face amount of a "cash back" promotion is simply incorrect. The North Carolina Commission has previously rejected this claim and determined that AT&T North Carolina's process of reducing a cash back promotion by the wholesale discount was correct. The North Carolina Commission was

affirmed by the district court in North Carolina.[9] In fact, every court and state commission that has addressed this issue has ruled in favor of AT&T.[10]

5) Promotions Denied Without Details – AT&T Florida denies any allegation that it has failed to provide adequate detail or explanation for promotional claims that were denied. First, FLATEL does not indicate or illustrate how AT&T Florida's denials of promotional credit claims failed to provide adequate reason for the denial. Second, FLATEL identifies no rule, order or contract provision that supports its claim that inadequate explanation was provided in conjunction with denial of some promotional claims or that greater detail should be provided.

[9] See, dPi Teleconnect, LLC v. Finley, et al, Docket No. 5:10-CV-466-BO (USDC, EDNC, Western Div.), Order dated February 12, 2012, at 6-7; BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T North Carolina v. dPi Teleconnect, LLC, et al., Docket No. P-836, Sub 5, etc. (North Carolina Utilities Commission) Order Resolving Credit Calculation Dispute dated September 22, 2011, at 5.

[10] *See*, e.g., dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. dba AT&T Kentucky, Docket No. 2009-00127 (Kentucky Public Service Commission), Orders dated January 19, 2012 and March 2, 2012; Nexus Communications, Inc. v. Chairman Donna L. Nelson, et al., Case No. A-12-CA-555-SS, United States District Court for Western District of Texas, Order filed March 26, 2013 (Texas District Court Order); Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company dba AT&T Texas under FTA Relating to Recovery of Promotional Credit Due, Docket No. 39028 (Texas Public Utility Commission) Order No. 15 Granting AT&T's Motion for Summary Decision dated April 5, 2012 at 4; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al.*, Docket No. U-31364-A (Louisiana Public Service Commission) Order dated May 25, 2012.

CONCLUSION

WHEREFORE, in consideration of the above, AT&T Florida respectfully requests that the Commission dismiss FLATEL's Amended Complaint with prejudice. If the federal court grants FLATEL's Motion to refer certain matters to the Commission, then the Commission can determine how best to address the referral from the court and instruct the parties accordingly.

Respectfully submitted this 13th day of February, 2014.

AT&T FLORIDA

w/Tracy W. Hatch

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ATTACHMENT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 13-CV-80766-DMM

BELLSOUTH TELECOMMUNICATIONS, LLC, doing business as AT&T Florida, doing business as AT&T Kentucky, doing business as AT&T North Carolina, doing business as AT&T South Carolina,

Plaintiff,

vs.

FLATEL, INC.

Defendant.
_____/

DEFENDANT, FLATEL, INC.'S MOTION TO STAY CASE AND TO REFER THIS MATTER TO FLORIDA'S PUBLIC SERVICE COMMISSION TO DETERMINE CERTAIN FACTS REGARDING PLAINTIFF, BELLSOUTH'S ALLEGED IMPROPER BUSINESS AND BILLING PRACTICES

Defendant, FLATEL, INC., by and through undersigned counsel, hereby moves the Court to stay this case and to refer the matter to Florida's Public Service Commission to determine certain facts regarding Plaintiff, BELLSOUTH'S alleged improper business and billing practices and states as follows.

1. Defendant respectfully moves the Court to Stay the litigation and refer the case to the Florida Public Service Commission (hereinafter "FPSC") , which has primary regulatory authority over telecommunications in Florida. Defendant has recently amended its formal request to the FPSC under Docket No.: 110306-TP, pertaining to alleged unfair interconnection agreement dispute changes, formulas, and requirements used by ATT to calculate disputes. The FPSC has indicated

its willingness to resolve these issues and make factual determinations, which if such factual determinations did not resolve the case, would greatly streamline the Court's necessary efforts.

2. The Court has broad discretion to stay proceedings and otherwise manage its docket. Clinton v. Jones, 520 U.S. 681, 706, 117 S. Ct. 1636, 137 L. Ed. 2d 945 (1997). Here, Defendant asserts that the Primary jurisdiction doctrine is potentially applicable and "is specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." Reiter v. Cooper, 507 U.S. 258, 268, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993); see also Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008) (stating that "the doctrine is a 'prudential' one, under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry, rather than the judicial branch"). "It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *In re* Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litigation, ____ F. Supp. 2d ___, No. 12-MD-2324, 2013 U.S. Dist. LEXIS 105830, 2013 WL 3830124, at *25 (S.D. Fla. July 24, 2013) *citing* Reiter, 507 U.S. at 268.

3. Accordingly, Plaintiff will not be prejudiced by this requested stay, the parties will likely incur less expense resolving the factual issues with the FPSC, it will conserve judicial time and resources, and it will likely narrow the issues for the Court's ultimate determination.

4. Plaintiff does not agree to the relief sought herein.

WHEREFORE, Defendant, FLATEL, INC., respectfully requests the Honorable Court enter an order staying the litigation, referring the matter to the Florida Public Service Commission while retaining jurisdiction, and for such other and further relief the Court deems reasonable and necessary.

DATE: January 28, 2014

Respectfully submitted,

/s/Stephen A. Smith, Esquire
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Attorneys for Defendant, FlaTel, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of January, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of notices of electronic filing generated by CM/ECF and/or U.S. Mail or in some other authorized manner for those counsel or parties who are not authorized to receive notices of electronic filing.

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ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

BELLSOUTH TELECOMMUNICATIONS, LLC,	)	
Plaintiff,	)	Case No. 13-CV-80766-DMM
vs.	)	
FLATEL, INC.,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY CASE AND REFER MATTER TO FLORIDA PUBLIC SERVICE COMMISSION AND INCORPORATED MEMORANDUM OF LAW

Plaintiff, BellSouth Telecommunications, LLC d/b/a/ AT&T Florida, AT&T Kentucky, AT&T North Carolina, and AT&T South Carolina ("AT&T"), respectfully submits its Response in Opposition to the Motion of defendant Flatel, Inc. ("Flatel") to stay this case and refer this matter to the Florida Public Service Commission ("FPSC"), and states as follows:

INTRODUCTION

Flatel failed to pay AT&T over $1.2 million for services that AT&T supplied to Flatel for resale pursuant to the terms of the parties' contract and the monthly bills for those services. Flatel does not deny that it received and resold those services, but it refuses to pay its bills based upon alleged credit claims, even though its contract requires payment of all charges, including disputed amounts, by each bill's due date. Now, in the face of this Court's admonition against further delays (DE 22), Flatel seeks to bring this action to a halt to permit Flatel to belatedly pursue those credit claims before the FPSC. AT&T does not object to the FPSC's resolution of Flatel's credit disputes. However, the FPSC has already ruled that Flatel had a contractual

obligation to first pay all amounts billed, regardless of any disputes over credits, and Flatel still refuses to pay its bills. There is no just reason to further delay AT&T's collection action while Flatel's credit disputes are being addressed by the FPSC.

In its bare-bones motion, Flatel does not quantify its credit claims or demonstrate in any way that it is likely to obtain a ruling from the FPSC that would allow it to escape liability to AT&T. In fact, it appears from Flatel's prior FPSC filing that even if the FPSC were to rule in favor of Flatel on each and every one of its credit claims, Flatel would still owe AT&T over $200,000 in Florida. In addition, Flatel owes AT&T another $177,622 in North Carolina, South Carolina and Kentucky, which would not be addressed by the FPSC, leaving an undisputed balance of over $375,000 due from Flatel regardless of the outcome of the FPSC proceeding.

In addition, as detailed below, a large portion of the credits sought by Flatel are based upon its contention that it was entitled to the full retail face amount of any "cash back" promotion for which its customers qualified and that AT&T underpaid those credits by discounting the retail amount by the applicable wholesale discount rate. The FPSC has never addressed that issue, but every court and state commission which has addressed the issue has ruled in favor of AT&T's method of calculating cash back credits to resellers. Flatel has not demonstrated that it is likely to convince the FPSC to rule otherwise.

Clearly, this motion is nothing more than another in a long line of delay tactics by Flatel to avoid its contractual payment obligations and forestall entry of an inevitable judgment against it. This case can, and should, promptly proceed to conclusion on AT&T's affirmative claims while Flatel simultaneously pursues its supposed credit claims in the FPSC. Alternatively, Flatel should be required to post a bond in the amount of its unpaid charges, or such other amount as this Court deems appropriate, as a condition of any stay of this case. In the absence of such

security, a stay would allow Flatel to dissipate assets and thereby impair, if not destroy, any chance that AT&T may have to collect its long-overdue monies and enforce its inevitable judgment. Indeed, Flatel has already represented to this court that it is "unable to afford representation" (DE 6), raising serious doubts as to Flatel's intention and ability to satisfy any Judgment.

STATEMENT OF FACTS

The relevant background facts and history of this dispute are set forth in AT&T's Complaint (DE 1) and in the Affidavit of David J. Egan filed on behalf of AT&T in support of its Motion for Final Default Judgment (DE 16-1) and need not be repeated here at length.

In brief, AT&T and Flatel entered into an interconnection agreement ("ICA") in 2005. (DE 1, ¶7; DE 16-1, ¶2 and Exhibit A) Under the ICA, AT&T provided Flatel with, among other things, telecommunications services for resale, and Flatel was required to pay all monthly billed charges, including disputed amounts, on or before the next bill date. (DE 1, ¶8; DE 16-1, ¶3 and Exhibit A [ICA], Attachment 7 "Billing", at Sections 1.4 and 1.4.1). Beginning in late 2009, Flatel began withholding payment of a portion of its bills from AT&T for telecommunications services provided under the ICA. (DE 16-1, ¶3) Flatel continued to breach the express payment requirements of the ICA by refusing to pay the full amount due, until AT&T eventually terminated service to Flatel in the 2011 to 2012 timeframe. (DE 16-1, ¶¶ 9-16)

In April, 2012, after disconnecting all services in Florida and applying all credits and security deposits, AT&T issued its final bills to Flatel for its three resale accounts in Florida, totaling $1,040,074 (later reduced internally to $1,040,051 after applying a $23 credit). (DE 16-1, ¶12 and Exs. C and F) In or around September, 2012, after disconnecting all resale services in

North Carolina, South Carolina and Kentucky, and applying all credits and security deposits, AT&T issued its final bills to Flatel for resale services provided in those states in the following amounts, after application of all credits and security deposits:

North Carolina	$61,430
South Carolina	$93,832
Kentucky	$22,360

(DE 1, ¶¶17, 24, 27, 30; DE 16-1, ¶17 and Ex. E)

Thus, Flatel owes a past due and unpaid balance to AT&T in the amount of $1,217,673, comprised of: $1,040,051 due in Florida, $61,430 due in North Carolina; $93,832 due in South Carolina; and $22,360 due in Kentucky. (DE 16-1, ¶22 and Ex. F)

AT&T filed its straight-forward collection complaint on August 6, 2013, seeking a judgment for the more than $1.2 million that Flatel failed to pay for services provided in Florida, Kentucky, North Carolina and South Carolina. (DE 1) Following the court's striking of Flatel's impermissible *pro se* Answer on November 1, 2013 (DE 11), and the Clerk's entry of a default on November 4, 2013 (DE 12), AT&T moved for entry of a Default Judgment (DE 16). It was only after the Court granted Flatel one additional chance to retain counsel, that Flatel appeared through counsel and filed an Answer, rendering AT&T's motion for Default Judgment moot.

LEGAL ARGUMENT

I. Flatel's Credit Claims Do Not Affect its Payment Obligation

Flatel has alleged, in its Sixth through Tenth Affirmative Defenses, that it is entitled to credits against the $1.2 million in unpaid charges. In sharp contrast to AT&T's straightforward claims for monies due on monthly bills for service pursuant to the provisions of the ICA, Flatel's alleged credit claims are ill-defined and unquantified and, most importantly, provide no excuse for non-payment. Importantly, under the express terms of the ICA, Flatel had no right to withhold payment to AT&T based upon any of its alleged claims for credits. The parties'

FPSC-approved Agreement requires Flatel to pay all amounts it is billed, even if it disputes those amounts:

> Payment Responsibility. Payment of ***all*** charges will be the responsibility of FLATEL…FLATEL shall make payment to [AT&T] for all services billed ***including disputed amounts….***
>
> Payment Due. Payment for services provided by [AT&T], ***including disputed charges***, is due on or before the next bill date….

(DE 16-1, Exhibit A [ICA], Attachment 7 "Billing", at Sections 1.4 and 1.4.1(emphasis added). Indeed, Flatel's November 2, 2011 petition to the FPSC seeking to enjoin AT&T from disconnecting service (the "Flatel Petition", attached hereto as **Exhibit A**) was dismissed without prejudice by the FPSC by Order No. PSC-12-0085-FOF-TP issued February 24, 2012 (the "FPSC Order", attached as **Exhibit B** hereto).

In dismissing Flatel's Petition, the FPSC ruled that the Petition failed to state a cause of action against AT&T and was subject to dismissal because the FPSC lacks authority to grant the requested injunctive relief. (Exhibit B at pp.4-6). The FPSC specifically ruled that:

> We articulated in Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, that carriers can enforce ICAs including the disconnection of services for violation of the ICAs where the payment terms are clear and unambiguous. Here the ICA provides that FLATEL should make payments for services provided by AT&T Florida including disputed charges on or before the next bill date. The ICA also provides that services can be discontinued for nonpayment of bills.
>
> * * *
>
> FLATEL's statement that the disputed balance includes promotions that should be offset against amounts it owes to AT&T Florida is not a cause of action as it relates to granting an emergency stay. The ICA requires that all services billed should be paid including disputed amounts, and FLATEL's petition is for an emergency stay to prevent disconnection of its service for nonpayments of bills. Therefore, FLATEL's assertion regarding the promotions failed to satisfy the requirements for a cause of action for an emergency stay.

(Exhibit B at p. 5 (footnotes omitted))(emphasis added)

AT&T's Complaint in this action states a simple breach of contract action against Flatel based upon Flatel's unambiguous obligation to pay amounts billed, including disputed amounts, by each bill's due date. Flatel has presented no justification for delaying the resolution of AT&T's affirmative claims while it pursues its alleged credit claims in the FPSC.

The FPSC has already ruled in its February 24, 2012 Order that the payment terms of Flatel's ICA are unambiguous and could be enforced as written, so there is no need for the Court to await the FPSC's interpretation of that contract clause.[1] Indeed, in a case dealing with identical ICA language, the FPSC similarly held that a Reseller could not withhold disputed amounts from AT&T and explained as follows:

> The parties' conduct is governed by an ICA with clear terms. **The terms and conditions of the Parties' ICA are clear and unambiguous. Specifically, that Express Phone shall make payments for all services billed including disputed amounts. Furthermore, we already ruled in LifeConnex, with identical language in the ICA, that the billed party is required to pay all sums billed, including disputed amounts, pursuant to the terms and conditions in the ICA. Express Phone must pay all disputed amounts. Dispute of promotion credits, does not affect the billing time frame or payment obligations established by the ICA. AT&T Florida is entitled under the clear terms of the ICA to prompt payment of all sums billed;** and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment; and that AT&T Florida appropriately disconnected Express Phone on March 30, 2011.[2] (emphasis added)

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[1] Indeed, as the FPSC noted in its February, 2012 Order, it has ruled that these identical provisions are unambiguous and enforceable in prior cases. *See In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc.*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, at 6 (July 16, 2010)(copy attached hereto as **Exhibit C**)(The FPSC found "that AT&T is entitled under the plain terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment" and "the plain language of these provisions is clear that while [the CLEC] can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA."). Commissions in Kentucky, North Carolina and Alabama have all reached similar conclusions regarding interconnection agreements with language that is identical to the ICA provisions. *See, In the Matter of BellSouth Telecomms., Inc. v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC,* Case No. 2010-00026*; In the Matter of Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC by BellSouth Telecomms., Inc.,* Docket No. P-55, Sub 1817*; and Petition of LifeConnex Telecom, LLC, f/k/a Swiftel, LLC Concerning Implementation of its Interconnection Agreement with BellSouth Telecomms., Inc.*, Docket No. 31450.

[2] *In re: Emergency Complaint of Express Phone Service, Inc. against Bellsouth Telecommunications, Inc*.; *In re: Notice of Adoption of existing interconnection, unbundling, resale and collocation agreement between BellSouth*

Moreover, in another order in the *Express Phone* matter, the FPSC held that, based upon the identical ICA language in this case, a CLEC's failure to comply with the terms and conditions of the ICA was "a material breach of the binding agreement".[3] A federal district court recently affirmed this Order holding that the FPSC "appropriately determined [that] Express Phone's failure to pay the disputed amounts to AT&T was a material breach of its ICA". *Express Phone Service Inc. v. Florida Public Service Com'n*, 2013 WL 6536748, 2013 U.S. Dist. LEXIS 175858, Case No. 1:12-cv-00197-MP-GRJ (N.D.Fla. December 12, 2013)(copies of the FPSC Orders and the district court's affirming decision of Order No. PSC-12-0390-FOF-TP are attached hereto as **Exhibit D**). In the *Express Phone case*, the court noted the binding nature of ICAs and held that "[o]nce an interconnection agreement is approved by the state commission, the Act requires the parties to abide by its terms". 2013 WL 6536748 at *5.

The FPSC has determined that it lacks jurisdiction to award money damages in resolving utility related disputes.[4] Moreover, the FPSC has already determined that the unambiguous terms of the ICA require Flatel to pay AT&T for all services billed including disputed amounts. As such, this court is the sole proper forum for the enforcement of these unambiguous ICA payment provisions and entry of a money judgment. "Where the language of the contract is

---

Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc., Docket No. 110071-TP; Docket No.. 110087-TP; Order No. PSC-11-0291-PAA-TP, 2011 Fla. PUC LEXIS 210 at 10 (Florida Public Service Commission July 6, 2011).

[3] *In re: Notice of Adoption of existing interconnection, unbundling, resale and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc,* Docket No. 11087-TP, Order No. PSC-12-0390-FOF-TP, 2012 Fla. PUC LEXIS 374 at 6-7 (Florida Public Service Commission July 30, 2012).

[4] *See Southern Bell Telephone and Telegraph Co. v. Mobile America Corporation, Inc., 291 So.2d 199, 202 (Fla. 1974)* ("Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla. Const."); *In re: Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. F12002-01*, Docket No. 020738-TP, Order No. PSC-03-0031-FOF-TP (Issued January 6, 2003) ("This Commission lacks any legal authority to award the type of money damages sought by AT&T."); *In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) ("the Commission may not award monetary damages in resolving utility related disputes.").

plain and unambiguous, no construction is required or permissible and the terms of the contract must be given an interpretation of ordinary significance." *Fernandes v. Manugistis Atlanta, Inc.*, 582 S.E.2d 499, 502 (Ga. Ct. App. 2003)(citation omitted).[5] Moreover, this is true even if the provision is perceived to be harsh to one party to the contract and the Court is not permitted to rewrite the terms. *See Berry v. Travelers Ins. Co.*, 14 S.E. 2d 196, 202 (Ga. Ct. App. 1941)("If it be said that the provision is a harsh one, the answer is that the rights of the parties are to be determined under the contract as made, and it is not within the power of the this court to rewrite it"). Should Flatel prevail on any of its claims for credits before the FPSC, it would be entitled to a credit against the amount of any unsatisfied portion of that Judgment or a refund of any excess monies paid to AT&T; however, pursuant to the unambiguous terms of the ICA, Flatel must pay AT&T first.

II. Flatel Has Not Demonstrated That Its Credit Claims Have Any Merit

Flatel argues in this motion, and AT&T agrees, that the FPSC is the proper forum for the resolution of the telecommunications issues implicated by the credit disputes alleged in Flatel's Sixth through Tenth Affirmative Defenses. Of course, Flatel could have pursued resolution of those credit disputes two years ago when its service was disconnected -- or six months ago when it was served with AT&T's Complaint. Instead, Flatel chose to blatantly ignore its payment obligations, just as it ignored the procedural rules of this Court until it was granted one last chance by this Court to vacate its default. Flatel now seeks to revive the very Petition the FPSC

[5] The ICA requires that Georgia law govern the Agreement. *See* Agreement, GTC, § 17 ("In all other respects, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles."). In any event, Florida law is in accord with Georgia law on this point. *See Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So. 2d 1194, 1194 (Fla. 3d DCA 2008) ("[W]here an agreement is unambiguous . . . we enforce the contract as written, no matter how disadvantageous the language might later prove to be."); *Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.") (citation omitted); *Paddock v. Bay Concrete Indus., Inc.*, 154 So. 2d 313, 316 (Fla. 2d DCA 1963) (holding that "an unambiguous agreement must be enforced in accordance with its terms").

dismissed without prejudice two years ago in an attempt to further delay the conclusion of this action – after being specifically cautioned against further delays by this Court (DE 22).

AT&T is prepared to litigate Flatel's credit disputes before the FPSC. However, Flatel has not demonstrated, and cannot show, that the resolution of those credit disputes will relieve it of its payment obligations to AT&T. First, the contract requires Flatel to pay AT&T all charges, including any disputed amounts, by each bill's due date. Moreover, based upon Flatel's own valuation of the credits which it seeks to resolve before the FPSC, Flatel will still owe AT&T over $200,000 even if it is successful on all of those claims. Specifically, the Petition that Flatel filed at the FPSC in November, 2011 (Exhibit A hereto at Ex. A thereto), alleges that Flatel is entitled to the following credits corresponding to the Affirmative Defenses asserted in this action.

Issue #1 (Sixth Affirmative Defense)	$326,924
Issue #2 (Seventh Affirmative Defense)	$51,306
Issue #3 (Eighth Affirmative Defense)	$44,759
Issue #4 (Ninth Affirmative Defense)	$353,579
Issue #5 (Tenth Affirmative Defense)	$60,209
Total	**$836,777**

As demonstrated by the Egan Affidavit submitted in support of AT&T's Motion for Final Default Judgment, AT&T is owed **$1,040,074** in Florida alone. (DE 16-1, ¶12 and Exs. C and F) Thus, even if Flatel were completely successful on all the credit issues it seeks to place before the FPSC, Flatel would still owe $203,297 to AT&T just in Florida.

In addition, Flatel owes AT&T another $177,622 in North Carolina, South Carolina and Kentucky and it has given no indication that it intends to pursue those credit issues in those state commissions; nor does Flatel's Motion to Stay cover these claims. Thus, Flatel is essentially proposing to further delay payment of an undisputed debt of over $375,000 while it pursues a ruling on how much more money it owes. And it proposes to do so notwithstanding the fact that

the FPSC has already ruled – based upon the clear terms of the parties' ICA -- that Flatel's payment obligation exists regardless of whether it has outstanding disputes over credits.

Finally, the bulk of promotional credits sought by Flatel in Florida relate to its Ninth Affirmative Defense, which is stated as Issue #4 in Flatel's Petition and valued by Flatel at $353,579. As noted in Flatel's Petition, this issue was the subject of a case between AT&T and another carrier in federal court in North Carolina pending at the time of Flatel's Petition (Exhibit A hereto, at last page (#4)). Since that time, the district court in North Carolina affirmed the ruling of the North Carolina Utilities Commission, rejecting the very argument pressed by Flatel and finding that AT&T's method of calculating "cash back" promotional credits to resellers was correct. See, *dPi Teleconnect, LLC v. Finley*, et al, Docket No. 5:10-CV-466-BO (USDC, EDNC, Western Div.), Order dated February 21, 2012, at 6-7; *BellSouth Telecommunications, Inc. dba AT&T Southeast dba AT&T North Carolina v. dPi Teleconnect, LLC, et al.*, Docket No. P-836, Sub 5, etc. (North Carolina Utilities Commission) Order Resolving Credit Calculation Dispute dated September 22, 2011, at 5 (copies of Orders are attached hereto as **Exhibit E**).

Very briefly, the contention by Flatel, which was rejected in North Carolina, is that resellers were entitled to the full retail face amount of any "cash back" promotion for which its customers qualified, and that AT&T underpaid those credits by discounting the retail amount by the state wholesale discount rate. After a full hearing, the NCUC ruled, and the federal court agreed, that AT&T was entitled to discount the cash back promotion by the state wholesale discount rate. So, for instance in Florida, if AT&T's new retail customer was entitled to a $50 gift card, then Flatel was entitled to a credit from AT&T in the amount of $39.08 for any qualifying new resale customer (discounting the $50 promotion by the 21.83% wholesale discount rate established by the FPSC). In its Ninth Affirmative Defense, Flatel is seeking the

difference between the $39.08 which it was credited and the full $50 for each qualifying customer. Not only was this argument soundly rejected in North Carolina, but every court or state commission which has been called up to address this issue has ruled in favor of AT&T.[6]

Thus, unless Flatel is able to convince the FPSC that it should rule contrary to every other forum that has ruled on this issue, Flatel will owe AT&T no less than $734,475 (adding the undisputed balance of $380,896 and the amount claimed by Flatel on the "wholesale discount" issue in Florida ($353,579)) even if Flatel were wildly successful in proving all of its other disputed credit claims.

III. If the Court disagrees with AT&T and believes that Flatel is entitled to a Stay, then Flatel Should be Required to Secure AT&T as a Condition of Any Stay

It is not surprising that Flatel's motion provided little if any substance regarding the credit disputes it seeks to pursue before the FPSC (nor, for that matter, is it surprising that Flatel makes no mention of its contractual obligation to pay all amounts billed by AT&T, including disputed amounts). The review of those credit claims above shows that Flatel will owe AT&T a considerable sum even if Flatel were successful at the FPSC and, moreover, that Flatel has little chance of success on the claim which is the largest of the five issues identified by Flatel. Most importantly, Flatel has an unambiguous contractual obligation to first pay AT&T the amounts billed and then pursue a resolution of its credit disputes, so Flatel has not demonstrated that its pursuit of credits provides any defense to AT&T's affirmative claims for payment.

[6] See, e.g., dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. dba AT&T Kentucky, Docket No. 2009-00127 (Kentucky PSC), Orders dated January 19 and March 2, 2012; *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana v. Image Access, Inc. d/b/a New Phone, et al.*, Docket No. U-31364-A (Louisiana Public Service Commission) Order dated May 25, 2012, at 17; *Nexus Communications, Inc. v. Chairman Donna L. Nelson*, et al., Case No. A-12-CA-555-SS, United States District Court for Western District of Texas, Order filed March 26, 2013; *Petition of Nexus Communications, Inc. for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company dba AT&T Texas under FTA Relating to Recovery of Promotional Credit Due*, Docket No. 39028 (Texas Public Utility Commission) Order No. 15 Granting AT&T's Motion for Summary Decision dated April 5, 2012 at 4; (Copies of these decisions are attached hereto as **Exhibit F**).

In *Reiter v. Cooper*, 507 U.S. 258, 113 S.Ct. 1213 (1993), a case relied upon by Flatel in support of its motion, the Supreme Court held that the question of whether a court should proceed immediately to judgment on a motor carrier's complaint without waiting for the Interstate Commerce Commission ("ICC") to rule on the defendant's claim that the tariff rates were unreasonable turns on the facts and equities of each case. In so doing, the Court stated that where a carrier is solvent, the equities favor proceeding to judgment on the principal claim without awaiting the outcome of the unreasonable-rate issue, because the ICC proceeding could produce substantial delay and the tariff rates, until disapproved by the ICC, are legal rates binding on both parties. *Id*. at 270-71. Similarly, here, Flatel has the contractual obligation to pay its bills without regard to its credit disputes; and the equities weigh in favor of permitting AT&T to proceed to judgment on its claims without awaiting the outcome of Flatel's belated attempt to establish that it is entitled to credits. Flatel faces no irreparable harm if it pays AT&T pending the outcome of its credit disputes.

The *Reiter* court also observed that the equities weigh in favor of permitting an immediate judgment where there is a potential insolvency of the defendant. *Id*. Here, Flatel filed with its *pro se* Answer a statement that it was "unable to afford representation". (DE 6). That representation, and Flatel's history of non-payment, establishes the very real threat that AT&T will be prejudiced by having to await the conclusion of the FPSC matter before it can obtain and enforce a Judgment. Flatel should not be allowed to drag on these proceedings without any assurance that it will abide by the ultimate rulings by the FPSC and this court.

AT&T respectfully submits that this action should move forward on AT&T's claims, while the parties simultaneously adjudicate Flatel's credit disputes before the FPSC. Alternatively, to the extent this court determines to stay this action until the FPSC matter is

completed, Flatel should be required to post security for payment of the following amounts to AT&T as a condition of any stay: (1) the difference between the credits sought in the FPSC matter and the amount owed to AT&T; (2) the amounts due in Kentucky, North Carolina, and South Carolina, which will not be addressed by the FPSC; and (3) the amount of the credits sought based upon the application of the wholesale discount rate to the "cash back" credits, as to which Flatel has no likelihood of success based upon rulings in other forums on that issue. If Flatel is granted an unconditional stay, and allowed to continue to hold on to AT&T's money, Flatel will likely continue its pattern of delay without any assurance that it will ultimately abide by the court's and FPSC's rulings.

CONCLUSION

In conclusion, based upon the foregoing, AT&T respectfully requests that the Court deny Flatel's request to stay the proceedings and refer the matter to the Florida Public Service Commission.

Dated: February 11, 2014

Respectfully submitted,

s/Manuel A. Gurdian
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Attorney for Plaintiff
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served on February 11, 2014 via CM/ECF on all counsel or parties of record on the service list below:

s/Manuel A. Gurdian
Manuel A. Gurdian

SERVICE LIST

Stephen A. Smith, Esq.
Pallo, Marks, Hernandez, Gechijian & DeMay, P.A.
4100 RCA Blvd., Suite 100
Palm Beach Gardens, FL 33410
Attorneys for Defendant, FlaTel, Inc.

EXHIBIT A

Dorothy Menasco 110306-TP

From: Lobsang Burgos [lburgos@flatel.net]

Sent: Friday, November 04, 2011 5:56 PM

To: Flatelinc@aol.com; Filings@psc.state.fl.us; Rick.Scott@eog.myflorida.com; Adam Teitzman; Bob Casey; Greg Shafer; Laura King; Alex.Starr@fcc.gov; Julius.Genachowski@fcc.gov; Michael.Copps@fcc.gov; Mignon.Clyburn@fcc.gov; Robert.McDowell@fcc.gov; Tracy.Bridgham@fcc.gov; fccinfo@fcc.gov

Cc: bm1694@att.com; jg1893@att.com; lp5882@att.com; chuck.campbell@cgminc.com; Beth.Murphy@cgminc.com; bryant.peters@cgminc.com; AMatari@flatel.com; ASolar@flatel.com; LBurgos@flatel.com; rgreene@greenelegalgroup.com

Subject: RE: 11-11-02 FPSC Emergency Docket

Attachments: 11-11-02 FPSC Docket and attachments.pdf

Please See attached Docket with all relevant documents included.

Click on the Bookmark Icon (Second icon on the bar located on the left side) to navigate through all the documents.

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Sincerely,
Lobsang Burgos
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From: Flatelinc@aol.com [mailto:Flatelinc@aol.com]
Sent: Friday, November 04, 2011 11:56 AM
To: filings@psc.state.fl.us; Rick.Scott@eog.myflorida.com; ATeitzma@PSC.STATE.FL.US; BCasey@PSC.STATE.FL.US; GShafer@PSC.STATE.FL.US; LKing@PSC.STATE.FL.US; Alex.Starr@fcc.gov; Julius.Genachowski@fcc.gov; Michael.Copps@fcc.gov; Mignon.Clyburn@fcc.gov; Robert.McDowell@fcc.gov; Tracy.Bridgham@fcc.gov; fccinfo@fcc.gov
Cc: bm1694@att.com; jg1893@att.com; lp5882@att.com; chuck.campbell@cgminc.com; Beth.Murphy@cgminc.com; bryant.peters@cgminc.com; AMatari@flatel.com; ASolar@flatel.com; LBurgos@flatel.com; rgreene@greenelegalgroup.com
Subject: 11-11-02 FPSC Emergency Docket

Please see attached...

Regards,
Abby Matari
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November 2, 2011

110306-TP

RE: Emergency Stay of Termination by AT&T

Ladies and Gentlemen of the Florida Public Service Commission,

FLATEL has found it necessary to appeal to the governing parties which exercise regulatory authority over the telecommunications industry and its competitive market oversight. FLATEL respectfully requests the Florida Public Service Commission and the Federal Communications Commission to look into what we believe to be unlawful practice where by AT&T offers immediate relief via Promotions to its End Users without parity to instantly offer the same exact relief to FLATEL's End Users.

It is FLATEL's intent to demonstrate what we believe to be unfair and unlawful practices in direct violation of SEC. 251. [47 U.S.C. 251] INTERCONNECTION of the Act for charges billed by AT&T that should be immediately credited to FLATEL in the same instant fashion that they credit their own retail customers. AT&T has engaged in an unjust and discriminatory practice in connection with its provision of communications services, in violation of SEC 251 (b)(1) Obligations of All Local Exchange Carriers. Each local exchange carrier has the following duties: (1) Resale: The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." and SEC. 201(b). [47 U.S.C. 201] SERVICE AND CHARGES of the Communications Act, which provides that "all practices" for and in connection with communications services "shall be just and reasonable," and "any such practice that is unjust and unreasonable is hereby declared to be **unlawful**.

This is one of many examples of how AT&T offers immediate consumer relief via Promotions to its End Users on the AT&T website (please see attached AT&T website image):

AT&T Q&A: How can I get my Line Connection waived?

AT&T Answer: AT&T residential customers who use our web site to establish new service and order at least 2 calling features **will not be charged** a line connection fee (a savings of up to $46)

In order for FLATEL to compete (with the same exact relief that AT&T offers to its customers), FLATEL's End User should be entitled to the same instant consumer relief. Instead, FLATEL is deliberately billed, overcharged, and forced to pay while waiting 75 days or longer for AT&T to apply these Promotions. (See Exhibit "A") This defies all of the regulations that were put in place to keep the market competitive and to protect the consumer's benefit.

Evidently this is a known disparity due to the fact that all states other than Florida, do not allow this practice. Thus, the issue facing FLATEL would not exist if FLATEL was entitled to similar Promotions from AT&T in Florida. The inequality created by AT&T Florida's policies and procedures regarding the resolution and application of credits coupled with AT&T Florida's interpretation of Section 1.4 must be addressed before any further action is taken in respect of the Suspension and Termination Notice. If not immediately addressed, this action could potentially put FLATEL out of business.

FLATEL has attempted to resolve this matter by negotiations with AT&T but those efforts were not realistic and what I believe to be premeditated strategic actions for many years by AT&T to put us in this position. I believe this hindered any sincere efforts and prolonged a resolution that could have been addressed before the matter escalated beyond reasonable amounts. AT&T has offered no realistic chance for AT&T and FLATEL to reach a compromise. AT&T has positioned FLATEL to continue negotiations without counsel, violating our constitutional right for counsel, and to pay an amount in question that has not been addressed for many years and expected to pay in only a few months. The question remains, why haven't the Promotions been addressed and applied?

In order to support our position and to identify the Promotions resolution issue we speak of, AT&T offered via email as quoted:

"With regard to the promotion items of $24,188.70 approved and awaiting payment status, as well as the disputed items for $80,437.40 (which includes CREX, CREX7, Maintenance, PAMA and LPC) that you mentioned of in your e-mail of October 13, 2011 we're agreeable to "taking them off the table" for now with your acceptance of an extended payment plan." (see email attachment 11-10-14 RE Flatel Payment Terms.pdf)

Also in an email dated September 30, 2011, AT&T stated

"The spreadsheet information that you provided will be helpful in any discussions the parties may have about the items on the spreadsheet. The appropriate AT&T representative will schedule a time to confer with you once payment is received.". (please see attachment 11-9-30 RE Notice of Suspension and Termination.pdf)

FLATEL currently has no past due balance. Therefore an extended payment plan is not an attempt to resolve any monetary issues between AT&T and FLATEL. AT&T has refused to address the overcharges from 2007 to date. We have experienced for many years, much variance concerning these Promotions: True Up, CREX7, TBODW, Long Distance Bundle Promotion, Retail Promotion not to be confused with disputes for Erroneous Billing, Repairs and Toll Block just to name a few.

With reference to the language in the ICA regarding disputes, FLATEL's position is not that there are "disputes" over credits that impact AT&T's demand for payment. FLATEL's position is that the charges AT&T is seeking to collect have accrued over several years based on AT&T's failure to process and apply Promotions under the Communications Act Sec. 251(b)(1). As a result, the charges currently demanded by AT&T represent Promotions that should be set off against the amounts owed to AT&T.

The United States Supreme Court has stated that setoff "allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18 (1995). FLATEL would like the FPSC and the FCC to intervene and assist FLATEL in getting AT&T to reconcile the amount demanded from AT&T after application of Promotions.

We also firmly believe that AT&T is in direct violation of the Telecommunications Act SEC. 252. [47 U.S.C. 252] PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS by giving FLATEL no option but to sign a nonnegotiable Interconnection Agreement (ICA) in which we were forced to waive our rights (please see attached emails), and also allowing AT&T to "legally", per their ICA, demand payment for Promotions **(not disputes)** that would otherwise be instantaneously waived in its entirety for their own End Users.

FLATEL wishes to appeal to the governing parties with respect to:

Florida Statute 364.162, Negotiated prices for interconnection and for the resale of services and facilities; commission rate setting.—

(1) A competitive local exchange Telecommunications Company shall have 60 days from the date it is certificated to negotiate with a local exchange telecommunications company mutually acceptable prices, terms, and conditions of interconnection and for the resale of services and facilities. If a negotiated price is not established after 60 days, either party may petition the commission to establish nondiscriminatory rates, terms, and conditions of interconnection and for the resale of services and facilities. The commission shall have 120 days to make a determination after proceeding as required by subsection (2). Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

(2) In the event that the commission receives a single petition relating to either interconnection or resale of services and facilities, it shall vote, within 120 days following such filing, to set nondiscriminatory rates, terms, and conditions, except that the rates shall not be below cost. If the commission receives one or more petitions relating to both interconnection and resale of services and facilities, the commission shall conduct separate proceedings for each and, within 120 days following such filing, make two separate determinations setting such nondiscriminatory rates, terms, and conditions, except that the rates shall not be below cost.

(3) In setting the local interconnection charge, the commission shall determine that the charge is sufficient to cover the cost of furnishing interconnection.

(4) The commission shall ensure that, if the rate it sets for a service or facility to be resold provides a discount below the tariff rate for such service or facility which appropriately reflects the local exchange telecommunications company's avoidance of the expense and cost of marketing such service or facility to retail customers, such rate must not be below cost. The commission shall also ensure that this rate is not set so high that it would serve as a barrier to competition.

This is an action to cure overcharges by AT&T for very serious damages as a result of AT&T's unreasonable practice in violation of the Communications Act of 1934. FLATEL is exercising any grounds to demand a stay to AT&T's actions of suspension and termination scheduled for November 7, 2011 and to be reinstated until these matters can be addressed, accounted for, and applied accordingly so that this matter can be properly escalated pursuant to the relevant provisions of the ICA operating under the laws set forth in the Telecommunication Act. FLATEL has been providing quality telecommunication services to the consumer for over 15 years and we have always been in compliance. Please do not disregard our appeal…

Regards,

Mr. Abby Matari
CEO / Corporate Development

Exhibit "A"

There are various issues and practices AT&T has implemented that severely impact the way FLATEL can do business in Florida. From the way they process the promotions to known issues they have yet to credit, below is a list of major issues AT&T is aware of but yet to make any attempt to resolve.

1.) In the AT&T Southeast region (formerly Bellsouth), FLATEL is forced to wait a minimum of 60 days for credit of the promotion to impact the bill. In all other AT&T regions and the AT&T Retail side, the effect of the impact of the promotion is on the first bill. Instead, the process for FLATEL, is as follows:

- Receive the AT&T invoice on the designated bill day – depending on the day the new customer signs on, FLATEL will receive the bill for that customer up to 28 or 30 days later
- File a promotion request with the AT&T Promotions group
- Await acknowledgment of the promotion request – this can take 2-3 business days
- Await resolution of the promotion request – this can take 7-10 business days from the acknowledgement date
- If the promotion request is approved, FLATEL could wait up to 30 days to see the credit on the subsequent AT&T invoice

On average, for an approved promotion, the time it takes for FLATEL to receive the benefit of the promotion is 75 days from the day the customer signed up.

If the promotion request is denied by AT&T and FLATEL does not agree, FLATEL has the ability to send a billing dispute to AT&T requesting they reinvestigate the promotion with the additional information provided. Since 2008 Flatel has **$326,924.45** in promotion requests that fall into this category that have yet to be addressed by AT&T. The submission date of these billing disputes dates back to **1/19/2009.** (*Please see the "Audit Escalate – ACK" attachment for claim details.)*

2.) "PAMA7/PAMA8 Issue" - At the end of 2008, Bellsouth introduced two new local service packages to replace their three existing local service packages.

The old packages were:

PAMA6 – known as the "2Pack" and included Caller ID + Call Waiting

PAMA5 – known as the "Preferred Pack" and included 3-5 features

VSB – known as "Complete Choice" and included 6+ features

Bellsouth retired the PAMA5 and PAMA6 packages on 1/27/2009 and the VSB on 2/19/2009.

The new (and current) packages are:

PAMA7 – known as "Complete Choice Basic" and includes Caller Id + Call Waiting

PAMA8 – known as "Complete Choice Enhance" and is the full feature option including 3+ features.

Bellsouth introduced both packages on 11/17/2008.

In December 2008 Bellsouth updated the tariff and accessible letters to include those "who subscribe to Complete Choice Basic (or any other package or service that contains those elements)". This language update included both PAMA7 and PAMA8 subscribers. (*See attached labeled "pama7pama8 LCCW.pdf".)*

In January 2009, we noticed a sharp decrease in the approval rating of the Line Connection Charge Waiver and the Cash back–Acquisition promotion (*see the Order Charge Promotions attachment and Cash Back Acquisitions attachment*). We had been accustomed to seeing a 95% approval however in December it dipped to 35% and then 6% in January. We sampled the lines that were denied and they all had either the PAMA7 or PAMAM8 package. Our theory was that the new PAMA7 and PAMA8 packages that AT&T is offering had not been added to AT&T's promotion logic and we immediately brought this to the attention of Nicole Bracy and Ad Allen in the Bellsouth promotions group.

We were told by Bellsouth in February that they did "show there is an issue with PAMA 7 and 8 with the Cash back Acquisition and LCCW promotions" and IT was working to fix the issue. In the meantime we should continue to file the promotions as usual and anything improperly denied would be credited once the fix was in place. We continued to see denials of these promotions until Bellsouth implemented the new logic in April 2009. We were assured that Bellsouth would reevaluate the promotions that were denied incorrectly because of their logic error; however that re-evaluation process has yet to take place. FLATEL has **$51,306.83** in this category.

3.) AT&T's attempted to lower the value of the $50 Cash Back on 9/1/2009. (*See Win-back Cash Back Promotion – FL attachment)* AT&T attempted to lower the value from $50 to $6.07 in Florida. At no point did AT&T consult with the Florida PSC or any other PSC to notify them of this dramatic change in business. The rate reduction was revoked on 11/4/2009 but in that short amount of time AT&T short paid Flatel **$6,620.18** by implementing the reduced rate prior to 9/1/2009.

Also AT&T should be required to credit additionally any lines that were paid at the lesser amount. For FLATEL this amount is **$38,139.63.** (*Please see the "9-1 formula" attachment for claim details)*

4.) Retail Promotion Legal Action – AT&T has been reducing cash-back credits by the amount of the wholesale discount in each state. For example, if the AT&T promotion is $50 and the Florida wholesale discount is 21.83%, AT&T has been crediting Florida resellers for $39.08 rather than the full $50. CGM has a case pending in federal court in North Carolina seeking a ruling on the very item that AT&T is demanding payment on in the area of Retail claims. This issue is also in front of other commissions but has not been ruled upon. We believe this is in direct violation of the Bellsouth vs. Sanford decision of 2007 that states that promotions should not be discounted. FLATEL has **$353,579.33** in this category. (*Please see "Retail Promotion" attachment for claim details.)*

5.) AT&T Promotions Denied without details – From 2006 to 2008, AT&T has rejected legitimately requested promotional credits, while has not provided any reason or detail for the rejection. This amount currently totals **$60,209.59.** (*Please see the "Provider Review" attachment)*

EXHIBIT B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for emergency relief and complaint of FLATEL, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida to resolve interconnection agreement dispute.	DOCKET NO. 110306-TP ORDER NO. PSC-12-0085-FOF-TP ISSUED: February 24, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER GRANTING MOTION TO DISMISS WITHOUT PREJUDICE

BY THE COMMISSION:

Background

On November 7, 2011, FLATEL filed its petition for an emergency stay against BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida) disconnection of its services for nonconformance with the interconnection agreement (ICA) payment terms. The ICA requires timely payment of billed amounts including disputed amounts. FLATEL alleged that it is entitled to promotion credits, and, therefore, its nonpayment of services billed was for outstanding promotion credits. FLATEL's services have been disconnected.[1]

In its petition for an emergency stay, FLATEL alleged that (1) the attempted resolution of the dispute with AT&T Florida through negotiations was unsuccessful; (2) currently, it has no past due balance and AT&T Florida's offered extension payment plan was not an attempt to resolve any monetary issues between AT&T Florida and FLATEL; (3) AT&T Florida offered immediate relief for promotions to its end users but not the same instant offer to FLATEL's end users; (4) AT&T Florida positioned FLATEL to negotiate without counsel; and (5) AT&T Florida refused to address overcharges from 2007 to date.

On November 28, 2011, AT&T Florida filed its motion to dismiss FLATEL's petition. AT&T Florida asserted that FLATEL's petition failed as a matter of law as it ignored the "plain and unambiguous provision" in the ICA that requires timely payment of bills including disputed amounts.

[1] FLATEL began transferring its end-user customers from its ICA with AT&T Florida to its commercial agreement with AT&T Florida prior to the disconnection of its resale services.

On December 12, 2011, FLATEL filed a request for a 30-day extension to respond to AT&T Florida's dismissal motion. On December 14, 2011, AT&T Florida filed a response opposing FLATEL's request for an extension. FLATEL was granted 5 days to file its opposition. On December 20, 2011, Commission staff held an informal meeting with the parties.

On December 21, 2011, FLATEL filed its opposition to the dismissal motion. On December 29, 2011, AT&T Florida filed its Response to FLATEL's Opposition. On January 11, 2012, FLATEL filed a response to AT&T Florida's December 29, 2011 filing. On January 18, 2012, AT&T Florida filed its response to FLATEL's January 11, 2012 filing.

We have jurisdiction over this subject matter pursuant to Section 364.16, Florida Statutes (F.S.).

Discussion

Standards of Review

A. Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a petition.[2] In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the petitioner, the petition still fails to state a cause of action for which relief may be granted.[3] When making this determination, only the petition and documents attached to or incorporated therein by reference can be reviewed and all reasonable inferences drawn from the petition must be made in favor of the petitioner.[4] Where agreement terms are incorporated into the petition by reference and are the basis of the petition, the agreement can be reviewed in determining the "nature of the alleged claim."[5] A court may not look beyond the four corners of the petition in considering its legal sufficiency.[6] However, the attachment of a document to the petition that conclusively negates the petition is sufficient grounds for dismissal.[7]

B. Emergency Stay

Pursuant to Section 364.015, F.S., violations of our orders or rules, in connection with the impairment of a telecommunications company's operations or service, constitute irreparable harm for which there is no adequate remedy at law, and for which relief can be sought in the circuit court. To grant a petition for an emergency stay or injunctive relief, we must have the authority to grant the requested relief. In Order No. PSC-11-0180-PCO-TP, issued on March 30,

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[2] Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).
[3] *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).
[4] Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).
[5] See Veal v. Voyager Prop. & Cas. Ins. Co., 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011).
[6] Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000)(citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).
[7] See Magnum Capital, LLC v. Carter & Assoc., LLC, 905 So. 2d 220, 221 (Fla. 1st DCA 2005)(citing Franz Tractor Co. v. J.I. Case Co., 566 So. 2d 524, 526 (Fla. 2d DCA 1990) and noting that "if documents are attached to a complaint and conclusively negate a claim, the pleadings can be dismissed").

2011, we reiterate our consistent holding that this Commission lacks authority to grant injunctive relief.[8]

Additionally, the ICA between AT&T Florida and FLATEL provides that disputes relating to the interpretation or the implementation of the agreement can be resolved by the regulating commission. The ICA defines the regulating commission as the appropriate regulatory agency in each state of AT&T's nine-state region. We are the regulating commission for Florida; therefore, we have jurisdiction to resolve disputes relating to the interpretation or implemention of the agreement. Additionally, pursuant to Section 364.16(3), F.S., we may, upon request, arbitrate, and enforce interconnection agreements and may exercise our jurisdiction to resolve disputes among carriers regarding, but not limited to, local interconnections and reciprocal compensation. Although Section 364.162, F.S., was repealed on July 1, 2011, we retain jurisdiction over disputes regarding interconnection agreements pursuant to Section 364.16, F.S.[9]

AT&T Florida's Motion to Dismiss

AT&T Florida asserted that FLATEL's petition should be dismissed because:

- FLATEL's petition failed as a matter of law as AT&T Florida's action conforms to the "plain and unambiguous provisions" of the agreement between the parties in which FLATEL agreed to make payments for all services billed including disputed amounts.

- This Commission does not have jurisdiction to grant injunctions and FLATEL's petition failed to meet well established pleading requirements, as it is too vague as to both operative facts and laws for this Commission to grant the relief sought.

- FLATEL failed to establish that its rights in negotiating and signing the agreement were not sufficiently protected by federal and state statutes and rules, and FLATEL's statement that it was forced to sign the agreement without counsel is meritless. This Commission approved the agreement, and this Commission was afforded the opportunity to reject the agreement if it was inconsistent with the public's interest.

[8] See Order No. PSC-11-0180-PCO-TP, issued on March 30, 2011, in Docket No. 110071-TP, In re: Emergency Complaint of Express Phone Service, Inc., against Bellsouth Telecommunications, Inc., d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement (noting that a petition for an emergency stay is akin to an petition for an injunctive relief and we lack authority to grant injunctive relief).

[9] See Order No. PSC-11-0420-PCO-TP, issued on September 28, 2011, in Docket No. 090538-TP, In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et. al. (stating that "[t]he legislation has not modified our exclusive jurisdiction over wholesale carrier-to-carrier disputes, and our obligation to ensure fair and effective competition among telecommunications service providers; therefore, we still retain jurisdiction to oversee fair and effective competition").

- FLATEL cited a repealed section of Chapter 364, F.S., in its petition as Section 364.162, F.S., was repealed effective July 1, 2011, more than two months before AT&T Florida began its collection efforts for the outstanding bills.

- AT&T Florida began disconnecting FLATEL service on November 8, 2011, and disconnection has been completed.

FLATEL's Response in Opposition

FLATEL asserted that our role is to protect the public's interest and that AT&T Florida is not providing services in accordance with the Telecommunications Act as evidenced by:

- The ICA was non-negotiable and unfair, FLATEL was forced to sign the amendments because it had an established client base that needed service, and FLATEL is not arguing the terms of the ICA but is attempting to resolve billing disputes with AT&T Florida.

- FLATEL paid AT&T Florida every month for 15 years and is not requesting an alteration of the ICA terms but is challenging AT&T Florida's practice of not granting instant credits to FLATEL end users in parity with AT&T Florida's end users.

- The promotional offers are not disputes and the payment provision of the ICA is not relevant. FLATEL defines disputed amounts as overcharges and stated that AT&T Florida should reinstate its account.

Analysis

Our rules do not contemplate the filing of a response to a Response in Opposition to a dismissal motion. We consider such pleadings as inappropriate pleadings, and the arguments raised are not considered.[10] Here, however, FLATEL's opposition to AT&T Florida's dismissal motion raised new issues not mentioned in FLATEL's initial petition. On December 29, 2011, AT&T Florida filed a response to FLATEL's opposition but AT&T Florida's response merely restated its arguments in its dismissal motion. Both parties submitted additional pleadings that were not contemplated by our rules. Since we consider these pleadings inappropriate pleadings, we did not consider these pleadings. These pleadings are also irrelevant as we lack jurisdiction to grant the requested injunction.

We have determined that FLATEL failed to identify the violation of any statute, rule, order, or the ICA sufficient to constitute a cause of action for an emergency stay. Additionally,

[10] See Order No. PSC-03-0525-FOF-TP, issued on April 21, 2003, in Docket No. 020919-TP, In re: Request for arbitration concerning complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for enforcement of interconnection agreements with BellSouth Telecommunications, Inc. (finding that AT&T's Response to BellSouth's Response was an inappropriate pleading not contemplated by our rules or the uniform rules, and thus we did not consider the arguments raised in AT&T's Response to BellSouth's Response).

we lack jurisdiction to grant emergency stays and FLATEL's services have been disconnected, which makes its petition moot. Therefore, FLATEL's petition shall be dismissed.

Further, FLATEL's petition shall be dismissed as, even if taken as true, it failed to state a cause of action. FLATEL's allegations regarding AT&T Florida's disconnection of services is insufficient to constitute a cause of action, as FLATEL failed to allege any violation of any statute, rule, order, or the ICA in connection with the discontinuation of services.[11] We articulated in Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, that carriers can enforce ICAs including the disconnection of services for violation of the ICAs where the payment terms are clear and unambiguous.[12] Here, the ICA provides that FLATEL should make payments for services provided by AT&T Florida including disputed charges on or before the next bill date.[13] The ICA also provides that services can be discontinued for nonpayment of bills.[14] FLATEL's allegations failed to demonstrate that AT&T Florida violated a statute, rule, or order, or that AT&T Florida's disconnection of FLATEL's services was not in accordance with the ICA. Therefore, FLATEL failed to state a cause of action for the requested relief of an emergency stay.

Likewise, FLATEL's statement that the parties failed attempt to resolve the matter through negotiations does not constitute a cause of action because the statement fails to demonstrate the violation of a statute, rule, or order. FLATEL's allegation that AT&T Florida's offered extended payment plan was not an attempt to resolve any monetary issues also failed to demonstrate a violation of a statute, rule, or order.

FLATEL's statement that the disputed balance includes promotions that should be offset against amounts it owes to AT&T Florida is not a cause of action as it relates to granting an emergency stay. The ICA requires that all services billed should be paid including disputed amounts, and FLATEL's petition is for an emergency stay to prevent disconnection of its service for nonpayment of bills. Therefore, FLATEL's assertion regarding the promotions failed to satisfy the requirements for a cause of action for an emergency stay.

Moreover, FLATEL filed its petition on November 7, 2011, citing Section 364.162, F.S., as the statutory authority for the requested emergency stay. The Legislature repealed Section 364.162, F.S., effective July 1, 2011. FLATEL's services have been disconnected; therefore,

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[11] See Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In re: Complaint and petition of John Charles Heekn against Florida Power & Light Co., (noting that a determination of a petition's cause of action requires examining the substantive law elements and stating that the improper allegation of the "elements of the cause of action that seeks affirmative relief" is sufficient grounds for dismissal, citing Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957)).

[12] See Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, in Docket No. 100021-TP, In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida (we issued a procedural order requesting that LifeConnex post a bond for the $1.4 Million owing to AT&T Florida and requesting that AT&T Florida postpone its intended disconnection. We clarified that the order was not an equitable remedy or an injunction, and that AT&T Florida could enforce the ICA for nonpayment on a going forward basis including disconnection of services for nonpayment as the ICA provided that LifeConnex was required to make timely payments including disputed amounts).

[13] See ICA, Attach. 7, Sec. 1.4.

[14] See ICA Attach. 7, Sec. 1.5.

FLATEL's petition for an emergency stay is moot. Finally, FLATEL sought an emergency stay, and we interpret FLATEL's request as akin to a request for injunctive relief. Although this Commission may, upon request, arbitrate and enforce interconnection agreements and have jurisdiction to resolve disputes among carriers, this Commission has consistently held that we have no authority to grant injunctive relief.[15] Therefore, we find it appropriate to dismiss FLATEL's petition.

Section 120.569(2)(c), F.S., provides, in part, that the dismissal of a petition should be without prejudice to petitioner's filing a timely amended petition curing the defect. We find it appropriate to dismiss FLATEL's petition without prejudice, and FLATEL may file an amended petition.

As mentioned above, Section 364.16(3), F.S., provides in part that this Commission may, upon request, arbitrate and enforce interconnection agreements and has jurisdiction to resolve disputes among carriers, including but not limited to, local interconnection and reciprocal compensation. FLATEL petitioned for an emergency stay and did not request the resolution of any promotional credit disputes. Should FLATEL choose to file an amended petition, the petition shall conform to the pleading requirements of Rules 25-22.036, F.A.C., and 28-106.201, F.A.C., and identify all disputes for which FLATEL requires resolution.

We find that FLATEL's petition is moot and that we lack authority to grant the requested injunctive relief. Therefore, we find it appropriate to dismiss FLATEL's petition, and the dismissal shall be without prejudice.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Motion to Dismiss FLATEL's petition is hereby granted, without prejudice. It is further

ORDER that this docket shall be closed.

[15] See Order No. PSC-11-0180-PCO-TP, issued on March 30, 2011, in Docket No. 110071-TP, In re: Emergency Complaint of Express Phone Service, Inc., against Bellsouth Telecommunications, Inc., d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement.

By ORDER of the Florida Public Service Commission this 24th day of February, 2012.

ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

PER

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT C

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.	DOCKET NO. 100021-TP ORDER NO. PSC-10-0457-PCO-TP ISSUED: July 16, 2010

The following Commissioners participated in the disposition of this matter:

NANCY ARGENZIANO, Chairman
LISA POLAK EDGAR
NATHAN A. SKOP

ORDER GRANTING LIFECONNEX TELECOM, LLC'S REQUEST FOR EMERGENCY RELIEF WITH CONDITIONS

BY THE COMMISSION:

CASE BACKGROUND

On January 8, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T") filed a Complaint and Petition for Relief ("Complaint") against LifeConnex Telecom, LLC, f/k/a Swiftel, LLC ("LifeConnex") seeking resolution of billing disputes between LifeConnex and AT&T; determination of the amount LifeConnex owes AT&T under the parties' Interconnection Agreement ("ICA"), and requiring LifeConnex to pay that amount to AT&T. In summary, AT&T alleges that LifeConnex purchases telecommunications services from AT&T for resale to end use consumers. Under the terms of the ICA and federal law, LifeConnex is authorized to apply certain discounts or promotional credits which AT&T applies to its own customers. AT&T alleges that LifeConnex improperly calculates the amount of discounts or credits it is entitled to. AT&T also alleges that LifeConnex fails to pay disputed amounts owed to AT&T, as required by the ICA, and rather deducts the amounts in dispute from its payments, in violation of the terms of the ICA.

On February 25, 2010, LifeConnex filed its Answer, Affirmative Defenses, and Counterclaims ("Answer") to AT&T's Complaint. In its Answer, LifeConnex alleges that it is entitled under federal law to the same discounts and promotional credits AT&T offers its own retail customers, and as a result, AT&T in fact owes significant sums to LifeConnex, which sums AT&T refuses to pay. LifeConnex raises a number of affirmative defenses and counterclaims. In its Answer, LifeConnex also suggests that we should either dismiss or hold this matter in abeyance pending the results of similar lawsuits pending in Federal court and a Petition pending at the Federal Communications Commission.

After a number of procedural motions, on May 13, 2010, the parties filed a Joint Motion on Procedural Issues, which was followed on June 15, 2010, by a Joint Motion on Procedural

Schedule (the "Joint Motions"). In the Joint Motions, the parties requested this matter be held in abeyance pending the outcomes of similar suits proceeding to hearing in Alabama, Louisiana, North Carolina, and South Carolina. The Joint Motions were granted by Order No. PSC-10-0402-PCO-TP, issued June 18, 2010, ("Abeyance Order"), which stated in part:

> Having reviewed the Joint Motions, I will hold these two Dockets in abeyance pending either resolution of the cases in the states set forth above or the filing of a persuasive motion to resume the dockets. Upon resumption of the dockets, I will consider motions from the parties which take into account intervening events and address both the appropriate scope of the proceedings and the appropriate posture of the proceedings with respect to consolidation. Upon resumption of the Dockets, the parties will be expected to withdraw all moot or superseded motions that are currently pending before this Commission but held in abeyance pursuant to this Order.

On June 21, 2010, AT&T filed a "Notice of Commencement of Treatment Pursuant to Current Interconnection Agreement" ("Notice of Commencement of Treatment"), wherein AT&T notified us that it had sent LifeConnex a letter, informing LifeConnex that unless it paid AT&T all past due balances (the balances at issue in this docket), "AT&T would suspend, discontinue, and/or terminate LifeConnex's service in Florida...." In the letter to LifeConnex, AT&T stated that if a partial payment was not made by July 6, 2010, AT&T would suspend LifeConnex's ability to order new services or make changes to existing lines; and if all past due balances were not paid by July 21, 2010, AT&T would take further action, including discontinuance of service to LifeConnex (and therefore to LifeConnex's end user customers) and/or termination of the ICA with LifeConnex. In the Notice of Commencement of Treatment, AT&T states that suspension, discontinuance, and/or termination are actions authorized by the parties' ICA, and that specific language in Section 1.4 of Attachment 7 to the ICA states "LifeConnex shall make payment to AT&T for all services billed including disputed amounts." AT&T subsequently informed our staff that it had extended the July 6, 2010, suspension date to July 13, 2010.

On July 1, 2010, LifeConnex filed a Request for Emergency Relief ("Emergency Request"), requesting that we issue an order "prohibiting AT&T from suspending, discontinuing, terminating, or otherwise disrupting LifeConnex's service in Florida pending resolution of the disputed matters in this docket." In the Emergency Request, LifeConnex alleges that it is currently providing telecommunications service to over 2,500 Florida customers, the majority of whom are low income, residential customers, through resale of AT&T's facilities. LifeConnex asserts that it is entitled to receive from AT&T the same credits and promotional discounts that AT&T gives to its own retail customers, and that LifeConnex has hired a private firm, Lost Key Telecom, Inc., to keep track of the credits. LifeConnex asserts that it disputes AT&T's claims in AT&T's Complaint filed in this docket, and has agreed with AT&T to the Joint Motions on Procedure and Scheduling.

In the Emergency Request, LifeConnex asks us to prevent AT&T from disrupting LifeConnex's service, including the ordering of new services. LifeConnex states that the parties agreed, and we ordered, that this proceeding would be held in abeyance until proceedings in

other states are resolved, at which time the instant Florida proceeding may be revived and the matters in dispute resolved. LifeConnex asserts that AT&T's Notice of Commencement of Treatment is contrary to the letter and spirit of the parties' agreement and the Order.

In its Response in Opposition to LifeConnex's Request for Emergency Relief ("Response in Opposition"), filed July 6, 2010, AT&T states that the ICA was approved by operation of law on December 27, 2007, and that the terms of the ICA thus constitute a binding contract between the parties, which we are obligated to enforce under state and federal law. AT&T states that Sections 1.4 and 1.4.1 of Attachment 7 to the ICA require LifeConnex to make payments of all amounts billed, including disputed amounts, on or before the billing due date. AT&T denies that it will owe LifeConnex any amounts at the conclusion of this case. AT&T further alleges that the plain language of the Joint Motions and the Abeyance Order make clear AT&T's Notice of Commencement of Treatment is not barred in any way, and in fact support AT&T's position that LifeConnex must comply with the ICA during the pendency of this dispute. AT&T further argues that AT&T's past conduct in allowing LifeConnex to deduct disputed amounts before paying its bills in no way constitutes a waiver of AT&T's right to enforce the terms of the ICA at this point in time. Finally, AT&T argues that we are without authority to issue injunctive relief, and even were we to have such authority, the facts in this case would not support such extraordinary relief.

Upon receipt of LifeConnex's July 1, 2010, Emergency Request, on July 2, 2010, our staff made contact with both AT&T and LifeConnex. Our staff specifically requested AT&T extend the disconnect date from July 21, 2010 to August 3, 2010, to enable our staff to bring a recommendation to us prior to AT&T taking action. Our staff reiterated this request the following week. After receiving no commitment from AT&T, our staff scheduled a status meeting/conference call on July 9, 2010, with all parties participating. Our staff specifically asked both parties about the status of negotiations between the parties to continue service to LifeConnex after the July 21, 2010, date; the parties' plans for LifeConnex's end use customers if the parties could not reach an agreement and AT&T discontinued service to LifeConnex; and whether AT&T would agree to extend the discontinuance date until August 3, 2010, in order to allow us to hear and consider the Emergency Request at a regularly scheduled Agenda Conference. Our staff was informed that the parties, while continuing to negotiate, did not appear to be close to any kind of agreement regarding continued service to LifeConnex. AT&T's attorneys participating in the status call indicated they had not been authorized to extend the discontinuance deadline until August 3, 2010. Finally, AT&T further indicated that LifeConnex's end-use customers were LifeConnex's, and it was the responsibility of LifeConnex to notify its customers regarding the potential discontinuance of service and assist its customers in finding alternative telecommunications services.[1]

As a result of the failure of the parties to indicate any firm commitment to LifeConnex's end user customers; the apparently negative outlook for a successful resolution to this dispute prior to the July 21, 2010, discontinuance deadline; and the possibly severe effects that discontinuance could have on over 2,500 mostly lifeline pre-paid consumers in this state, our

[1] AT&T did point out that the discontinuance would result in the access lines remaining "warm;" that is, LifeConnex customers would still have access to 911 emergency service calls even though their phones have no dial-tone.

staff determined that we should address LifeConnex's Emergency Request prior to the July 21, 2010, discontinuance deadline. Therefore, on July 12, 2010, our staff filed an Emergency Recommendation for the July 13, 2010, regularly scheduled Agenda Conference.

We have jurisdiction pursuant to 47 U.S.C. Section 252 of the Telecommunications Act of 1996 (the Act), Sections 120.80(13)(d)and (e), 364.01 and 364.161, Florida Statutes (F.S.) and Rules 25-22.036 and 28-106.201, Florida Administrative Code (F.A.C.).

REQUEST FOR EMERGENCY RELIEF

In its Request for Emergency Relief, LifeConnex "asks that the Commission order AT&T to take no actions to suspend or otherwise interfere with LifeConnex's service to its customers pending a final determination by the Commission in the Consolidated Phase of this Docket."

LifeConnex argues three bases for its requested relief: our general authority to protect the public interest, ensure fair competition, and prevent anti-competitive behavior under Section 364.01, F.S.; the Order holding the docket in abeyance; and the terms of the parties' Interconnection Agreement itself.

General Jurisdiction under Section 364.01, F.S.

LifeConnex asserts that we should take action to prevent AT&T from suspending, discontinuing and/or terminating LifeConnex under our general jurisdiction contained in Section 364.01, F.S.[2] We do not interpret Section 364.01, F.S., as authority to grant the specific relief requested by LifeConnex under these facts.

We agree that we have authority to promote competition and to prevent anti-competitive behavior. But, we also find this authority goes both ways. In this fact pattern, the parties' conduct is governed by an ICA with clear terms. The Federal and Florida statutory schemes regarding telecommunications services allow parties to enter into binding contracts, and expect to have the terms of those contracts enforced bilaterally. We do not find our authority under Section 364.01, F.S., is intended to provide emergency relief when one party seeks to be relieved of its obligations under a negotiated contract in the absence of extraordinary and compelling circumstances.

If LifeConnex's fundamental concern in this docket is AT&T's delay in processing discounts and promotional credits, the ICA provides LifeConnex options for relief – to file a

[2] LifeConnex does not cite a specific subsection to Section 364.01 in support of its argument. Upon review, we find the following three subsections would be implicated in this matter: our jurisdiction to "[p]rotect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices" 364.01(4)(a); "[e]ncourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services" 364.01(4)(b); and "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint" 364.01(4)(g).

complaint/petition before us to determine the treatment of disputed amounts. LifeConnex did not avail itself of this remedy, instead resorting to self help. A Petition to determine the correct treatment of discounts and credits is now pending before us, and whenever the parties seek to reinstate the proceeding, we will determine these matters through the hearing process. Given this fact pattern, we do not find that allowing AT&T to take action clearly contemplated by the ICA rises to the level of "anti-competitive" activity or denies "fair competition" sufficient to invoke our general authority under Section 364.01, F.S.

Order Holding Dockets in Abeyance

We do not find the Order Holding Dockets In Abeyance bars this action, and language contained in the Joint Motions themselves supports AT&T's position that the Notice of Commencement of Treatment may proceed independently of the underlying dispute. In the Joint Motion on Issues, the parties specifically included the following language:

> 5. Nothing in this Joint Motion is intended, or shall be construed, as a waiver of any Party's pending motions, claims, counterclaims or defenses or any Party's right to amend and supplement its claims, counterclaims, or other pleadings, or to pursue any issue, claim, or counterclaim that is not addressed in the Consolidated Phase in each Party's respective docket, either concurrent with or following the Consolidated Phase, or to seek such other relief as a change in circumstances may warrant.

We find the plain language of the parties' Joint Motion makes clear that the abeyance does not serve as any type of bar to AT&T's Notice of Commencement of Treatment. LifeConnex was a signatory to the Joint Motion, and will not be allowed to argue that its agreed upon language should somehow not be applied, and should instead be either ignored or re-interpreted as a bar to further actions. We therefore find that the terms of the Joint Motion and the Order are controlling, and mean what they say – that the Joint Motions and the Order Granting Abeyance clearly contemplated that neither party was precluded from seeking additional relief.

In addition, we find that the purpose of the underlying "dispute docket" held in abeyance is fundamentally retroactive; that is, it deals with past due sums currently in dispute. We acknowledge that, absent any additional actions, our final decision on the dispute will impact the parties' future relationship, but the majority of the docket deals with prior billings.

On the other hand, the instant Notice of Commencement of Treatment is fundamentally prospective in nature: AT&T is attempting to limit on-going exposure to what could possibly turn out to be unpaid bills for actual services rendered.[3] We find this to be reasonable on AT&T's part. Otherwise, unpaid sums, if any, could continue to accrue for months, and in the

[3] This determination is based solely on the pleadings to date. It is clear that there is a dispute about whether any sums are due to either party and the amount of those sums. This dispute will only be resolved following an evidentiary hearing and our decision based on the final record. As such, we may substantially depart from our current findings regarding the terms of the ICA and the parties' responsibilities as the record is further developed.

event we find against LifeConnex, the pleadings reveal no clear evidence that LifeConnex could or would make good on those bills.

Interconnection Agreement

As a third basis for its requested emergency relief, LifeConnex invokes the parties' Interconnection Agreement. Both parties agree that we have authority under state and federal law to enforce the terms of the Interconnection Agreement. The parties also agree that the terms of the ICA control the relationship between the parties. We do find, however, that the plain language in the ICA entitles LifeConnex to the relief it seeks. That is, with respect to the matter before us today, AT&T is entitled under the plain terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment; and that AT&T has not waived its right to take such action.

As noted by AT&T, Sections 1.4 and 1.4.1 of Attachment 7 to the parties' Commission-approved ICA state:

> 1.4 Payment Responsibility. Payment of all charges will be the responsibility of Swiftel, LLC. Swiftel, LLC shall pay invoices by utilizing wire transfer services or automatic clearing house services. Swiftel, LLC shall make payment to AT&T for all services billed **including disputed amounts.** AT&T will not become involved in billing disputes that may arise between Swiftel, LLC and Swiftel, LLC's customer. (Emphasis added.)
>
> 1.4.1 Payment Due. Payment for services provided by AT&T, **including disputed charges**, is due on or before the next bill date. Information required to apply payments must accompany the payment. The information must notify AT&T of Billing Account Numbers (BAN) paid; invoices paid and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when the payment and Remittance Information are received by AT&T. If the Remittance Information is not received with payment, AT&T will be unable to apply amounts paid to Swiftel, LLC's accounts. In such event, AT&T shall hold such funds until the Remittance Information is received. If AT&T does not receive the Remittance Information by the payment due date for any account(s), late payment charges shall apply. (Emphasis added.)

We find the plain language of these provisions is clear that while LifeConnex can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA, subject to resolution through the ICA's dispute provisions, or ultimately, our determination. As a result of this language, we find the ICA does not support LifeConnex's Emergency Request.

Exclusive of LifeConnex's arguments regarding the effect of the Joint Motions and Abeyance Order, as well as LifeConnex's waiver argument, discussed below, we also find the plain language of the ICA supports AT&T's right to take the type of action outlined in the Notice of Commencement of Treatment. The language of Sections 1.5 through 1.5.5 of Attachment 7 to the parties' ICA clearly lays out the procedures AT&T is entitled to take in the event of

LifeConnex's non-compliance with the ICA, including billing provisions. Given our finding (based on the pleadings to date and not prejudging facts that may be developed at hearing) that LifeConnex is not currently complying with the terms of the ICA, and the ICA's language setting forth AT&T's rights, we find no reason to conclude the language of the ICA prohibits the actions set forth in AT&T's Notice of Commencement of Treatment.

LifeConnex's final argument is that AT&T's apparent prior practice of allowing LifeConnex to deduct disputed amounts from payments constitutes a waiver by AT&T of the suspension/discontinuance/termination provisions of the ICA. This is not the case. As pointed out by AT&T in its Response in Opposition, Section 17 of the ICA's General Terms and Conditions states:

> 17 Non-Waiver A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

We find this "boilerplate" contract term is unambiguous, and clearly allows AT&T the right to fail to enforce provisions in the ICA on a flexible basis, without then being required to waive enforcement of those provisions in the future.

Furthermore, in addition to the plain language of the non-waiver provision, we find the general legal concept of "waiver" is not implicated on these facts. As stated in one legal treatise:

> [i]n the case of a true waiver implied in fact from conduct, the intent to waive must be clearly manifested or the conduct must be such that an intent to waive may reasonably be inferred...rather, in the absence of an express declaration manifesting the intent not to claim the right allegedly waived, there must be a clear, unequivocal, and decisive act of the party who is claimed to have waived its rights, so consistent with an intention to waive that no other reasonable explanation is possible. 13 Williston on Contracts Section 39:28 (4th edition.)

Under these facts, we cannot determine that AT&T's conduct in failing to strictly enforce the terms of the ICA with respect to billing is so unequivocal or decisive that it can be decided that AT&T, contrary to the ICA's non-waiver language, clearly demonstrated the intent to permanently waive those provisions.

We are aware of the legal concept of "equitable estoppel," which is so similar to the legal concept of waiver that it should be discussed, despite not being raised by either of the parties' pleadings. As we stated in Order No. PSC-01-2515-FOF-EI, issued December 24, 2001, in Docket No. 950379-EI, Re: Tampa Electric Company:

> In order to demonstrate equitable estoppel, the following elements must be shown:
> 1) a representation as to a material fact that is contrary to a position asserted later;

> 2) reliance on that representation; and 3) a detrimental change in position to the party claiming estoppel caused by reliance on the representation. *State Department of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981). *See also United Contractors Inc. v. United Construction Corp.*, 187 So. 2d 695 (Fla. 2d DCA 1966). Estoppel operates to prevent the benefitting party from repudiating the accompanying or resulting obligation. *Doyle v. Tutan*, 110 So. 2d 42, 47 (Fla. 3d DCA 1959).

We find that LifeConnex has not demonstrated that AT&T either made a representation as to a material fact contrary to a later position, nor that LifeConnex changed its position to its detriment. In fact, if anything, LifeConnex has been consistent in its conduct of not promptly paying its bills as required by the ICA, and rather acted contrary to those terms, and benefited from its conduct, to the extent that there is now over $1.4 Million in dispute in Florida. We therefore decide that LifeConnex's arguments regarding waiver fail.

Grant of Relief With Conditions

We are troubled by AT&T's insistence on strictly enforcing the terms of the ICA at this point in time. We find the facts developed to date indicate that AT&T has allowed LifeConnex to continue service for several years, despite the fact that LifeConnex did not follow the terms of Sections 1.4 and 1.4.1 of Attachment 7 to the ICA, and that this failure has directly contributed to the accrual of approximately $1.4 Million in disputed payments over the previous years. As a condition of providing future service, AT&T is attempting to insist on payment of the entire amount in dispute (the underlying amounts in this docket, which AT&T agreed in the Joint Motion to hold in Abeyance) in order to continue to provide ongoing service. AT&T's position in agreeing to hold determination of the disputed amount in abeyance, and then insisting on payment of a balance that took several years to accrue be paid within 30 days, is not fair, just, or reasonable, and we therefore grant LifeConnex's requested relief, with specific conditions, as follows.

We find that the $1.4 Million in dispute, as discussed above, is fundamentally retroactive in character, and the proceeding currently held in Abeyance is the most efficient means of resolving that dispute. We also find that AT&T has the right to protect itself on a going-forward basis, pending the resolution of the dispute. To this end, we grant AT&T the right to insist on strict compliance with the payment terms of the ICA from July 13, 2010, 2010, onwards. To be clear: from the date of this decision, July 13, 2010, the terms of the Interconnection Agreement regarding billing and payment shall be followed, such that, upon receiving a bill from AT&T for service, LifeConnex shall pay such bill, including disputed amounts, within the time period prescribed in the ICA. If LifeConnex fails to comply with the terms of the ICA, including billing provisions, AT&T may take action as authorized by the ICA, including suspension, disconnection, and/or termination of service to LifeConnex.

Given the magnitude of the sum in dispute (approximately $1.4 Million), we are concerned with ensuring that once this docket is resumed, and we make a final determination of the correct disposition of the amount currently in dispute, sufficient funds will be available for LifeConnex to pay AT&T such sums as we may determine are due and owing to AT&T.

Therefore, as a further condition of allowing LifeConnex to continue to receive service from AT&T under the ICA during the pendency of this dispute, we order LifeConnex Telecom, LLC to post a bond in the amount of $1.4 Million by July 21, 2010. The bond will remain in place throughout the remainder of this proceeding until we make final resolution of AT&T's Complaint and LifeConnex's claims and counterclaims and final disposition of all disputed matters, including funds in dispute, and the bond shall state that it will be released or shall terminate only upon subsequent order of this Commission.

Further, in order to protect LifeConnex's end user customers, we order that in the event AT&T initiates action to suspend, discontinue, or terminate LifeConnex's service, LifeConnex shall be required to provide notice to its end use customers, within 14 days of the receipt of written notice by AT&T that AT&T is initiating suspension, discontinuance and/or termination of LifeConnex's service, that the customer's service may be cut off and that the customer may wish to immediately begin seeking alternative telecommunications services in order to avoid lapse of service. Further, LifeConnex shall provide a copy of this notice to our staff for prior approval, and shall keep us fully advised of the status of its end use customers until AT&T's actions are resolved.

We wish to make clear that in granting LifeConnex relief with the above conditions, we are not granting equitable relief, nor are we granting an injunction. Instead, we are taking this action under our authority to issue an interim procedural order under our clear jurisdiction to enforce the terms of the ICA and to resolve matters in dispute. AT&T filed a complaint seeking our resolution of a dispute, after allowing an unpaid balance to accumulate over an extended period of time.[4] With both parties having affirmatively invoked our jurisdiction under both Federal and State law to interpret and enforce the ICA, and to adjudicate this dispute in particular, we determine to take interim action to protect both parties and LifeConnex Telecom, LLC's end user customers while this dispute is pending before us.

Based upon the foregoing, it is

ORDERED by the Florida Public Service Commission that LifeConnex Telecom, LLC's Request for Emergency Relief is GRANTED with conditions. It is further

ORDERED that AT&T and LifeConnex Telecom, LLC shall fully comply with all terms of the parties' Interconnection Agreement, including billing provisions, from July 13, 2010, onward. It is further

ORDERED that if LifeConnex Telecom, LLC fails to comply with the terms of the Interconnection Agreement, including billing provisions, AT&T may take such actions as are authorized by the parties' Interconnection Agreement, including suspension, discontinuance, and/or termination of service to LifeConnex Telecom, LLC. It is further

[4] We note that AT&T could have sought to suspend, discontinue, and/or terminate LifeConnex at anytime during the extended period of non-payment of disputed amounts. Rather, AT&T chose to continue providing service and seek our resolution of this dispute. Now that the dispute is pending before us, AT&T shall not be allowed to subvert the judicial process by taking such sudden and detrimental action.

ORDERED that amounts currently in dispute shall be resolved through the hearing process. It is further

ORDERED that LifeConnex Telecom, LLC shall, by July 21, 2010, post a bond in the amount of 1.4 Million Dollars, containing wording that the bond will be released or shall terminate only upon subsequent order of this Commission. It is further

ORDERED that in the event AT&T takes action to suspend, discontinue, and/or terminate service to LifeConnex Telecom, LLC, within fourteen (14) days of receipt of written notice that AT&T is taking such action, LifeConnex Telecom, LLC shall provide Notice to its customers informing them of the possibility their service may be interrupted and of their option to find alternative telecommunications services. It is further

ORDERED that LifeConnex Telecom, LLC, shall provide this Notice to Commission staff for review and prior approval in sufficient time as will allow LifeConnex Telecom, LLC to meet the fourteen (14) day notice requirement above. It is further

ORDERED that this docket shall remain open pending the resolution of AT&T's underlying Complaint and Petition for Relief and LifeConnex Telecom, LLC's claims and counter-claims.

By ORDER of the Florida Public Service Commission this 16th day of July, 2010.

ANN COLE
Commission Clerk

(SEAL)

AJT

DISSENT BY: CHAIRMAN ARGENZIANO

CHAIRMAN ARGENZIANO dissents without separate opinion.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

EXHIBIT D

1 of 33 DOCUMENTS

In re: Emergency Complaint of Express Phone Service, Inc. against Bellsouth Telecommunications, Inc. d/b/a AT&T Florida regarding interpretation of the parties' interconnection agreement; In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.

DOCKET NO. 110071-TP; DOCKET NO. 110087-TP; ORDER NO. PSC-11-0291-PAA-TP

Florida Public Service Commission

2011 Fla. PUC LEXIS 210

11 FPSC 7:29

July 6, 2011, Issued

PANEL: [*1] The following Commissioners participated in the disposition of this matter: ART GRAHAM, Chairman; LISA POLAK EDGAR; RONALD A. BRISE; EDUARDO E. BALBIS; JULIE I. BROWN

OPINION: ORDER DENYING SUMMARY FINAL ORDER AND NOTICE OF PROPOSED AGENCY ACTION ORDER DENYING ADOPTION OF IMAGE ACCESS INTERCONNECTION, SETTING DOCKET NO. 110071-TP FOR HEARING

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to *Rule 25-22.029*, Florida Administrative Code.

I. Background

Docket Nos. 110071-TP and 110087-TP involve Express Phone Service, Inc. (Express Phone) and BellSouth Telecommunications, Inc. d/b/a AT&T Florida (AT&T Florida). Express Phone is a certificated Competitive Local Exchange Company (CLEC) in the state of Florida. Express Phone and AT&T Florida have an existing interconnection agreement (ICA) approved in Docket No. 060714-TP. The Parties' ICA was effective until November 2, 2011.

Docket No. 110071-TP

On March 15, 2011, [*2] Express Phone filed an emergency complaint against AT&T Florida, requesting emergency relief to avoid customer disconnection, that the docket be held in abeyance, and mediation (Emergency Complaint). n1 The Emergency Complaint alleges that on March 18, 2011, AT&T Florida planned to improperly disrupt Express Phone's service order provisioning, and cut off all services to existing Express Phone customers due to billing disputes arising out of the parties' ICA. n2 In addition, Express Phone argues that AT&T Florida's failure to honor Express Phone's request to adopt a different ICA violates the Telecommunications Act of 1996 (the Act).

n1 Emergency Complaint, Request for Emergency Relief to Avoid Customer Disconnection, Request to Hold Docket in Abeyance, and Request for Mediation against BellSouth Telecommunications, Inc. d/b/a AT&T Florida.

n2 Express Phone states that the billing disputes stem from the calculation/application of promotional credits for resold services.

On March 17, 2011, our staff held a meeting [*3] via conference call to give the parties an opportunity to discuss the Complaint and imminent disconnection of services to Express Phone's customers.

On March 18, 2011, Express Phone filed a motion seeking emergency relief to maintain the status quo, allowing Express Phone to continue service to its customers. n3 On March 25, 2011, AT&T Florida filed its Response in Opposition to Express Phone's Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo. By Order No. PSC-11-0180-PCO-TP, issued March 30, 2011, Express Phone's Emergency Motion was denied. n4 Express Phone was disconnected on March 30, 2011.

n3 Express Phone Service, Inc's Motion for Emergency Consideration by the Prehearing Officer to Maintain Status Quo.

n4 The Order noted that while Prehearing Officers have much discretion regarding the procedural aspects of dockets, Express Phone's Emergency Motion seeks relief that exceeds the bounds of a procedural ruling authorized by *Rule 28-106.305*, F.A.C. stating that "[u]pon review of Express Phone's request for an Order maintaining the status quo, it appears that Express Phone's request is more akin to a request for injunctive relief. This Commission has consistently held that we lack authority to grant injunctive relief."

[*4]

On April 4, 2011, AT&T Florida filed its Response in Opposition to Express Phone's Emergency Complaint, Request to Hold Docket in Abeyance and Request for Mediation. AT&T Florida contends that Express Phone has not honored its commitments under the ICA and has stopped paying its bills on disputed amounts, contrary to the Parties' ICA language that states "Express Phone shall make payment to [AT&T Florida] for all services billed including disputed amounts." AT&T Florida also opposes Express Phone's request to adopt a different agreement because Express Phone has no right to switch from one ICA to another in mid-stream, stating that the current ICA is in effect until November 2011.

Docket No. 110087-TP

On March 29, 2011, Express Phone filed a Notice of Adoption with the Commission that it was adopting, in its entirety, the ICA between AT&T Florida and Image Access, Inc. d/b/a NewPhone (Image Access ICA). Express Phone asserts it twice attempted to secure AT&T Florida's acknowledgement of its adoption of the Image Access ICA: first, on October 21, 2010, by correspondence with AT&T Florida indicating its desire to adopt the Image Access ICA and then by letter to AT&T Florida on [*5] March 14, 2011. Express Phone argues that AT&T Florida refused to recognize the adoption by imposing conditions on Express Phone which do not appear in Section 252(i) of the Act or its implementing rules. AT&T Florida argues that Express Phone was not entitled to adopt the Image Access ICA because Express Phone's ICA had not yet expired and Express Phone was withholding payments in dispute.

On March 29, 2011, AT&T Florida submitted a letter in Docket 110087-TP, objecting and withholding consent of Express Phone's attempt to adopt an ICA different from its current and effective ICA on file. AT&T Florida noted that Express Phone's letter does not alter the effectiveness of the current agreement between the parties, which was signed by both and approved by this Commission. On April 4, 2011, Express Phone filed an Amended Notice of Adoption.

On April 12, 2011, Express Phone filed a Motion for Summary Final Order and Request for Oral Argument. In its Motion, Express Phone states there are no legitimate issues of material fact that remain to be resolved surrounding its right to adopt the Image Access ICA. As such, Express Phone requests that we issue a Summary Final Order that finds Express [*6] Phone's adoption of the Image Access ICA, as amended, valid pursuant to *47 U.S.C. 252*(i) and *47 C.F.R. 51.809* as a matter of law. Express Phone believes that we should further find such adoption effective as of October 20, 2010.

On April 18, 2011, AT&T Florida filed its Response in Opposition to the Amended Notice of Adoption. On April 19, 2011, AT&T Florida filed its Response and Objections to Express Phone Service, Inc.'s Motion for Final Summary Order. AT&T Florida argues that Express Phone is not entitled to the relief that it seeks, nor allowed to adopt the Image Access ICA, concluding that Express Phone is currently subject to an existing ICA and is in material breach of the ICA by withholding payments for amounts in dispute.

Adoption of Interconnection Agreement

Pursuant to the Act, a telecommunications carrier has two methods to interconnect with an incumbent Local Exchange Company (LEC). The first method, described in Section 252(a), is through negotiation, and the second, detailed in Section 252(b), is through compulsory arbitration. However, in lieu of Sections 252(a) and (b), a telecommunications [*7] carrier may also adopt an existing interconnection agreement. An interested carrier may choose to adopt an existing interconnection agreement on file with this Commission that best meets its business needs. The requesting carrier must adopt all terms and conditions included within the existing interconnection agreement.

Section 252(i) and *47 C.F.R. 51.809* govern a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC.

Section 252(i) provides:

> A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 C.F.R. 51.809, describes the two instances where an incumbent LEC may deny a requesting carrier the right to adopt an entire effective agreement. *47 C.F.R. 51.809(b)* provides "[t]he obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to [*8] the state commission that:

> 1) the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
>
> 2) the provision of a particular agreement to the requesting carrier is not technically feasible."

Unless an incumbent LEC can demonstrate its costs will be greater to provide the agreement to the new carrier(s), or the agreement is not technically feasible to provide to the new carrier(s), the incumbent LEC may not restrict the carrier's right to adopt.

The purpose of the Federal Communication Commission's (FCC) adoption requirements is to ensure that a LEC cannot discriminate amongst the carriers it serves. However, the instant case triggers a public policy consideration prior to the application of the FCC's adoption requirements. Specifically, in this case we are being asked to consider whether a CLEC that has an outstanding balance due to its underlying carrier should be permitted to adopt a new ICA that modifies its existing payment obligations.

Oral Argument was granted in Docket No. 110087-TP at the June 14, 2011 Agenda Conference [*9] on the request for Summary Final Order. We have jurisdiction pursuant to Chapters 120 and 364, Florida Statutes and Section 252(i) of the Act.

II. Analysis

A. Summary Final Order

Standard of Review

Section 120.57(1)(h), F.S., provides that a Summary Final Order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final

summary order. *Rule 28-106.204(4)*, F.A.C., states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits."

The purpose of summary judgment, or in this proceeding, summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the light most favorable toward AT&T Florida, against whom the summary judgment is to be entered. Express Phone carries a heavy burden to present a showing that there is [*10] no genuine issue as to any material fact. Subsequently, the burden shifts to AT&T Florida to demonstrate the falsity of the showing. If AT&T Florida does not do so, summary judgment is proper and should be affirmed. Even if the facts are not disputed, a summary judgment is improper if different conclusions or inferences can be drawn from the facts. See Trawick's Florida Practice and Procedure, Section 25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (2011).

Express Phone

Express Phone argues that the following facts are undisputed and entitle it to adopt the ICA effective October 20, 2010.

. Express Phone entered into a Resale ICA with AT&T Florida on October 4, 2006. The ICA was filed for approval in Docket No. 060714-TP.
. On October 20, 2010, Express Phone faxed a letter to AT&T Florida stating that it adopted the Image Access ICA.
. AT&T Florida responded to Express Phone on November 1, 2010, claiming that Express Phone was not entitled to exercise its opt in rights because its current ICA was still in effect.
. On March 14, 2011, Express Phone notified AT&T Florida of its desire to adopt the Image Access ICA.
. On March 25, 2011, AT&T Florida responded with [*11] a list of conditions it required be fulfilled before it would recognize the adoption.
. AT&T Florida has continued to refuse to acknowledge Express Phone's adoption of the Image Access ICA.
. The Image Access ICA was filed for approval in Docket 060319-TP.
. On March 29, 2011, Express Phone filed a Notice of Adoption of the Image Access ICA with this Commission.
. On April 4, 2011, Express Phone filed its Amended Notice of Adoption with this Commission.

Express Phone believes there is no genuine issue as to any material fact. Express Phone further believes that it should be allowed to adopt the Image Access ICA as a matter of law because AT&T Florida does not claim a statutory exception as established in *47 C.F.R. 51.809*. n5 Express Phone believes that if AT&T Florida had timely recognized the Image Access adoption request, AT&T Florida would not have been able to terminate service to Express Phone. Therefore, Express Phone requests that we grant its Motion for Summary Final Order and direct AT&T Florida to immediately reinstate service to Express Phone.

n5 *47 C.F.R. Section 51.809* provides technical feasibility and cost exceptions for adoption.

[*12]
AT&T Florida

AT&T Florida requests that we deny Express Phone's Motion for Summary Final Order because the following facts are in dispute.

. The effective date of the attempted adoption.
. The status of the current ICA.
. The identity of the ICA that Express Phone is seeking to adopt.
. The availability of relief sought by Express Phone.

AT&T Florida further argues that Express Phone's motion fails as a matter of law because Express Phone is not in good standing under the Parties' existing ICA. AT&T Florida contends that our approval of an ICA does not automatically mean that the ICA is available or appropriate for adoption. AT&T Florida also believes that the underlying complaint in Docket No. 110071-TP has not progressed far enough to consider a motion for summary final order, arguing that the matter is still at a preliminary stage and the parties have not provided testimony or discovery.

Analysis

AT&T Florida and Express Phone were operating under an ICA with a five year term, in effect from November 2006 until November 2011. On March 29, 2011, Express Phone filed a notice to adopt the Image Access ICA. n6 It appears that the impetus for wanting to adopt the Image [*13] Access ICA is that Express Phone believes it contains terms that are more advantageous. Specifically, Express Phone's current ICA contains language that requires it to pay both disputed and undisputed amounts for services. The Image Access agreement does not contain the same provisions regarding disputed amounts. Express Phone believes that if it is allowed to adopt the Image Access agreement, any debts in dispute may be withheld. AT&T Florida disagrees with Express Phone unilaterally adopting a different ICA when their current ICA is still in effect and Express Phone is in breach by failing to pay the disputed amounts.

n6 The Image Access ICA was amended in 2009, extending the contract term to 2012.

The standard for granting a summary final order is very high. Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." [*14] *Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)* (citing *Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977))*. "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 2d 1123 (5th DCA 2000)*. The purpose of a summary final order is to avoid the expense and delay of trial when no dispute exists concerning the material facts. There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law. If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper. *Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996)*. "Even where the facts are uncontroverted, the remedy of summary judgment is not available if different [*15] inferences can be reasonably drawn from the uncontroverted facts." Albelo, at 1129.

First, Express Phone filed its interconnection agreement with AT&T Florida on November 2, 2006, for a five year term. A question has been raised whether a company can adopt a new interconnection agreement for the same services during the life of the current interconnection agreement. Both Express Phone and AT&T Florida have offered interpretations of the terms and conditions of the existing interconnection agreement. This is a question of first impression before us and it is therefore inappropriate to be dealt with by summary final order.

Second, Express Phone admits to withholding payments that are disputed. AT&T Florida believes that Express Phone's actions constitute a breach of the existing ICA, and as such, Express Phone's service has been disconnected pursuant to the ICA. Express Phone has not conclusively demonstrated that AT&T Florida cannot prevail on this issue. We must decide whether failure to abide by an existing ICA renders a company unable to avail itself of adoption until the existing contract is made whole by company action.

We have recognized that policy considerations should [*16] be taken into account in ruling on a motion for summary final order. n7 Because we have a duty to regulate in the public interest, the rights of not only the parties must be considered but also the potential impact to others and the decision cannot be made in a vacuum. Policy considerations must be taken into account in granting a summary judgment. n8

n7 Order No. PSC-98-1538-PCO-WS, issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

n8 PSC-07-1008-PAA-TL, issued December, 19, 2007, in Docket No. 070126-TL, In re: Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to *Section 364.025(6)(d), F.S.*, for Villages of Avalon, Phase II, in Hernando County, by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.

[*17]

AT&T Florida and Express Phone have both offered different effective dates for the Image Access ICA adoption. With respect to the effective date, we find that conflicting interpretation exists regarding the point in time the adoption was noticed and that therefore, a genuine issue of material fact exists concerning the effective date of the adoption.

Decision

We have rendered decisions previously on the effective date of an adoption; however, the questions regarding the status of the existing interconnection agreement are new. We find that genuine issues of material fact exist. There are outstanding questions of fact regarding the status of the interconnection agreement, the effective date of adoption and whether Express Phone can adopt the Image Access ICA as a matter of law. As such, we find it appropriate to deny the Motion for Summary Final Order.

B. Adoption of the Image Access ICA

Express Phone

Express Phone asserts that a competitor's right to adopt an existing ICA is set out in Section 252(i) of the Act which provides:

> A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this [*18] section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Express Phone argues that AT&T Florida's rejection of Express Phone's request for adoption of the Image Access ICA is contrary to the Act. Express Phone notes that the two exceptions, found in Rule 51.809(b)(1) and (2), technical feasibility and cost, have not been argued by AT&T Florida. Express Phone contends that we determined in Order No. PSC-08-0584-FOF-TP, issued September 8, 2008 (Nextel Adoption Order) that unless one of the two exceptions of Section 51.809(b) is met, the adoption is valid and must be recognized. n9 Express Phone believes the conditions AT&T Florida imposes is an attempt to use the parties' billing dispute to prohibit Express Phone from adopting the Image Access ICA. n10 Express Phone argues that AT&T Florida cannot deny Express Phone's request to adopt a new ICA simply because its current agreement has not expired or is not ripe for re-negotiation. First, Express Phone believes that Section 11 of the General Terms and Conditions of the current ICA recites the provisions found in *47 U.S.C. 252* [*19] (i) and *47 C.F.R. 51.809*, regarding adoptions.

> Pursuant to *47 U.S.C. Section 252*(i) and *47 C.F.R. Section 51.809*, BellSouth shall make available to Express Phone any entire resale agreement filed and approved pursuant to *47 U.S.C. Section 252*. The adopted agreement shall apply to the same states as the agreement that was adopted, and the term of the adopted agreement shall expire on the same date as set forth in the agreement that was adopted.

n9 In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by NPCR, Inc. d/b/a Nextel Partners, Docket No. 070368-TP and In re: Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by Nextel South Corp. and Nextel West Corp., Docket No. 070369-TP, Order No. PSC-08-0584-FOF-TP at 11, affirmed, BellSouth Telecommunications, Inc. v. Florida Public Service Commission, Case No. 4:09-cv-l02/RS/WCS, issued April 19, 2010.

[*20]

n10 AT&T requests that Express Phone pay amounts withheld in dispute.

Express Phone argues that this section allows Express Phones to adopt another agreement at any time. In addition, if Express Phone cannot leave its ICA for the life of the agreement, Express Phone is unprotected from discrimination. Express Phone states that to accept AT&T Florida's position would be to allow AT&T Florida to discriminate among carriers.

Express Phone believes that the current ICA should not impact Express Phone's adoption of the Image Access ICA and argues that the Image Access ICA is more favorable as it allows the CLEC to retain its funds until a disputed item is resolved. Failure to allow the adoption allows AT&T Florida to discriminate against Express Phone in billing matters. Moreover, Express Phone asserts that it pays all undisputed bills and it would be in full compliance with its contractual obligations had AT&T Florida honored its request for adoption.

AT&T Florida

AT&T Florida argues the ICA is a valid and binding contract and that we should require Express Phone to honor it and pay AT&T Florida [*21] all past due amounts. AT&T Florida further asserts that Express Phone's ability to pay its bills is questionable.

AT&T Florida contends that while Section 252(i) generally permits a requesting carrier to obtain an interconnection agreement with an incumbent local exchange carrier, by adopting another carrier's agreement, it is not automatic and not without a process. AT&T Florida contends that the existing ICA is clear that Express Phone must pay all amounts, including "disputed" amounts prior to the next bill date. AT&T Florida reiterates that Express Phone has failed to comply with this provision.

AT&T Florida asserts Express Phone is in material breach of the Parties' ICA due to Express Phone's failure to pay amounts in dispute. AT&T Florida contends that since Express Phone has admitted that it has withheld payments, the Commission should enforce the terms of the Agreement as written. AT&T Florida argues that the Commission found in a similar docket n11 that AT&T Florida is entitled to prompt payment of all billed amounts and to terminate services if such amounts are not paid.

n11 Order No. PSC-10-0457-PCO-TP, issued July 16, 2010, Docket 100021- TP, In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a/ AT&T Florida.

[*22]

AT&T Florida argues the contract language is unambiguous and the Commission is required by Florida law to enforce the agreement. *Paddock v. Bay Concrete Indus., 154 So.2d 313* (Fla. 2s DCA 1963). See also *Brooks v. Green 993 So.2d 58 (Fla. 1st DCA 2008)* ("It is established law in this state that a contract must be applied as written, absent an ambiguity or some legality.") *Medical Center Health Plan v. Brick, 572 So.2d 548, 55(Fla. 1st DCA 1990)* ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract. *Nat'l Health Laboratories, Inc. v. Bailmar, Inc., 444 So.2d 1078, 1980 (Fla. 3d DCA 1984).*").

AT&T Florida argues that both parties are obligated to comply with the Agreement and Express Phone may only terminate, modify, or negotiate a new agreement pursuant to the terms in the ICA. n12 In *Global Naps, Inc. v. Verizon, 396 F.3d 16 (1st Cir. 2005)* a CLEC filed a petition for arbitration pursuant to Section 252 and the state commission and the First Circuit Court of Appeals concluded [*23] that Section 252(i) does not grant a CLEC the right to opt out of one agreement into another.

n12 Express Phone may request termination of the Agreement only if it is no longer purchasing services pursuant to the Agreement. No modification or amendment ... shall be effective and binding upon the parties unless it is made in writing and duly signed by the parties. Negotiations for a new agreement shall commence "no earlier than two hundred seventy (270 days... prior to the expiration of the initial term of the Agreement.

AT&T Florida also cites to Order No. PSC-98-0466-FOF-TP, issued March 31, 1998, when we stated that the Act does not authorize us to conduct an arbitration on matters covered in an agreement and to alter terms within an approved negotiated agreement under Section 252(e). n13

n13 In re: Petition of Supra Telecommunications and Information Systems for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecommunications, Inc., or in the alternative, petition for arbitration of interconnection, Docket No. 980155-TP

[*24]

It is AT&T Florida's position that allowing Express Phone to adopt an ICA before the company cures its breach of the existing agreement would be inconsistent with public interest. In order to cure its breach of the existing ICA, AT&T Florida argues that Express Phone should have to remit all past due amounts pursuant to the provisions of the parties' ICA. AT&T Florida contends that we have held that an adoption can be rejected when it is not in the public interest. Order No. PSC-99-1930-PAA-TP, issued September 29, 1999. n14

n14 In re: Notice by BellSouth Telecommunications, Inc. of adoption of an approved interconnection, unbundling, and resale agreement between BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc. by Healthcare Liability Management Corporations d/b/a Fibre Channel Networks, Inc. and Health Management Systems, Inc. Docket No. 990959-TP.

Analysis

Express Phone believes it has adopted the Image Access ICA effective October 20, 2010. Express Phone sent letters [*25] regarding adoption of the Image Access ICA to AT&T Florida but did not file a Notice of Adoption with us until March 29, 2011. AT&T Florida objects to the October 20, 2010 effective date of the alleged adoption. Express Phone also did not properly identify the correct Image Access ICA until April 4, 2011.

In the Nextel Adoption Order, we determined that the effective date of an adoption is from the date that the Notice of Adoption is filed with us. While Express Phone discussed adoption with AT&T Florida, it did not file a Notice of Adoption with us until March 29, 2011.

Parties are bound by the terms and conditions of Commission-approved agreements. Supra. Express Phone does not deny that it has withheld payments of the amounts it considers in dispute. Express Phone's failure to pay disputed amounts is an issue that affects its ability to adopt the Image Access ICA.

Express Phone was attempting to escape its outstanding obligations by breaching its existing ICA to adopt a more favorable agreement. Express Phone was unilaterally attempting to terminate the existing ICA without mutual agreement by the parties, in contravention of the terms and conditions of the existing ICA. [*26] The existing ICA states that payment for services must be provided, including disputed charges, at the billing date established by the ICA. n15 We do not believe that the adoption of an ICA would cure past billing issues in dispute, and disagrees with Express Phone's assertion that such an adoption would cure outstanding billing obligations.

n15 Sections 1.4 and 1.4.1 of the ICA.

We must determine whether Express Phone can adopt a new ICA when there is a material breach of the existing ICA. A material breach must be of the type that would discharge the injured party from further contractual duty. Beefy Trail Inc. v. Beefy King International, Inc., Here, Express Phone has withheld payments in dispute, resulting in AT&T Florida's disconnection of Express Phone for failure to pay using termination provisions provided by the ICA.

Express Phone argues that AT&T Florida does not object on the basis of the two available exceptions in *47 C.F.R. Section 51.809(b)(1)* and (2), lack of [*27] technical feasibility or greater costs to serve adopting party. We find that based on the facts and circumstances in the Nextel Adoption Order, we found that technical feasibility and the cost to serve an adopting party were the only two exceptions. However, the circumstances in this case differ, as by Express

Phone's own admission, it did not pay disputed amounts pursuant to terms and conditions of the existing ICA. n16 For Express Phone to benefit while not in good standing of its existing ICA is inconsistent with sound public policy and does not promote effective business practices in the state of Florida.

n16 AT&T argues that in addition to these exceptions, an ICA's terms and conditions may also serve as a limitation to a requesting carrier's right to adopt. This issue has not been previously addressed by the Commission.

Decision

If Express Phone were in good standing in its existing ICA, the adoption may be effective from the date of the Notice filed with us, providing that there is not a finding of [*28] a lack of technical feasibility or greater costs to serve. However, we do not find that the terms and conditions of the Image Access ICA would modify anything that occurred during the previous ICA, including outstanding billing. Unless Express Phone is in good standing with the existing ICA, we find that AT&T Florida does not have to enter into a new ICA and Express Phone's adoption of the Image Access ICA is denied.

C. Promotional Credits

Express Phone

Express Phone asserts that there is an ongoing billing dispute with AT&T Florida involving promotional credits. Express Phone states that it has a past due balance and was notified that services would be suspended if $ 1,268,490 were not paid by March 14, 2011, for services provided in Florida, and that all services would be terminated if past due balances were not paid by March 29, 2011. n17 Moreover, Express Phone contends that AT&T Florida's threat to discontinue service and disconnect its resale service is unlawful and anticompetitive. n18

n17 Revised Notice of Suspension and Termination letter dated February 23, 2011 listed as Attachment A to the Complaint.

[*29]

n18 AT&T disconnected service to Express Phone on March 30, 2011.

Express Phone recognizes that the ICA n19 between AT&T Florida and Express Phone states in Section 1.4 that "Express Phone shall make payment to BellSouth for all services billed including disputed amounts." Section 1.4.1 of the ICA states "Payment for services provided by BellSouth, including disputed charges, is due on or before the next bill date." Express Phone understands that under the current ICA it is required to pay for all services billed including disputed amounts. However, Express Phone asserts that it pays all undisputed bills and it would be in full compliance with its contractual obligations had AT&T Florida honored its lawful request for adoption.

n19 Resale Agreement dated August 23, 2006.

AT&T Florida

AT&T Florida states that the Commission approved the ICA between AT&T Florida and Express Phone. AT&T Florida argues the ICA is a valid and binding [*30] contract and that we should require Express Phone to honor it and pay AT&T Florida all past due amounts because when they entered into the agreement, Express Phone agreed to pay AT&T Florida for all services billed including disputed amounts on or before the next bill date.

Analysis

Without additional evidence beyond Express Phone's initial petition and AT&T Florida's response, there is insufficient information for us to render a decision regarding promotional credits. Express Phone cannot withhold disputed amounts from AT&T Florida.

The parties' conduct is governed by an ICA with clear terms. The terms and conditions of the Parties' ICA are clear and unambiguous. Specifically, that Express Phone shall make payments for all services billed including disputed amounts. Furthermore, we already ruled in LifeConnex, with identical language in the ICA, that the billed party is required to pay all sums billed, including disputed amounts, pursuant to the terms and conditions in the ICA. Express Phone must pay all disputed amounts. Dispute of promotion credits, does not affect the billing time frame or payment obligations established by the ICA. AT&T Florida is entitled under the [*31] clear terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment; and that AT&T Florida appropriately disconnected Express Phone on March 30, 2011.

Decision

Whether Express Phone shall receive the requested promotional credits is a valid question before us. However, it is clear that additional discovery and testimony are required to resolve Docket 110071-TP. Therefore, we find an evidentiary hearing shall be scheduled to hear this matter.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Express Phone's Motion for Summary Final Order in Docket No. 110087-TP is be denied. It is further

ORDERED that adoption of the Image Access ICA is not available to Express Phone because Express Phone is in material breach of the Parties' existing ICA. It is further

ORDERED that additional discovery and testimony is required to resolve Docket 110071-TP and an evidentiary hearing shall be set on the promotional credits. It is further

ORDERED that those provisions of this Order which are issued as proposed agency action shall become final [*32] and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by *Rule 28-106.201*, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that any protest to the action proposed herein shall specify the docket to which the protest applies. It is further

ORDERED that if a protest to this Order is filed, the protest shall not prevent the action proposed herein from becoming final with regard to the remaining docket listed in this Order. It is further

ORDERED that in the event this Order becomes final, Docket No. 110087-TP shall be closed and Docket No. 110071-TP shall remain open for an evidentiary hearing to be conducted on the promotional credits.

By ORDER of the Florida Public Service Commission this 6th day of July, 2011.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsGeneral OverviewEnergy & Utilities LawUtility CompaniesContracts for Service

2 of 33 DOCUMENTS

In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.

DOCKET NO. 110087-TP; ORDER NO. PSC-12-0390-FOF-TP

Florida Public Service Commission

2012 Fla. PUC LEXIS 374

12 FPSC 7:236

July 30, 2012, Issued

PANEL: [*1] The following Commissioners participated in the disposition of this matter: RONALD A. BRISE, Chairman; LISA POLAK EDGAR; ART GRAHAM; EDUARDO E. BALBIS; JULIE I. BROWN

OPINION: FINAL ORDER ON NOTICE OF ADOPTION

BY THE COMMISSION:

I. Case Background

Express Phone Service, Inc. (Express Phone) is a Competitive Local Exchange Company (CLEC) certified since 2000 to provide resale services in Florida. In 2006, BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast (AT&T Florida) and Express Phone negotiated and executed a binding resale agreement (2006 ICA). n1 Express Phone is currently not providing resale services in Florida. n2

n1 Docket No. 060714-TP - Request for approval of resale agreement between BellSouth Telecommunications, Inc. and Express Phone Service, Inc.

n2 As of March 31, 2011, AT&T Florida ceased providing services to Express Phone.

On March 29, 2011, Express Phone filed a Notice of Adoption that it was adopting a different interconnection agreement, in its entirety, between AT&T [*2] Florida and Image Access, Inc. d/b/a NewPhone (NewPhone ICA). On that same day, AT&T Florida filed a letter and non-consent to the adoption of the NewPhone ICA.

On April 12, 2011, Express Phone filed a Motion for Summary Final Order. This Commission denied the Motion in Proposed Agency Action Order No. PSC-11-0291-PAA-TP (PAA Order), issued July 6, 2011. On July 27, 2011, Express Phone protested the portions of the PAA Order which relate to its adoption of the NewPhone ICA and requested a formal proceeding.

An Order Establishing Procedure, Order PSC-12-0031-PCO-TP, was issued on January 19, 2012, and modified by Order Nos. PSC-12-0058-PCO-TP and PSC-12-0130-PCO-TP, issued on February 10, 2012, and March 20, 2012, respectively. On May 3, 2012, an Administrative Hearing was held.

The Adoption Process

Pursuant to *47 U.S.C. § 252* of the Telecommunications Act of 1996 (Act), a telecommunications carrier has three methods to enter into an interconnection agreement with an Incumbent Local Exchange Company (ILEC). The first method, described in § 252(a), is negotiation, and the second, in § 252(b), is compulsory arbitration. In the alternative, however, [*3] in lieu of § 252(a) and (b), a telecommunications carrier may adopt an existing interconnection agreement pursuant to § 252(i). Depending on its specific business model, an interested carrier may choose to adopt an existing interconnection agreement on file with the Commission, and must adopt all Terms and Conditions included within that interconnection agreement.

Section 252(i) governs a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC. Section 252(i) provides:

> A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The purpose of the FCC's adoption requirements is to ensure that an ILEC cannot discriminate among the carriers it serves.

The AT&T Florida/Express Phone 2006 ICA

The parties agreed that the 2006 ICA would begin on November 3, 2006 and expire on November 2, 2011. Section 2.1 of the Terms and Conditions of the 2006 ICA states in part "[t]he initial term of this Agreement [*4] shall be five (5) years, beginning on the effective date..." which was agreed upon by the parties to be thirty (30) days after the date of the last signature executing the agreement. Section 2.3.1 of the Terms and Conditions sets forth the conditions necessary for early termination of the 2006 ICA, and states in part:

> Express Phone may request termination of this Agreement only if it is no longer purchasing services pursuant to this Agreement.

This language, along with the clear language in Section 12.2 regarding modification of the agreement, provides a path for Express Phone to negotiate an amendment permitting early termination. Section 12.2 reads:

> No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the parties.

We have jurisdiction pursuant to Chapters 120 and 364, Florida Statutes (F.S.), and § 252(i) of the Act.

Issues Presented

A. Doctrines of Equitable Relief

We have been asked to determine whether Express Phone's Notice of Adoption or AT&T Florida's denial of the adoption is barred by the doctrines of equitable relief, [*5] including laches, estoppel and waiver.

Express Phone

Express Phone argues that AT&T Florida cannot object to Express Phone's adoption of the NewPhone ICA and believes that an opt-in is valid upon the incumbent's receipt of the CLEC's Notice of Adoption. Express Phone's basis for disagreeing with AT&T Florida's refusal is the doctrine of unclean hands. Express Phone asserts that when a party has violated a restriction which it now seeks to enforce, the enforcement of such restriction is prohibited or denied. n3

n3 See, *Pilafian v. Cherry, 355 So.2d 847, 850 (Fla. 3rd DCA 1978)*

Express Phone argues that AT&T Florida's provision of the 2006 ICA as a "standard" contract during their initial discussions illustrated a failure to provide all options during discussions and therefore was discriminatory by its failure to be consistent with offerings to other CLECs. Moreover, Express Phone contends that AT&T Florida's failure to deal in good faith through the life of the ICA and unreasonable [*6] delay toward acknowledging the adoption of the New-Phone ICA bars any refusal from AT&T Florida.

AT&T Florida

AT&T Florida argues that Express Phone is barred from adopting a new interconnection agreement by estoppel and laches. AT&T Florida contends that Express Phone had an opportunity to adopt the NewPhone ICA or to negotiate or arbitrate different payment terms for its 2006 ICA with AT&T Florida. Furthermore, AT&T Florida argues that once the 2006 ICA was signed, the parties became contractually bound by its terms. n4 AT&T Florida argues that laches bars a party from pursuing a legal right that it may have had if it waits too long to do so. n5 AT&T Florida argues that prior to signing the 2006 ICA, there was opportunity to adopt a different ICA or to negotiate or arbitrate different payment terms for its ICA. AT&T Florida stresses that the agreement is enforceable and binding on both parties, even if a provision is perceived to be harsh or disadvantageous to one party.

n4 See *Medical Ctr. Health Plan v. Brick, 572 So.2d 548, 551 (Fla. 1st DCA 1990) (A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.")*

[*7]

n5 See generally, 35 Fla. Jur. 2d Limitations and Laches § 115.

AT&T Florida contends that equitable estoppel results from the "voluntary conduct of a party" and "absolutely preclude[s]" the party from asserting rights which it might otherwise have had. n6 AT&T Florida disagrees that Express Phone lacked the resources to negotiate and argues that negotiating in good faith for an interconnection agreement would not have created an undue economic burden for Express Phone.

n6 *State ex re. Watson v. Gray, 48 So.2d 84, 87-88 (Fla. 1950)*

AT&T Florida points out that Express Phone never availed itself of the established options provided by the 2006 ICA. Further, AT&T Florida argues that Express Phone cannot suggest that AT&T Florida has the burden to make business decisions for Express Phone, such as what is the best interconnection agreement suited to Express Phone. The Act does not impose that burden on AT&T [*8] Florida. AT&T Florida notes that AT&T witness Greenlaw stated "it is incumbent upon the CLEC to identify what the terms and conditions are what they feel is the best deal." AT&T Florida contends that it did not waive its right to deny Express Phone's adoption and that Express Phone cannot simply change its mind and unilaterally reject the 2006 ICA.

Analysis

In 2006, Express Phone and AT&T Florida entered into an interconnection agreement for an initial term of 5 years. Upon the signing of an interconnection agreement, approved by this Commission, the rights and obligations of the parties are set forth in the terms and conditions of the specific interconnection agreement. As a result, the actions of the parties or the availability of an alternative interconnection agreement prior to the signing of the 2006 ICA should not be factors in our determination of the validity of an adoption. n7

n7 A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract. *Nat'l Health Laboratories, Inc. v. Bailmar, Inc., 444 So.2d 1078, 1980 (Ha. 3d DCA 1984).*

[*9]

Equitable relief, such as the doctrines of estoppel, laches, waiver and unclean hands, are concepts which we have commented on in previous proceedings, but has not been the basis for a decision. This Commission only has those

"powers granted by statute expressly or by necessary implication." n8 *Section 364.162, F.S.*, only authorizes this Commission to seek equitable relief in an appropriate circuit court, not to order equitable relief. Our authority, while "broad enough to inquire into competitive conduct, does not clearly authorize the Commission to impose equitable relief." n9 Rather, the resolution of equitable relief is "reserved for agencies with specific statutory authority." n10 As this Commission is a statutory creature, we have no common law jurisdiction or inherent power as do the courts. n11

n8 *Deltona Corp. v. Mayo, 342 So.2d 510, 512 (Fla. 1977)*

n9 *In re: Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries*, Docket No, 010345-TP, Order No. PSC-01-2178-FOF-TP, issued November 6, 2001, concurring opinion of Chairman Jacobs.

[*10]

n10 Id.

n11 *In re: Petition for expedited enforcement of interconnection agreement with Verizon Florida Inc. by Teleport Communications Group, Inc. and TCG South Florida.*, Docket No. 021006-TP, Order No. PSC-01-2178-FOF-TP, issued December 6, 2002, citing *East Central Regional Wastewater Facilities Bd. v. City of West Palm Beach, 659 So.2d 402, 404 (Fla. Dist. Ct. App. 1995); In re: Initiation of show cause proceedings against TELECO COMMUNICATIONS COMPANY for violation of Rule 25-4.004, F.A.C., Certificate of Public Convenience and Necessity Required*, Docket No. 911214-TP, Order No. PSC-96-0007-FOF-TP, issued January 2, 1996.

It is not AT&T Florida's burden to find the best interconnection agreement for Express Phone. A company seeking an interconnection agreement with AT&T Florida may file arbitration or a complaint. Express Phone failed to avail itself of these remedies. Accordingly, we find that discussions and interactions that occurred prior to the signing of the 2006 ICA shall not be considered.

Decision [*11]

This Commission has only those powers granted by statute expressly or by necessary implication and does not have authority to order equitable relief. Accordingly, we find that it is not appropriate to make a finding that the adoption is barred by the doctrines of equitable relief.

B. Adoption under applicable laws

We have been asked to determine if Express Phone is permitted, under the applicable laws, to adopt the NewPhone Interconnection Agreement during the term of its existing agreement with AT&T Florida.

Express Phone

Express Phone contends that it is entitled to opt in to the NewPhone ICA during the term of a prior interconnection agreement. Express Phone asserts that § 252(i) sets out the requirements for an adoption of an ICA. n12 Express Phone argues that an Incumbent Local Exchange Company (ILEC) must make any interconnection agreement available to any requesting telecommunications carrier and that the ILEC and the Commission are precluded from placing conditions on an opt-in.

n12 (i) Availability to Other Telecommunications Carriers. -- A local exchange carrier shall make available any interconnection agreement available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

[*12]

Express Phone argues that *47 C.F.R. § 51.809* (§ 51.809) describes only two instances where *47 U.S.C. § 252*(i) is inapplicable, n13 where an incumbent LEC can demonstrate its costs will be greater to provide the agreement to the new carrier(s) or the agreement is not technically feasible to provide to the new carrier(s). Express Phone further argues that these two exceptions do not apply nor did AT&T Florida raise them. Express Phone contends AT&T Florida, by failing to allow the NewPhone adoption, discriminated against Express Phone. Such discrimination may give a CLEC a competitive advantage over other CLECs. Express Phone states that the Federal Communication Commission's (FCC) intent is to avoid a situation where a CLEC with better terms in its interconnection agreement will have an advantage over other CLECs with whom it competes.

n13 (1) where the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunication carrier that originally negotiated the agreement or (2) the provision of the a particular agreement to the requesting carrier is not technically feasibility.

[*13]

Express Phone argues that AT&T Florida does not have the ability to do anything but perform in a way consistent with the Act. Express Phone asserts that the District Court of North Carolina held that no action by a state commission is required and that an opt-in is self-effectuating. n14 Express Phone argues that the reasons for opting into another interconnection agreement are irrelevant. Express Phone asserts that the Commission has previously held that AT&T Florida could not refuse to recognize an adoption. n15

n14 *BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission, 2010 WL 5559393 (E.D. N.C. 2010).*

n15 *Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by Nextel South Corp. and Nextel West Corp.*, Docket No. 070369-TP, Order No. PSC-08-0584-FOF-TP, *affirmed,* Bellsouth Telecommunications, Inc. v. Florida Public Service Commission, Case No. 4:09-cv-102/RS/WCS (April 19, 2010). (Nextel Order)

[*14]

Furthermore, Express Phone argues that the fact that there are disputes between the parties does not bar it from adopting the NewPhone ICA under *47 U.S.C. § 252*(i). Express Phone argues that this proceeding is about adoption and the interpretation of interconnection agreements. Express Phone's dispute with AT&T Florida should only affect its adoption if the relevant sections of the Act and the FCC rules contained a restriction on the ability of a CLEC to adopt an existing interconnection agreement based on the presence of a dispute. And since the Act and the FCC do not contain such a restriction, Express Phone contends it should be permitted to adopt the NewPhone interconnection agreement.

AT&T Florida

AT&T Florida argues that while in breach of its contractual obligations, Express Phone is seeking to terminate its current interconnection agreement and adopt a different interconnection agreement. AT&T Florida contends that by attempting to adopt a new interconnection agreement, Express Phone is seeking to unlawfully terminate its current interconnection agreement.

AT&T Florida asserts that a party that enters into a contract is bound by the [*15] contract. n16 AT&T Florida further asserts that the Commission has previously determined that a CLEC cannot leave an interconnection agreement early. n17 While not binding to the Commission, other state commissions have addressed the same issue, finding that *47 U.S.C. § 252*(i) does not authorize "voiding a contract." n18

n16 Medical Ctr. Health Plan, 551.

n17 The Commission rejected arbitration of a new interconnection agreement while the parties operated under an existing agreement on the basis that the Act does not allow the Commission to alter terms within an approved negotiated agreement. *In re: Petition of Supra Telecommunications & Information Systems for generic proceeding to arbitrate rates, terms, and condition of interconnection with BellSouth Telecommunications, Inc.*

or in the alternative, petition for arbitration of interconnection agreement. Docket No. 980155-TP, Order No. PSC-98-0466-FOF-TP (March 31, 1998).

n18 *Petition of Pac-West Telecomm, Inc. v. a Declaratory Ruling Respecting its Rights to Interconnection with Verizon New York, Inc. Case No. 06-C-1042* (N.Y. Comm'n Feb. 27, 2007), *Global NAPs, Inc. v. Verizon New England, Inc. 396 F.3d 16 (1st Cir. 2004).*

[*16]

AT&T Florida asserts that Express Phone primarily seeks to use its adoption to avoid its obligation to pay a past due balance. AT&T Florida argues that the Commission has previously held that the Commission has the authority to reject an adoption as not being consistent with the public interest. n19 Moreover, AT&T Florida contends that to allow the adoption would reward Express Phone for its breach and establish that the terms of the 2006 ICA were not enforceable. Florida law holds that a party is bound by a contract provision, even if it is somehow perceived to be harsh or unfair. n20

n19 *In re: Notice by BellSouth Telecomms., Inc. of adoption of an approved interconnection, unbundling, and resale agreement between BellSouth Telecomms., Inc. and AT&T Commc'ns of the Southern States, Inc. by Healthcare Liability Mgmt. Corps. d/b/a Fibre Channel Networks, Inc. and Health Mgmt. Sys., Inc.* Docket No. 99059-TP, Order No. PSC-99-1930-PAA-TP (Sept. 29, 1999).

n20 *Applica Inc. v. Newtech Electronics Indus., Inc. 980 So.2d 1194 (Fla. 3d DCA 2009)*

[*17]

Finally, AT&T Florida argues it is not the purpose of § 252(i) to allow a carrier to escape its payment obligations under an existing agreement and to allow this to occur would negate the express and unambiguous terms of the parties' ICA.

Analysis

Pursuant to § 252(i), an ILEC's existing interconnection agreements must be made available for adoption by any requesting telecommunications carrier. The purpose of § 252(i) is to ensure that all competitive carriers are on a level playing field. By granting competitive carriers the right to adopt a competitor's interconnection agreement, Congress ensured that a competitive carrier would not be able to enter into an interconnection agreement with an ILEC that contained favorable terms and conditions not made available to its competitors. However, in the instant proceeding, Express Phone has contorted the purpose of § 252(i), and is attempting to gain a competitive advantage over AT&T by seeking to adopt an interconnection agreement with more favorable payment terms while concurrently failing to meet the payment terms of its existing agreement.

It is undisputed that Express Phone and AT&T Florida mutually entered into the 2006 ICA. [*18] Florida has established that once a party enters into a contract, it is bound by the contract. n21 Further, we have determined that an interconnection agreement is a binding agreement. n22 The United States Court of Appeals for the Eighth Circuit confirmed that, pursuant to § 252, state commissions, such as Florida, "are vested with the power to enforce the provisions of the agreements...(they) have approved." n23

n21 *Medical Center Health Plan v. Brick, 572 So.2d 548, 551 (Fla. 1st DCA 1990)*

n22 *In re: Petition for approval of election of interconnection agreement with GTE Florida Incorporated pursuant to Section 252(i) of the Telecommunications Act of 1996, by Sprint Communications Company Limited Partnership d/b/a Sprint*, Docket No.971159-TP, Order No. PSC-98-0251-FOF-TP, issued February 6, 1998.

n23 *Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir. 1997)*

Express Phone has not paid its disputed amounts as required by the terms and conditions [*19] of its 2006 ICA. Express Phone's failure to comply with the terms and conditions of the 2006 ICA is a material breach of the binding

agreement. Express Phone's breach of its 2006 ICA renders the company ineligible to adopt the NewPhone ICA until the 2006 ICA's breach is remedied.

A company bound by the terms and conditions of its signed interconnection agreement, shall not be allowed to adopt an alternative interconnection agreement if the company is concurrently breaching its existing interconnection agreement. Accordingly, we find that we do not need to reach a decision on whether the NewTalk interconnection agreement is available for adoption by Express Phone because Express Phone is not eligible to adopt a new interconnection agreement until it remedies the breach of its 2006 ICA.

Decision

A telecommunications company shall not be permitted to adopt an alternative interconnection agreement when it has failed to materially comply with its existing ICA. Express Phone failed to pay disputed amounts as required by its existing interconnection agreement with AT&T Florida and thus shall not be eligible to adopt an alternative interconnection agreement until it is in compliance [*20] with the 2006 ICA.

C. Terms of the ICA

We have been asked to determine if Express Phone is permitted under the terms of the interconnection agreement with AT&T Florida to adopt the NewPhone Interconnection Agreement.

Express Phone

Express Phone asserts that its adoption rights are spelled out in Section 11 of the Terms and Conditions of the 2006 ICA, and these rights are buttressed by § 252(i) of the Act and its implementing rule, *47 C.F.R. § 51.809*. Express Phone contends that Section 11 of the 2006 ICA overrides the term and termination language contained in Section 2.1 of the ICA.

Express Phone believes AT&T Florida has not acted in good faith regarding credits for promotions. If its adoption request is approved, the terms of the NewPhone ICA will allow Express Phone to withhold amounts which are in dispute, pending resolution.

Express Phone believes AT&T Florida's reliance on the term and termination language of the ICA ignores its rights to adopt an existing agreement as provided under federal law. Express Phone argues that if the language of Section 11 did not permit Express Phone to adopt the NewPhone ICA, there would be no reason [*21] to include the language in the 2006 ICA.

AT&T Florida

Express Phone's 2006 ICA specifies an initial five year term, beginning on November 3, 2006 and expiring on November 2, 2011. It is AT&T Florida's position that no other provision in the ICA altered the term of the ICA, and early termination can only occur if Express Phone was no longer purchasing services pursuant to the 2006 ICA.

AT&T Florida argues that Section 11 of the ICA, a recitation of § 252(i), "does not grant any rights beyond the rights and obligations that the parties already have by law." In addition, Section 11 is limited to the adoption of any entire *resale* agreement, and does not apply to interconnection agreements such as the NewPhone ICA. (emphasis added) AT&T Florida also argues that Express Phone does not have the right under federal law to adopt a new ICA while it is a party to an existing agreement and while in breach of that agreement. AT&T Florida believes "[t]he public interest would not be served by allowing a CLEC, such as Express Phone, to use 252(i)...to escape the obligations that they have under such an agreement."

Finally, AT&T Florida argues that the 2006 ICA requires Express Phone to [*22] pay all amounts due, whether they are in dispute or not. AT&T Florida believes Express Phone is and continues to be, in material breach of the contract between the parties for failing to pay approximately $ 1.5 million.

Analysis

We have previously determined that parties are bound by the Terms and Conditions of Commission-approved agreements. n24 The Terms and Conditions section of Express Phone's 2006 ICA clearly state the agreement was for five (5) years; Express Phone was permitted to request early termination if it was no longer ordering services; any mod-

ification to the agreement must be mutual, in writing, and binding on both parties; and Express Phone must pay all amounts due, whether they are in dispute or not. Neither the Commission, the FCC, nor the courts have addressed the specific issue of whether a party to an ICA is permitted to adopt another ICA without first fulfilling the obligations of its existing ICA.

n24 In re: Petition of Supra Telecommunications and Information Systems for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecommunications, Inc., or in the alternative, petition for arbitration of interconnection, Docket No. 980155-TP.

[*23]

Without prior written agreement to amend the 2006 ICA, Express Phone withheld payments it considered to be in dispute. The plain language of the resale agreement with AT&T Florida requires that payment for services must be provided, including disputed charges, at the billing date established by the ICA. Express Phone's failure to pay disputed amounts is contrary to the explicit terms contained in the 2006 ICA.

By seeking to adopt the NewPhone ICA, Express Phone attempts to terminate the 2006 ICA without mutual agreement by the parties which is in direct opposition to the clear Terms and Conditions of the 2006 ICA.

Express Phone argues that AT&T Florida does not object to its adoption request/notification on the basis of the two available exceptions in § 51.809(b)(1) and (2). Based on the facts and circumstances in the Nextel Order, we found that technical feasibility and the cost to serve an adopting party were the only two exceptions to § 252(i) of the Act. n25 However, the circumstances in this case differ from Nextel because Express Phone was in breach of its 2006 ICA by failing to pay disputed amounts contrary to Section 1.4 of the Terms and Conditions of the 2006 ICA.

n25 Order No. PSC-08-0584-FOF-TP, issued on September 10, 2008, in Docket No. 070368-TP. Notice of adoption of existing interconnection agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Southeast and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P., by NPCR, Inc. d/b/a Nextel Partners, Page 7.

[*24]

Express Phone argues that Section 11 of its 2006 ICA permits it to adopt any valid ICA at any time, and this provision overrides all other terms of the ICA, including Section 2, which controls the length of the contract and the date it terminates. AT&T Florida argues that this conclusion is bad public policy and believes such a conclusion would "make voidable every ICA simply at the will of a CLEC that doesn't like the terms of its agreement." A party which is in violation of an existing ICA shall not have the right to adopt another agreement until it has fulfilled the obligations of the existing ICA.

The terms of Express Phone's 2006 ICA specify the duration of the ICA, the window of opportunity to negotiate a new agreement, the terms under which the agreement can be renegotiated or terminated, and payment responsibilities. Express Phone has not followed the terms of the agreement, arguing instead that regardless of its standing in relation to the agreement, the agreement provides an opportunity to adopt another agreement without the consent of AT&T Florida.

Decision

Express Phone is in breach of its agreement with AT&T Florida and, because of that breach, it shall not be permitted [*25] to adopt the NewPhone agreement until the breach is remedied. Allowing Express Phone to adopt the NewPhone agreement while in violation of the terms of its 2006 ICA would be bad public policy. Therefore we find it appropriate that Express Phone is not permitted under the terms of its 2006 ICA with AT&T Florida to adopt the NewPhone ICA.

D. Effective date

We have been asked to determine the effective date of the adoption by Express Phone. Because we have determined that the NewPhone agreement is not available for adoption by Express Phone at this time, we find that a determination of the effective date is moot.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Express Phone is not eligible to adopt an alternative interconnection agreement as set forth in the body of this order. It is further

ORDERED that this docket shall be closed after the time for filing an appeal has run.

By ORDER of the Florida Public Service Commission this 30th day of July, 2012.

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawTelephone ServicesLocal Exchange CarriersDuties of Incumbent Carriers & ResellersCommunications LawTelephone ServicesLocal Exchange CarriersRatesEnergy & Utilities LawUtility CompaniesLiability

Slip Copy, 2013 WL 6536748 (N.D.Fla.)
(Cite as: 2013 WL 6536748 (N.D.Fla.))

United States District Court,
N.D. Florida.
EXPRESS PHONE SERVICE INC., Plaintiff,
v.
FLORIDA PUBLIC SERVICE COMMISSION; Ronald A. Brisé, in his official capacity as the Chairman of the Florida Public Service Commission; Lisa Polak Edgar, Art Graham, Eduardo E. Balbis, and Julie I. Brown, in their official capacities as Commissioners of the Florida Public Service Commission; and Bellsouth Telecommunications, LLC, d/b/a AT & T Southeast, Defendants.

No. 1:12–cv–00197–MP–GRJ.
Dec. 12, 2013.

Marsha Ellen Rule, Rutledge Ecenia Underwood etc, Tallahassee, FL, for Plaintiff.

Kathryn Gale Winter Cowdery, Florida Public Service Commission, Tallahassee, FL, Manuel Alfredo Gurdian, Suzanne Lynn Montgomery, AT & T Florida Legal, Miami, FL, for Defendants.

ORDER

MAURICE M. PAUL, Senior District Judge.

***1** This matter is before the Court on Plaintiff's appeal from a decision of the Florida Public Service Commission ("FPSC") pursuant to 47 U.S.C. § 252(e)(6). Express Phone Service, Inc. ("Express Phone") appeals the FPSC's ruling that Express Phone was bound by the terms of its 2006 interconnection agreement with Defendant BellSouth Telecommunications, LLC, d/b/a AT & T Florida d/b/a AT & T Southeast ("AT & T"), and that Express Phone could not adopt a new interconnection agreement while concurrently in breach of its existing agreement with AT & T (the "Final Order").[FN1] Upon consideration of the issues presented, the Court affirms the decision of the FPSC.

FN1. *In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunic'ns, Inc. d/b/a AT & T Fla. d/b/a AT & T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Serv., Inc.*, 2012 Fla. PUC LEXIS 374 (2012) (Order No. P SC12–0390–FOF–TP).

I. BACKGROUND

The Telecommunications Act of 1996 (the "Act") "created 'a new telecommunications regime designed to foster competition in local telephone markets.' " *Nixon v. Missouri Mun. League*, 541 U.S. 125, 124 S.Ct. 1555, 158 L.Ed.2d 291 (2004) (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 638, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002)). The Act requires incumbent local exchange carriers ("ILECs"), such as AT & T, to lease unbundled network elements to competitive local exchange carriers ("CLECs"),[FN2] such as Express Phone. Once a CLEC requests to lease network elements from an ILEC and the terms of their relationship are set through negotiation, arbitration or adoption, the parties memorialize those terms in an interconnection agreement ("ICA").

FN2. While "incumbent local exchange carrier" is defined in the Act, 47 U.S.C. § 251(h), "competitive local exchange carrier" is not. The latter term is synonymous with what the Act refers to as a "requesting carrier." *See, e.g.*, 47 U.S.C. § 251(c).

The Act permits a CLEC to adopt an existing ICA between an ILEC and another CLEC. *See* 47 U.S.C. § 252(i). Initially, through the Federal Communications

Commission's ("FCC") implementation of § 252(i) pursuant to 47 C.F.R. § 51.809, a CLEC could "pick and choose" individual terms from other ICAs to incorporate into its existing agreement. In 2004, the FCC amended § 51.809 to eliminate "pick and choose" and, instead, implemented an "all or nothing" approach, which limits a CLEC to adopting only an approved ICA in its entirety. *See* 47 C.F.R. § 51.809.

State public service commissions are vested with the authority to approve or reject interconnection agreements reached by carriers. *See* 47 U.S.C. § 252(a)(1). The commissions may also arbitrate disputes between the carriers about their interconnection agreements or arbitrate the terms and rates if no agreement is reached. *See* 47 U.S.C. § 252(b). In this way, the states' role in local telephone regulation is preserved and the public service commissions are free to act in accordance with state interests, so long as those interests are not contrary to the Act and FCC regulations. *See* 47 U.S.C. §§ 251(d)(3), 261.

A. The Express Phone Interconnection Agreement

Pursuant to § 252(a)(1) of the Act, Express Phone and AT & T negotiated and entered into an interconnection agreement in 2006 (the "Express Phone ICA"), which had an initial term of five years and was approved by the FPSC in early 2007. (R. at pp. 35, 563, 1257, 1259.) The agreement set forth the terms under which AT & T would provide wholesale service to Express Phone for resale to its retail customers. (Document 1, p. 6, ¶ 13; Document 7, p. 3, ¶ 13.) The Express Phone ICA provided, *inter alia,* that Express Phone would "make payment to [AT & T] for all services billed including disputed amounts," or risk disconnection of its service. (R. at pp. 1265–68, Attach. 3, § 1.4.)

***2** In 2009, Express Phone began withholding payment of disputed amounts, in violation of the "pay and dispute" terms of the Express Phone ICA. (*See, e.g.,* R. at pp. 1390–92.) Following negotiations between the parties in August and September 2010 regarding an increased security deposit (R. at pp. 437:23–438:25, 1390–97), Express Phone sent a letter to AT & T on October 20, 2010, seeking to adopt an interconnection agreement between AT & T and a third-party CLEC, Image Access, Inc. d/b/a NewPhone (the "NewPhone ICA") (R. at pp. 1160–66). The NewPhone ICA contained different payment provisions, including a "withhold and dispute" clause that Express Phone sought to obtain. (*See* R. at pp. 433:22–434:2.) That ICA was filed with the FPSC in April 2006 and was approved by the FPSC in July 2006, prior to the execution and adoption of the Express Phone ICA. (*See* R. at pp. 421:9–423:24.) The NewPhone ICA was available for adoption at the time Express Phone negotiated and adopted its interconnection agreement with AT & T.

At the time Express Phone sent the October 20, 2010, letter to AT & T seeking to adopt the NewPhone ICA, it had a past due balance of over $850,000, with nearly thirteen months remaining until the expiration of the Express Phone ICA. (*See* R. at pp. 605:21–22, 638:1–15.) By its terms, the Express Phone ICA limited negotiations for a successor agreement to begin no earlier than the beginning of February 2011. (R. at pp. 1259, 638:11–15.) On November 1, 2010, AT & T responded by letter denying Express Phone's attempt to adopt the more favorable NewPhone ICA and indicated that the Express Phone ICA was still in effect. (*See* R. at pp. 1167–1168, 660:1–7.) In February 2011, AT & T began formal collection action by sending Express Phone a breach notice (*see* R. at pp. 606:28–607:4), to which Express Phone responded by letter in March 2011, again requesting that it be allowed to adopt the NewPhone ICA. (R. at pp. 1169–1177.)

At the time Express Phone sent the March 2011 responsive letter to AT & T, it had a past due balance of over $1.3 million (*see* R. at p. 606:26–27), and the Express Phone ICA now permitted negotiations for a successor agreement. AT & T conditionally accepted Express Phone's adoption request in March 2011,

conditioned (among other things) on Express Phone curing its non-payment breach by paying all past due amounts, including disputed amounts. (R. at pp. 1178–79, 660:12–18.) Express Phone filed a complaint with the FPSC against AT & T in March 2011 (R. at pp. 221, 652), and filed notice on March 29, 2011, that it had adopted the NewPhone ICA, effective immediately. (R. at p. 1.) Thereafter, AT & T filed with the FPSC its objection and non-consent to Express Phone's adoption of the NewPhone ICA. (R. at p. 6.) After the FPSC denied Express Phone's emergency motion to prevent AT & T from disconnecting service pursuant to the Express Phone ICA, AT & T disconnected service. (R. at p. 1341.)

***3** On April 4, 2011, Express Phone filed with the FPSC an amended notice of its adoption of the NewPhone ICA, identifying the effective date of the adoption as October 20, 2010–*i.e.*, the date of its original letter to AT & T seeking adoption-rather than the March 29, 2011, effective date identified in its Notice of Adoption that same day. (R. at p. 8.) AT & T again denied Express Phone's adoption request until its non-payment breach was cured. (R. at p. 1185.) AT & T also filed a Response in Opposition to Express Phone's Amended Notice of Adoption. (R. at p. 134.) On April 12, 2011, Express Phone filed a Motion for Summary Final Order, asking the FPSC to find its adoption of the NewPhone ICA was valid and to order AT & T to reinstate service. (R. at p. 31.) On July 6, 2011, the FPSC denied Express Phone's motion and adoption of the NewPhone ICA. (R. at p. 220.) Three weeks later, Express Phone requested a formal administrative hearing pursuant to Fla. Stat. §§ 120.569 and 120.57, regarding the denial of its adoption of the NewPhone ICA. (R. at p. 235.)

B. The FPSC Decision

The FPSC held an evidentiary hearing on May 3, 2012, during which it heard testimony from both parties and received 45 exhibits into the record. (R. at pp. 357–1489.) The record shows that Express Phone began accruing past due amounts in 2007 (R. at p. 1272), and by March 1, 2012, had accrued a past due balance in excess of $1.4 million. (R. at p. 608.) The record also includes testimony from Express Phone expert witness Don Wood, who agreed that an interconnection agreement is a binding contract. (R. at pp. 543–44.)

On July 30, 2012, the FPSC issued its Final Order on Express Phone's Notice of Adoption. The FPSC found that Express Phone was bound by the 2006 ICA it entered with AT & T and that Express Phone was in "material breach" of the ICA by failing to pay "its disputed amounts as required by the terms and conditions [thereof]." (R. at 1575.) Additionally, the FPSC found that Express Phone's material breach "render[ed it] ineligible to adopt" the NewPhone ICA (or any other ICA) until its "breach [was] remedied." (*Id.*) The FPSC reasoned that a "company bound by the terms and conditions of its signed interconnection agreement shall not be allowed to adopt an alternative interconnection agreement if the company is concurrently breaching its existing interconnection agreement." (*Id.*) Express Phone now seeks review of the FPSC's Final Order. All parties have filed briefs and on September 11, 2013 the Court held oral arguments, in which all parties participated.

II. STANDARD OF REVIEW

Federal district courts have exclusive appellate jurisdiction to review determinations made by the state public service commissions. *See* 47 U.S.C. § 252(e)(6). *De novo* review applies to a state commission's interpretation of the meaning and import of the Act, while the arbitrary and capricious standard of review applies to a state commission's application of the Act. *See MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F.Supp.2d 1286 (N.D.Fla.2000). Furthermore, to the extent the FCC has issued an interpretive decision implementing the Act, the FCC's decision is entitled to *"Chevron"* deference, which means that the decision is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron USA, Inc.*

v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ; *see also AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384–87, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (applying *Chevron* to FCC interpretations of the Act).

III. DISCUSSION

***4** Express Phone argues that the FPSC's determination that a CLEC must comply with a discriminatory term in its ICA before it may remedy that discrimination by adopting a more beneficial ICA is contrary to § 252(i) and § 51.809. (Doc. 21 at pp. 11–17.) In addition, Express Phone contends that the FPSC's ruling that a CLEC may not adopt a more preferable ICA unless it first complies with discriminatory terms in its existing ICA is arbitrary and capricious. (Doc. 21 at pp. 18–21.) AT & T and the FPSC counter that ICAs are binding agreements and a breaching party may not unilaterally adopt another ICA until it cures its breach of the existing ICA. (Docs. 22 & 23.)

A. Discriminatory Term in Express Phone ICA

Express Phone's position is predicated on the notion that the "pay and dispute" provision of its ICA is discriminatory pursuant to § 252(i), as compared to the "withhold and dispute" provision of the NewPhone ICA. (Doc. 21.) In arguing that the latter ICA is more favorable, Express Phone points out that it is at a distinct disadvantage against its competitors who, like NewPhone, are able to withhold disputed amounts until their resolution. (*Id.* at 14, 27 .) Express Phone argues that the "pay and dispute" provision creates an incentive for AT & T to overbill it, while the "withhold and dispute" provision creates an incentive for AT & T to work with NewPhone to resolve any outstanding disputes. (*Id.* at 14.) Express Phone also asserts that these incentives are not speculative because when AT & T had a billing dispute with NewPhone, AT & T negotiated and reached agreement with NewPhone, but refused to do the same with Express Phone. (*Id.* at 14.)

In contrast, the FPSC argues that the anti-discrimination provisions of the Act-*i.e.*, § 251(b) and (c)—do not apply to negotiated agreements like the Express Phone ICA made pursuant to § 252(a)(1) because that section "specifically provides that the nondiscrimination requirements of § 251(b) and (c) do not apply to § 252(a)(1) negotiated interconnection agreements." (Doc. 22 at p. 18.) Section 252(a)(1) provides that "an [ILEC] may negotiate and enter into a binding agreement with the [CLEC] without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). Section 252(i) merely provides that an ILEC shall make available any interconnection agreement to any CLEC upon the same terms and conditions. 47 U.S.C. § 252(I).

The fact that disparate terms may exist among various ICAs does not alone render an ICA with an unfavorable term discriminatory. Indeed, " '[e]qual terms and conditions' and 'nondiscriminatory access' do not mean identical agreements." *Nu Vox Comms., Inc. v. Edgar*, 511 F.Supp.2d 1198, 1209 (N.D.Fla.2007). The Act "does not require that all interconnection agreements be identical." *MCI Telecomms. Corp. v. Mich. Bell Tel. Co.*, 79 F.Supp.2d 768, 776 (E.D.Mich.1999); *see also Levine v. BellSouth Corp.*, 302 F.Supp.2d 1358, 1372 (S.D.Fla.2004) (holding that it is not unreasonable to treat Louisiana customers differently than customers from other states when Louisiana regulation requires it). Different agreements can contain different types of burdens and benefits, as long as the benefits equal out the burdens. *Nu Vox*, 511 F.Supp.2d at 1209 (citing *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C.Cir.2006)). This is particularly so in light of the FCC's "all or nothing" rule, which limits a CLEC to adopting a state commission-approved agreement in its entirety, rather than selected provisions thereof. 47 C.F.R. § 51.809(a).

***5** Thus, even though the NewPhone ICA's "withhold and dispute" provision may have been more favorable than the Express Phone ICA's "pay and

dispute" provision, this difference alone does not rise to the level of discrimination contemplated by the Act. As AT & T points out, New Phone's affiliate, Digital Express, Inc., itself has argued that the NewPhone ICA is discriminatory with respect to its security deposit provisions. (Doc. 23 at n. 14; *see* FPSC, Docket No. 120169–TP.) Even assuming the anti-discrimination provisions of the Act did apply in this context and in light of the parties' prior dispute regarding the security deposit provision of the Express Phone ICA, the balancing of burdens and benefits between the Express Phone ICA and the NewPhone ICA militates against a determination that the "pay and dispute" provision of the Express Phone ICA was discriminatory.

B. Binding Nature of ICA's

Express Phone next asserts that the FPSC's determination that it must first cure its breach by complying with the "pay and dispute" provision of its existing ICA before it can adopt another ICA "creates a regulatory 'Catch 22.' " (Doc. 21 at p. 17.) Specifically, the crux of Express Phone's argument is that its ability to adopt a preferential ICA is the specific statutory remedy provided for the alleged discrimination it experienced. (*Id.*) On the other hand, the FPSC and AT & T argue that the Act does not permit Express Phone to unilaterally cancel its existing ICA and adopt another one while in breach, as ICAs are binding agreements. (Doc. 22 at p. 16; Doc. 23 at p. 15.) Having already addressed the discrimination issue, above, this Court rejects Express Phone's argument that the FPSC's order "authorizes and institutionalizes the very discrimination that § 252(i) and Rule 51.809 were designed to prevent." (Doc. 21 at p. 17.)

Once an interconnection agreement is approved by the state commission, the Act requires the parties to abide by its terms. *See Verizon Md., Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4th Cir.2004); *Fernandes v. Manugistis Atlanta, Inc.*, 582 S.E.2d 499,502 (Ga.Ct.App.2003) ("Where the language of the contract is plain and unambiguous, no construction is required or permissible and the terms of the contract must be given an interpretation of ordinary significance."); *Medical Ctr. Health Plan v. Brick*, 572 So.2d 548, 551 (Fla. 1 st DCA 1990) ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.") (citation omitted). Moreover, a party is bound by a contract provision, even if it is somehow perceived to be harsh or unfair. *See Berry v. Travelers Ins. Co.*, 64 Ga.App. 727, 14 S.E.2d 196, 202 (Ga.Ct.App.1991); *Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So.2d 1194, 1194 (Fla. 3d DCA 2009).

The Express Phone ICA was voluntarily entered into by the parties after negotiation and subsequently approved by the FPSC. (R. at 1, 35, 31–32, 35, 1257, 1259.) Accordingly, it is a "binding agreement" pursuant to § 252(a)(1). *See McLeod USA Telecommunic'ns Servs., Inc. v. Iowa Utils. Bd.*, 550 F.Supp.2d 1006, 1029 (S.D.Iowa 2006). The Court notes that Express Phone itself conceded that an ICA is a binding contract. (R. at pp. 543–44.) As the FPSC appropriately determined, Express Phone's failure to pay the disputed amounts to AT & T was a material breach of its ICA.

C. Concurrent Breach Precludes Adoption

***6** Again relying on § 252(i), Express Phone argues that it is entitled to upgrade its existing ICA at any time and for whatever reason, since that section of the Act entitles all CLECs to "most favored nation" status. (Doc. 24 at p. 2). Notably, and relevant to the FPSC's Final Order, Express Phone extends the foregoing logic to a situation in which a CLEC is concurrently in breach of its existing ICA while seeking adoption of another ICA. (*See, e.g.*, Docs. 21 & 24.) As discussed above, the Express Phone ICA is a binding agreement and § 252(i) does not relieve a party thereunder from its obligations, particularly when that party is in breach.

In determining the meaning of § 252(i), the section must be read in light of the structure and intent of

the Act. *See Global NAPs, Inc. v. Verizon New England, Inc.*, 396 F.3d 16, 24 (1st Cir.2005), *cert. denied*, 544 U.S. 1061, 125 S.Ct. 2522, 161 L.Ed.2d 1110 (2005). In *Global NAPs*, a case involving a § 252(b) interconnection agreement arbitration order, Global NAPs, the CLEC, argued that because § 252(i) does not expressly state when and under what circumstances the ILEC must make interconnection agreements available to other competitors, it was free to opt into an alternative agreement at any time it chooses. *Id.* at 24. The court disagreed, finding that the CLEC's reading brought § 252(i) in direct conflict with, and in important aspects negated, provisions of § 251(b) and (c) of the Act. *Id.* at 24–26. The court affirmed the state commission's determination that § 252(i) could not be read to allow Global NAPs to avoid the terms of the binding arbitration order by opting into an interconnection agreement which had been available to it throughout the entire period of negotiation and arbitration. *Id.* at 28.

While this Court notes that the Express Phone ICA was not subject to arbitration, the reasoning advanced by the First Circuit in *Global NAPs* is nonetheless persuasive. The NewPhone ICA was available for adoption at the time Express Phone entered into its ICA with AT & T in 2006, but Express Phone neglected to adopt the NewPhone ICA at that time. (*See* R. at pp. 421:9–423:24.) Instead, Express Phone waited to seek adoption of the NewPhone ICA until it was in breach of its existing ICA, which was nearly one year away from its expiration. Even if the "pay and dispute" provision in the Express Phone ICA was discriminatory as compared to the NewPhone ICA's "withhold and dispute" provision, this would not entitle Express Phone to adopt the NewPhone ICA in the manner it sought (*i.e.*, while in material breach). Accordingly, the FPSC properly held that adoption of another ICA is precluded during a party's concurrent breach of an existing ICA.

D. Final Order as Arbitrary and Capricious

Next, Express Phone asserts that the FPSC's determination that it would be bad public policy to permit Express Phone to adopt the NewPhone ICA until it cured its breach of the existing ICA is arbitrary and capricious. (Doc. 21 at pp. 18–22.) The arbitrary and capricious standard is exceedingly deferential, and the Court is not authorized to substitute its judgment for the FPSC's as long as the FPSC's conclusions are rational. *See Pub. Serv. Tel. Co. v. Ga. Pub. Serv. Comm'n*, 404 F. App'x. 439, 441 (11th Cir.2010); *Atlanta Gas Light Co. v. Fed. Energy Regulatory Comm. 'n*, 140 F.3d 1392, 1397 (11th Cir.1998) (concluding that an agency's findings will be overturned only if it is shown that there is "no rational connection between the facts and the choice made," or if the decision was not based on consideration of "relevant factors" or "there has been a clear error of judgment").

*7 After review of the record, the Court finds there is sufficient evidence establishing the FPSC's reasoned basis for denying Express Phone's adoption of the NewPhone ICA. The FPSC enforced the "pay and dispute" provision of the Express Phone ICA as it had done for numerous prior other interconnection agreements and as other state commissions have done as well. (R. at pp. 650–53, 1295–96, 1298, 1305–06, 1323.) *See, e.g., In re: Complaint and petition for relief against Life Connex Telecom, LLC f/k/a Swiftel, LL C by BellSouth Telecommunic'ns, Inc. d/b/a AT & T Fla.*, 2010 Fla. PUC LEXIS 515, * 11, 15–16 (2010) (Order No. PSC–10–0457–PCO–TP); *In re: Request for emergency relief and complaint of FLA TEL, Inc. against BellSouth Telecommunic'ns, Inc. d/b/a AT & T Fla. to resolve interconnection dispute*, 2012 Fla. PUC LEXIS 50, * 10 (2012) (Order No. PSC–12–0085–FOF–TP). The FPSC's rejection of Express Phone's adoption as contrary to the public interest was not without consideration of relevant facts or the result of a clear error in judgment. Accordingly, the FPSC's justification and reasoning for the decisions in its Final Order are not arbitrary and capricious.

IV. CONCLUSION

The FPSC correctly concluded that interconnection agreements voluntarily negotiated pursuant to § 252(a)(1) are binding on the parties to those agreements, and that Express Phone was bound by the terms of its 2006 interconnection agreement with AT & T, such that Express Phone could not adopt a new interconnection agreement (*e.g .*, the NewPhone ICA) while concurrently in breach of its existing agreement with AT & T. As such, the FPSC's Final Order is affirmed.

Since the FPSC determined that Express Phone was in material breach of its ICA during all relevant times and its Final Order is limited to the context of an adoption during a concurrent breach by the adopting party, this Court's decision does not address adoption where there is no breach and should not be viewed in that light.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

The Final Order of the Florida Public Service Commission is AFFIRMED.

DONE AND ORDERED.

N.D.Fla.,2013.
Express Phone Service Inc. v. Florida Public Service Com'n
Slip Copy, 2013 WL 6536748 (N.D.Fla.)

END OF DOCUMENT

EXHIBIT E

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

DPI TELECONNECT, L.L.C., Plaintiff,

v.

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

ORDER

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

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

BACKGROUND

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

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

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

DISCUSSION

Standard of Review

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

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

I. The Telecommunications Act of 1996

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

2. Calculating the Value of Promotional Credits

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

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

service to dPi and other resellers for $78.50.

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Terrence W. Boyle

TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-836, SUB 5
DOCKET NO. P-908, SUB 2
DOCKET NO. P-1272, SUB 1
DOCKET NO. P-1415, SUB 2
DOCKET NO. P-1439, SUB 2

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina, Complainant	)	
v.	)	ORDER RESOLVING CREDIT CALCULATION DISPUTE
dPi Teleconnect, LLC, Image Access, Inc., d/b/a NewPhone, Affordable Phone Services, Inc., BLC Management, LLC, d/b/a Angles Communications Solutions, and LifeConnex Telecom, Inc., f/k/a Swiftel, Respondents	)	

HEARD IN: Commission Hearing Room 2115, Dobbs, Building, Raleigh, North Carolina, on April 15, 2011

BEFORE: Commissioner William T. Culpepper, III, Presiding; Chairman Edward S. Finley, Jr.; and Commissioners Lorinzo L. Joyner, Bryan E. Beatty, Susan Warren Rabon, and ToNola D. Brown-Bland

APPEARANCES:

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

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For the Using and Consuming Public:

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For dPi Teleconnect, LLC, Image Access, Inc., d/b/a NewPhone, Affordable Phone Services, Inc., and BLC Management, LLC d/b/a Angles Communications Services:

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For Affordable Phone Services, Inc., and BLC Management, LLC, d/b/a Angles Communications Solutions:

Henry Walker, Brantley Arant Boult Cummings, LLP, 1600 Division Street, Suite 700, Nashville, Tennessee 37203

BY THE COMMISSION: On January 8, 2010, BellSouth Telecommunications, Inc., d/b/a AT&T Southeast, d/b/a AT&T North Carolina (AT&T or Complainant) filed in separate dockets complaints and petitions for relief against dPi Teleconnect, LLC (dPi), Image Access, Inc., d/b/a NewPhone (NewPhone), Affordable Phone Services, Inc. (Affordable Phone), and BLC Management, LLC, d/b/a Angles Communications Services (Angles) (collectively Respondents or Resellers), requesting that the Commission resolve outstanding billing disputes that exist between Complainant and Respondents, determine the amount that each Respondent owes Complainant under its respective interconnection agreement with AT&T, and require each Respondent to pay the amount to Complainant.

On February 25, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed defensive pleadings to AT&T's complaints. On April 9, 2010, Complainant filed responses to each of the defensive pleadings. On April 30, 2010, Respondents dPi, NewPhone, Affordable Phone and Angles each filed reply pleadings to Complainant's April 9, 2010, responsive pleadings.

On May 14, 2010, the Respondents and Complainant filed a Joint Motion on Procedural Issues in which the parties requested that the Commission hold all other pending motions in abeyance and convene a consolidated proceeding (Consolidated Phase) to which the Complainants and all Respondents are parties to resolve the following issues: how credits to resellers for the Cashback and Line Connection Charge Waiver (LCCW) promotions should be calculated; and whether the Word-of-Mouth promotion is available for resale and, if so, how the credits to resellers for the Word-of-Mouth promotion should be calculated. This Joint Motion was granted by Commission Order issued May 20, 2010.

On July 23, 2010, Complainant filed stipulations entered into by Complainant and Respondents for the Consolidated Phase. On August 3, 2010, the Commission issued its Order Allowing Intervention by LifeConnex Telecom, LLC, f/k/a Swiftel (LifeConnex), in the Consolidated Proceeding.

On August 27, 2010, Complainant prefiled the direct testimony and exhibits of William E. Taylor, and Respondents prefiled the direct testimonies and exhibits of Joseph Gillan and Christopher C. Klein. On October 1, 2010, Complainant filed the rebuttal testimony of William E. Taylor, and Respondents filed the rebuttal testimonies of Joseph Gillan and Christopher C. Klein.

On February 8, 2011, the Commission issued its Order Scheduling Hearing. On April 11, 2011, dPi filed Objections to and Motion to Strike Portions of Dr. William Taylor's Testimony. On April 13, 2011, Complainant filed a Response to Motion to Strike. The matter came on for hearing as scheduled on April 15, 2011. dPi's motion to strike was denied from the bench by Presiding Commissioner Culpepper.

WHEREUPON, based upon the foregoing and the entire record in this matter, the Commission makes the following

FINDINGS OF FACT

1. This matter is properly before the Commission on the Complaint of AT&T, and the Commission has jurisdiction over the parties in this Consolidated Phase and over the subject matter of the issues raised in this proceeding.

2. Pursuant to federal law, the Commission has previously reviewed avoided cost studies presented to the Commission and found a uniform discount rate of 21.5% to be just and reasonable for the residential services at issue in this Consolidated Phase.

3. AT&T's two-step process for determining credits that a reseller is entitled to receive when a telecommunications service which is subject to a retail cashback promotion is sold appropriately applies the Commission-approved 21.5% discount to the promotional price of the service and is therefore reasonable, in compliance with applicable laws, and otherwise appropriate.

4. The alternative proposals offered by the Respondents in this matter overstate the avoided cost estimate, which distorts the 21.5% discount rate set by the Commission and thus understates the wholesale prices that the Resellers are required to pay.

5. In comparing retail prices to wholesale prices, it is appropriate to consider the prices over a reasonable period of time, which is consistent with how customers subscribe to services.

6. AT&T's process of providing a discounted credit to Resellers for the LCCW results in both the retail customer and the wholesale customer paying a net amount of zero for the line connection charge, which is the appropriate result.

7. The Word-of-Mouth promotion is a marketing effort that is not required to be made available for resale.

DISCUSSION OF EVIDENCE AND CONCLUSIONS

Federal law provides that prices for resold telecommunications services shall be set on the basis of retail rates charged to subscribers for the service requested, excluding the portion thereof attributable to costs that are avoided when an incumbent local exchange carrier ("ILEC") like AT&T provides a service on a wholesale basis rather than on a retail basis.[1] In 1996, the Commission used cost studies and other evidence presented in a contested proceeding to determine the aggregate amount of "avoided costs" associated with AT&T's retail services. The Commission then divided that aggregate "avoided cost" figure by the aggregate revenue generated by those services to determine the uniform resale discount rate of 21.5% for the residential services at issue in this docket. *See* Recommended Arbitration Order, *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50 at 43 (December 23, 1996); Order Ruling on Objections, Comments, Unresolved Issues, and Composite Agreement, *In the Matter of Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, Docket No. P-140, Sub 50 (April 11, 1997). The issues in this Consolidated Phase involve: how credits to resellers for the Cashback and LCCW promotions should be calculated; and whether the Word-of-Mouth promotion is available for resale and, if so, how the credits to resellers for the Word-of-Mouth promotion should be calculated.

A. CASHBACK PROMOTIONS

AT&T uses the following two-step process to sell a telecommunications service that is subject to a retail cashback promotion to Resellers at wholesale: (1) a Reseller orders the requested telecommunications service and is billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the

[1] 47 U.S.C. 252(d)(3).

21.5% resale discount rate established by the Commission); and (2) the Reseller requests a cashback promotional credit which, if verified as valid by AT&T, results in the Reseller receiving a bill credit in the amount of the face value of the retail cashback benefit discounted by the 21.5% resale discount rate established by the Commission. (*See* Stipulations for Consolidated Phase at ¶¶7-9; Taylor Direct, Tr. at 29-30). To illustrate AT&T's method, assume a promotion that provides qualifying retail customers a one-time $50 cashback benefit when they purchase a service with a monthly price of $80. The effective price for the service to the retail customer is $30 ($80 standard price less $50 cashback) for the month that the customer receives the promotional cashback benefit. The same service is available for purchase by a Reseller at a monthly price of $62.80 ($80 discounted by 21.5%). If the Reseller also qualifies to purchase the promotion for resale, AT&T gives the Reseller a $39.25 ($50 discounted by 21.5%) promotional cashback credit. This results in the Reseller paying an effective price of $23.55 ($62.80 less $39.25) for the month that the Reseller receives the cashback credit, which amount is 21.5% less than the $30 price to the retail customer for the cashback month.

In this proceeding, the Resellers have contended that AT&T's two-step method is impermissible, does not appropriately apply the Commission approved discount and improperly calculates the credit that the Resellers are due to the Resellers' disadvantage. For the reasons explained below, the Commission concludes that AT&T's previously described two-step method complies with applicable law and appropriately applies the Commission-approved 21.5% resale discount percentage to the retail rate of the promotion-qualifying service.

In its *Local Competition Order,*[2] the FCC anticipated that state commissions would implement the "avoided cost" requirements of Section 252(d)(3) by adopting resale discount percentage rates like the 21.5% rate previously established. The FCC explained that, when avoided costs are determined in this manner, state commissions "may then calculate the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate." *See Local Competition Order* at ¶ 908. The FCC went on to explain that when a promotional offering is available for more than 90 days (as is the case with the promotions at issue in this Consolidated Phase), the "promotional price ceases to be short-term ***and must therefore be treated as a retail rate for an underlying service.***" *Id.* at ¶¶949-50 (emphasis added). As the example illustrated above demonstrates, in AT&T's two step method, AT&T multiplies the retail rate when a reseller qualifies to purchase the promotion by the discount price to determine the wholesale price (i.e., the retail rate minus the avoided costs) that the telecommunications product is made available to Respondents. The Commission therefore concludes that AT&T's two-step method described above is appropriate

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, (1996)(*Local Competition Order*), *subsequent history omitted.* In this Order, the FCC concluded that it was "especially important to promulgate national rules for use by state commissions in setting wholesale rates" that will "produce results that satisfy the intent of the 1996 Act," and it stated that "[t]he rules we adopt and the determinations we make in this area are crafted to achieve these purposes," *Id.* at ¶907.

because it correctly applies the 21.5% resale discount rate to the retail rate, i.e., the promotional price, for the underlying service.

The Fourth Circuit's decision in *BellSouth Telecom, Inc. v Sanford*, 494 F.3d 439 (4th Cir.) 2007, supports the Commission's decision. In *Sanford,* the Fourth Circuit concluded that the Commission "correctly ruled that 'long-term promotional offerings offered to customers in the marketplace for a period of time exceeding 90 days have the effect of changing the actual retail rate to which a wholesale requirement or discount must be applied.'"[3] Noting the FCC's finding that a promotion or discount offered for more than 90 days became part of a retail rate that had to be offered to competing LECs, the Fourth Circuit affirmed the conclusion "that when such incentives [like cashback or gift cards] are offered, the nominal tariff (the charge that appears on the subscriber's bill) is not the 'retail rate charged to subscribers' under §252(d)(3) because the nominal tariff does not reflect the value of the incentives."[4] The Fourth Circuit then provided the following example to explain its decision:

> Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to compete with BellSouth's $20 retail fee. Now suppose that BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100. According to the NC Commission's orders, the appropriate wholesale rate is still $16, because that is the net price paid by the retail customer ($20), less the wholesale discount (20%).[5]

This $16 wholesale price that the Fourth Circuit affirmed is exactly the price that results when AT&T's method is applied to this scenario. (Taylor Rebuttal, Tr. at 68-69).

Finally, the decision rendered in Docket P-55, Sub 1744 (*dPi Recommended Order*) also is supportive of the credit calculation methodology proposed by AT&T in this case. In that docket, the Commission adopted a discount promotion credit calculation methodology advanced by AT&T that was based upon the example set forth in the *Sanford* decision. In that docket, the Commission held that AT&T should calculate the value of the promotional discount by deducting the wholesale discount from the retail value of the promotion. Finding of Fact 26, *dPi Recommended Order.* The methodology proposed in this proceeding is mathematically identical to the formula advanced by AT&T and adopted by this Commission in that docket.

In addition to being consistent with applicable law, AT&T's method also is consistent with economic reality. The Resellers' witnesses testified that a $50 one-time

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[3] *Id.* at 442.

[4] *Id.* at 450.

[5] *Id.* at 450.

cashback benefit reduces the effective retail price of a resold telecommunications service by $50. (Gillan Cross, Tr. at 244; Klein Evid. Hrg. Exh. No. 1 at 44). As a result of the "avoided cost" pricing standard in Section 252(d)(3), however, changes in the retail price of a telecommunications service do not flow through to a reseller on a dollar-for-dollar basis. For example, if the standard retail price of a service is increased by $50 (from $30 to $80, for example), the wholesale price for the service does not increase by $50. Instead, it increases by only $39.25:

	Retail	**Wholesale**
New Price	$80	$62.80 ($80 discounted by 21.5%)
Initial Price	$30	$23.55 ($30 discounted by 21.5%)
Difference	$50	$39.25 ($50 retail difference discounted by 21.5%)

The Resellers' witnesses testified that, conversely, a $50 reduction in the standard retail price of a service does not result in a $50 reduction in the wholesale price of the service, but instead results in a $39.25 reduction in the wholesale price of the service. (Gillan Cross, Tr. at 235; Gillan Cross Exam. Exh. No. 1; Klein Cross, Tr. at 307-08).[6] In the Commission's view, it is appropriate that AT&T provides the Resellers the same $39.25 wholesale price reduction when the retail price reduction takes the form of a cashback benefit as the resellers would receive if it took the form of a $50 reduction to the "standard price." (*See* Taylor Direct, Tr. at 30-31). Further, this conclusion is consistent with the Commission's prior determination that a reseller is only entitled to the price lowering impact of the promotion and not the face value. *See dPi Recommended Order,* p. 22.

The Commission has reviewed and rejects each of the various alternative methods the Resellers proposed to use in applying the 21.5% resale discount to cashback offerings. Our review reveals that each method is inconsistent with the *Local Competition Order,* the *Sanford* decision, and the *dPi Recommended Order.* The Commission is persuaded that each of the Resellers' alternative proposals overstates the avoided cost estimate, which in turn distorts the established 21.5% resale discount rate and understates the wholesale price Resellers are required to pay for the services they order from AT&T.

In reaching this decision, the Commission notes that the Resellers have spent considerable time and resources in this proceeding arguing that AT&T's credit calculation method produces wholesale prices that are higher than retail prices. The evidence presented in this proceeding clearly indicates that the vast majority of the promotions that are the subject of this hearing have one-time cashback promotional benefits that exceed the monthly retail price of the service. In those situations, the Respondents have clearly demonstrated that resellers receive less money from AT&T for keeping the service for only a month or two than a retail customer would receive

[6] To simplify the math, Gillan Cross Exam. Exh. No. 1 assumed a 20% wholesale discount, which resulted in a $40 reduction in the wholesale price. When the actual 21.5% wholesale discount rate is used, the reduction is $39.25.

from AT&T for keeping the service only a month or two. (*See* Gillan Cross Exam. Exh. No. 8; Attachments P and Q to AT&T's Brief).

Although the Commission accepts that the result produced by this calculation shows that the Resellers receive less money from AT&T for keeping the service for only a month or two than a retail customer would receive, the Commission is not persuaded that this fact demonstrates that AT&T's method causes the Resellers' wholesale purchase price to exceed the retail price that AT&T offers to its retail customers. To reach such a conclusion, the Commission would be required to accept the fundamental assumption embraced by Respondents that the pricing practices in this case, i.e., the wholesale price determination and/or the credit calculation should be based upon "that single month when the promotion is processed." Post Hearing Brief of the Respondents, p. 5. This, the Commission cannot do for the following reasons.

First, the Commission cannot accept this assumption because the wholesale discount is an average for all of AT&T's retail services. As such, it was never intended to represent the avoided costs for a particular service for an individual month. Second, and more importantly, the Commission cannot accept this assumption because the evidence presented in this hearing shows that, on average, both AT&T's customers and the Resellers' customers keep service more than a month or two. AT&T's witness Dr. Taylor testified that on average, AT&T's retail customers who take cashback promotions stay "much, much longer" than one or two months, (Taylor Redirect, Tr. at 184), and relying on the sworn testimony of dPi's CEO, Dr. Taylor testified that on average, Resellers' end users keep service from between three and ten months. (*Id.*, Tr. at 184-85). Resellers' witness Dr. Klein, for instance, testified that in considering whether pricing practices are below cost or predatory, "you would have to look at more than only one month of service." (Klein Cross, Tr. at 306; *See also* Klein Depo., Klein Evid. Hrg. Exh. No. 1. at 57-58).

Because of this evidence, it is not reasonable to consider a single month's financial data to determine the price of a product when the customer who purchases that product is reasonably expected to remain a customer of the seller of that product for enough months to make the promotion profitable. Taylor Direct, Tr. at 41. Instead, in these circumstances, it is appropriate for Cashbacks to be considered over a reasonable period of time in order to determine the ultimate price of the promotion based product. Such an approach is consistent with the Commission's historic practice which has allowed companies to recover their "up front" costs over a reasonable period of time instead of requiring that all such costs be recovered in the first month of service. The *Sanford* Court also looked favorably upon a similar approach.[7]

When considered in this manner, a reseller that keeps the service for more than a month or two always pays a net amount that is not only *less* than what the retail customer pays, but that is less by the 21.5% resale discount rate that the Commission

[7] See *Sanford*, 494 F.3d at p. 454 where the Court stated: "[W]hen a promotion is given on a one-time basis in connection with an initial offering of service, its value must be distributed over the customer's expected future tenure with the carrier and discounted to present value.

established. (*See* Gillan Cross Exam. Exh. No. 8; Attachments P and Q to AT&T's Brief). Based on this evidence, the Commission concludes that over a reasonable period of time, the wholesale price of the cashback product is less than the retail price that the retail customer pays. That is, the Resellers appropriately pay 21.5% less than retail customers pay under AT&T's method over time. Thus, there is no merit to the Resellers argument the credit calculation proposed by AT&T and accepted by this Commission results in the wholesale price of the telecommunications service being higher than the retail price.

In conclusion, the Commission notes that while the Commission has considered the issue of the proper methodology for calculation of the amount to be credited to resellers for promotions in greater detail in this proceeding than in prior dockets, the Commission's decisions in Docket No. P-100, Sub 72(b) (*Restriction on Resale Orders I and II),* and in the *dPi Recommended Order* respectively make clear that the face value of a promotion is not required to be passed through to a reseller. Rather, only the benefit of such a reduction must be passed on to resellers by subtracting the properly determined wholesale discount from the lower actual retail price. Consistent with these decisions, the Commission, therefore, finds and concludes that AT&T's two-step process properly passes on the price lowering benefit of a cashback promotion to the Resellers by subtracting the properly determined wholesale discount from the lower actual retail price.

Similarly, the Commission is not persuaded by the Resellers' "price squeeze" arguments. Reseller witness Dr. Klein conceded that: he is not claiming that AT&T is trying to force the resellers out of business by creating a price squeeze; he is not claiming that AT&T has any sort of predatory intent; he is not claiming a violation of Section 2 of the Sherman Act; and in his view as an economist, there is not sufficient evidence in this docket to show a violation of section 2 of the Sherman Act. (Klein Cross, Tr. at 305-06). While Dr. Klein stated that he is testifying about a price squeeze in the regulatory context of the 1996 Act and the FCC's Rules and Orders implementing the 1996 Act, (Klein Cross, Tr. at 306-07), he conceded that if this Commission determines and the courts affirm that AT&T's method complies with the resale provisions of federal law, there would be no price squeeze in the "regulatory context" about which he testifies. (*See* Klein Cross, Tr. at 309). Since AT&T's method does, in fact, comply with federal law, no price squeeze has been evidenced in this proceeding.

Finally, the Resellers' "rebate" argument is likewise not persuasive. Resellers' witness Dr. Klein conceded that end users who receive a cashback "rebate" receive the same features, functionality, and quality of service as end users who do not receive the cashback "rebate," (Klein Cross, Tr. at 313), and that "the only thing that the rebate in and of itself affects" about the service is "the net amount paid for the service." (*Id.*).[8] The 1996 Act requires AT&T to pass certain aspects of a service along to the Resellers

[8] *See also* Klein Depo., Klein Evid. Hrg. Ex. No. 1 at 83 ("what we're arguing about on these promotions is the price that should be charged"); *id.* at 84 ("as far as I know about what's at issue here, that's correct. It's just the monetary arrangements.").

in the same manner as provided to retail customers, but price is not one of them. Instead, the 1996 Act as implemented by this Commission authorizes AT&T to establish the wholesale price of a service by applying the 21.5% resale discount rate to the retail price of the service.

This point is confirmed by the *Sanford* decision, which generally characterizes cashback promotions as "rebates."[9] Additionally, in addressing the example of a $120 standard monthly price and a $100 monthly cashback benefit, *Sanford* specifically refers to "a coupon for a monthly ***rebate*** check for $100."[10] Calling the check a "rebate," however, did not lead the Fourth Circuit to apply its hypothetical 20% resale discount to the $120 "standard" price as the Resellers propose. To the contrary, the Fourth Circuit confirmed this Commission's reasoning that the resale discount must be applied to the promotional price of $20 that results when the "monthly rebate check for $100" is applied to the $120 standard price for the offering.

B. LCCW PROMOTIONS

The LCCW promotion waives the nonrecurring installation charge for new retail customers who are eligible for the promotion. AT&T witness Taylor testified that resellers are initially billed the retail charge for the line connection less the standard wholesale discount. If a timely request for a promotional credit is submitted, AT&T credits the reseller with the amount it initially billed the reseller. As a result, neither the retail customer nor the wholesale customer pays the line connection charge. (Tr. p. 45)

Witness Taylor testified that the line connection charge should be regarded as a telecommunications service since customers generally must buy it with their local exchange service. Thus, he contended that the two services should be treated as a single retail telecommunications service consisting of an upfront, one-time price and a monthly recurring charge, to which the wholesale discount is applied. (Tr. p. 46) Alternatively, Dr. Taylor proposed treating the LCCW as a cashback promotion and providing it for resale at the retail price less the wholesale discount. (Tr. pp. 46-47)

Respondent witness Klein contended that AT&T should credit the reseller with the avoided cost of line connection when the reseller's customer qualifies for the LCCW. (Tr. pp. 276-278, 280) He argued that the LCCW is in the form of a rebate for the reseller and should be calculated by applying the avoided cost discount to the standard retail rate, and giving the reseller the same rebate that the retail customer receives. (Tr. p. 288).

The Commission finds that AT&T's methodology of crediting Resellers with the wholesale price of the LCCW does not differ from that determined as proper for the cashback promotion. In regard to the LCCW, the effective retail rate is zero, so the

[9] *See Sanford*, 494 F.3d at 442, 449.

[10] *Id.* at 450.

effect of the promotion is that neither retail nor wholesale customers are charged the line connection charge, which is appropriate.

C. WORD-OF-MOUTH PROMOTION

AT&T witness Taylor testified that the Word-of-Mouth referral program should be regarded as an AT&T marketing expense. Customers are acting in the capacity of a part-time sales force for AT&T and compensated for successful referrals by receiving a cash reward. (Tr. p. 50) Dr. Taylor also stated that the benefit the recipient receives has no relationship to the services purchased by the recipient from AT&T, and that to receive the Word-of-Mouth payment, the recipient must perform a service of value to AT&T by convincing someone to become a new AT&T customer.

Respondents' witness Klein testified that the Word-of-Mouth referral program is a rebate offered as a term and condition of service and FCC rules require that rebates must be available for resale. (Tr. pp. 287-88) Dr. Klein offered a formula used to calculate the effective rate to the customer based on the rebate, and concluded that if the referral program was not available for resale, AT&T would be evading its wholesale rate obligation.

The Commission agrees with AT&T that the Word-of-Mouth referral program is not subject to the resale obligations of the Act. As explained by witness Taylor, the referral program differs from offerings that are subject to resale obligations in several critical aspects. First, there is no correlation between the referral program and services purchased from AT&T by the recipient; those services may remain unchanged regardless of the number of successful referrals. Instead, the benefit received is directly tied to telecommunications services purchased by other end users, creating a situation where the recipient of the referral program is essentially performing a marketing or sales service on behalf of AT&T. (Tr. p. 51).

The parties agree that marketing and sales costs are specifically included in the calculation of avoided costs as required by FCC rules (§ 51.609). Under cross-examination, Dr. Klein agreed that sales costs associated with several potential individual promotional efforts would not be required to be made available for resale. (Tr. pp. 315-16). The Commission believes that the Word-of-Mouth referral program is analogous to the sales efforts described in the cross-examination of Dr. Klein and is essentially a marketing program for AT&T's services. The Commission is aware of nothing in the *Local Competition Order* requiring a program that markets retail services to be made available for resale by a competitor.

The Commission, therefore, finds and concludes that the Word-of-Mouth referral program is not required to be made available for resale. Since the Commission has determined that the Word-of-Mouth referral program is not subject to the resale obligation, the question of how credits to Resellers should be calculated is moot.

IT IS, THEREFORE, ORDERED as follows:

1. That the credits to Resellers for the Cashback and Line Connection Charge Waiver promotions should be calculated by applying the Commission-approved 21.5% resale discount to the retail price of the underlying service; and.

2. That the Word-of-Mouth referral program does not have to be made available for resale.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of September, 2011.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Commissioner Lucy T. Allen did not participate in this decision.

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CHAIRMAN EDWARD S. FINLEY, JR., CONCURRING IN RESULT: I concur with the conclusion of the majority that the calculations of any payments due the resellers from AT&T for cash back promotions should result in payments produced by AT&T's formula but for reasons different than those relied upon by the majority in its discussion and conclusions set forth in subsection A. For reasons that do not appear on the record, AT&T has agreed voluntarily to resell the subscription incentives at issue in this docket and has stipulated that it would do so in this case. In my view AT&T has no obligation to resell the promotions under TA-96 or the FCC's Local Competition Order because the subscription incentives are items of economic value, not rate discounts. Moreover, the subscription incentives are one-time promotion payments and the duration of the promotion is for less than 90 days.

All of the difficulties, the differences of opinion and the myriad formulae and calculations with which the Commission has been presented arise because in the one month the subscription incentive payments are made to AT&T's retail customers, the resale price to resellers exceeds the retail price. Under ¶¶ 949 and 950 of the Local Competition Order and 47 C.F.R. § 51.613(a), ILECs are not required to resell short term promotions or promotions that will be in effect for no more than 90 days. Failure to acknowledge that these one-time subscription incentives fall clearly within the short term promotion category has resulted in endless arguments in which the parties struggle mightily to force a square peg into a round hole. These arguments miss the dispositive point.

In North Carolina the Commission's jurisdiction to require ILECs to resell these subscription incentive promotions arises because they are "items of value" affecting the underlying services the subscriber receives and are therefore "de facto" offerings in contrast to "de jure" or "per se" offerings addressed by Congress and the FCC. Because they are only "de facto" offerings they pose less potential anticompetitive harm to resellers. Such was the Commission's holding upheld by the Fourth Circuit in Sanford. Being only "de facto" offerings the subscription incentives need not be assessed by the FCC's requirements on resale at all. If they are to be so assessed, they need not be resold to resellers due to their one-time duration.

While painting itself into a corner by asserting "AT&T North Carolina is not arguing that the 'short term promotion exception' relieves it of its resale obligation with regard to the cash back promotions at issue in this proceeding" AT&T proceeds to substantiate its arguments on the very principles underlying this exception.

> As the discussion of Attachment D above demonstrates, the Resellers' "wholesale is higher than retail" argument is the result of myopically focusing on a single month or two in isolation and ignoring the reality of what happens thereafter.

Brief p. 20.

> Indeed, no aspect of a cash back promotion makes economic sense in such a short term, because it would be irrational for AT&T North Carolina to offer $50 cash back to woo customers who will stay with the Company for only a month or two. Likewise the provisions of the 1996 Act are not intended to enable new entrants to win customers in a single month: that is not competition – it is churn. A proper understanding of the economics of a cash back promotion necessarily looks at a longer term.

Brief p. 21.

> And the Resellers cannot honestly claim that what they perceive as a "wholesale is higher than retail" situation persists for an unreasonable period of time – in the example addressed in Attachment D of this Brief, for example, the situation is forever reversed when the service is kept for more than a single month.

Brief p. 22.

> Looking at one-month in isolation for the on-going service charges ignores the economic realities of the tenure of the end user customer and does nothing more than encourage Resellers to churn those end users off after one month.

Brief p. 24.

> In its Local Competition Order, the FCC excluded short-term promotions from the Federal Act's resale obligations and thus sanctioned retail prices that temporarily are higher than wholesale prices, recognizing that
>
> > Promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales based competition and we do not wish to unnecessarily restrict such offerings. We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects. We therefore conclude that short-term promotional prices do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.

Brief pp. 24-25.

Resellers likewise advance arguments anchored on the principle that the promotion aspect of the subscription incentive lasts for a duration of only one month.

> Regarding the cash back promotions, the question before the Commission is how to determine the amount Resellers are entitled when reselling services subject to cash back promotions for that single month when the promotion is processed. No other months are in dispute.
>
> . . .
>
> However, for this single month in dispute, AT&T continues to resist the requirements that it resell its services to CLECs at the effective retail rate less its costs avoided.

Brief p. 1. (emphasis in original).

> It is unclear why this was a concern, since AT&T does not reduce its monthly rate. A cash back promotion is a price gimmick – a one-time deal designed to win business from competitors – that does not change the standard monthly rate and does not indicate a change in avoided costs.

Brief p. 22.

Both parties are absolutely correct. The subscription incentives are short term promotions that, were the FCC rules to apply, would be exempted from any resale requirement. As the ILEC has no obligation to resell the promotion in the first place, the Commission should not force the ILEC to pay Resellers more than the ILEC is willing voluntarily to pay. Endless arguments as to how the payment should be calculated through reference to FCC principles that apply to long term, de jure promotions, not short term and not de facto ones, simply are not useful.

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

EXHIBIT F

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

This case is before the Commission on a billing dispute between dPi Teleconnect, Inc. ("dPi") and BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky"). The parties have filed extensive discovery, testimony and briefs on the issues and the oral argument was held on October 25, 2011. The parties have agreed to submit the matter to the Commission on the record.

Background

DPi is a prepaid provider of local telecommunications service that purchases "wholesale" service from AT&T Kentucky and resells it to its own

customers, who generally would not qualify for traditional phone service. For example, dPi purchases local service from AT&T Kentucky for $13.85 and then sells it, on a prepaid basis, to its customers for approximately $55.00 a month.[1]

Under Federal Communication Commission ("FCC") regulations, if an incumbent, such as AT&T Kentucky, offers a promotion that lasts greater than 90 days, it must discount the wholesale price to a wholesale purchaser (such as dPi) if the wholesale purchaser's customers would have qualified for the promotional discounts had they been AT&T Kentucky customers. 47 C.F.R. § 51.613.

The instant complaint focuses on three separate AT&T Kentucky promotional offerings. The primary component of these promotions involved a cash-back offering that gave qualifying AT&T Kentucky customers the opportunity to receive a check in a designated amount from AT&T Kentucky.[2] Specifically, if the customer purchased certain features, he would receive the cash back in the form of a check or voucher. DPi purchased the promotion at issue from AT&T Kentucky at the standard resale rate for the telecommunications services provided in the promotion.

The issue arises because AT&T Kentucky did not provide any portion of the cash-back promotion to dPi because AT&T Kentucky believed that offering to provide a gift card, check, coupon or other giveaway in return for the purchase of

[1] Ferguson Direct Testimony at 23, exhibit PLF-10.

[2] The promotions and the amounts in dispute for each of them are: (1) "Cash Back $100 Complete Choice" for $27,200; (2) "Cash Back $100 1FR with Two Paying Features" for $2,600; and, (3) "Cash Back $50 1FR with Two Paying Features" for $9,200.

telecommunications services was not covered by the FCC regulations requiring AT&T Kentucky to extend those promotions to resellers.

1. dPi's Arguments

DPi asserts that relevant FCC regulations and statutes require AT&T Kentucky to extend the cash-back promotional offers that it provides to its customers to resellers such as dPi.[3] DPi relies upon 47 U.S.C. § 251(c)(4) which provides that a carrier like AT&T Kentucky must:

> (A) [O]ffer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.
>
> (B) [N]ot prohibit, nor impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service.

DPi argues that the FCC requirement that AT&T Kentucky extend the same offers it applies to its retail customers applies to its promotions. Specifically, dPi asserts that the FCC has found that resale restrictions are presumptively unreasonable and that AT&T Kentucky can only rebut this presumption if the restrictions are narrowly tailored.[4]

DPi also points to FCC regulations that it argues supports its position.

47 C.F.R. § 51.605 provides, in relevant part, that:

> (a) [A]n incumbent LEC shall offer to any requesting telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates . . . .
>
> . . . .

[3] DPi's Initial Brief at 4-5.

[4] Id.

> (e) [A]n incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC.

The applicable regulation provides, in relevant part, that, "an incumbent LEC may impose a restriction [on resale] only if it proves to the state commission that the restriction is reasonable and non-discriminatory." 47 C.F.R. § 51.623(b).

DPi argues that the cash-back promotions apply to it because the promotions affect the rate that AT&T Kentucky charges its customers for the service (the cash-back promotion effectively reduces the retail cost to less than the amount for which AT&T Kentucky sells the service to dPi). DPi argues that allowing AT&T Kentucky to reduce the rate on the back end by offering the rebate is an unfair and unreasonable method for AT&T Kentucky to circumvent the FCC rules regarding extension of promotions to resale customers.

DPi also argues that the restriction in the cash-back promotions is invalid because it never sought prior Commission approval of the restriction as required by 47 C.F.R. § 51.623(b).

DPi asserts, contra AT&T Kentucky, that the interconnection agreements that govern the relationship between AT&T Kentucky and dPi place a six-year window to challenge a denial of a promotion and not a 12-month time restriction as AT&T Kentucky argues.[5] The first interconnection agreement governing the relationship was in effect from 2003 until 2007, the period of time over which the majority of the disputes arose. DPi argues that the interconnection agreement invokes federal law to control the offering of resale services as well as disputes

[5] Id. at 5-6.

arising out of those services. To the extent that federal law does not apply, Georgia state law governs, which provides for a six-year window in which to bring a dispute. DPi argues that the newer interconnection agreement, which has a 12-month window in which to file a dispute, does not apply retroactively and does not govern this dispute.[6]

DPi also asserts that AT&T Kentucky has issued several "cash-back" promotions over the last decade and that these cash-back promotions are essentially rebates. The effect, then, is to reduce the overall rate that AT&T Kentucky's customers are charged.[7]

DPi asserts that AT&T Kentucky's billing system automatically overcharges every reseller for every service that the reseller orders that is subject to a promotional discount. It is then up to the reseller to apply for the credits if it understands that it qualifies for the promotional discounts. DPi argues that AT&T Kentucky makes this process as difficult as possible by requiring resellers to meticulously document the credit with the proper data and fill out AT&T Kentucky's online forms and that AT&T Kentucky provides no reason for rejecting promotional credits.[8]

DPi claims that, although it met the criteria for the cash-back promotions, AT&T Kentucky did not inform dPi that it did, or did not, qualify for the discount until after June 2007. (After June 2007, AT&T Kentucky began offering the

[6] Id. at 6-7.

[7] Id. at 8.

[8] Id. at 9.

discount to dPi). When AT&T Kentucky started to grant the discount in June 2007, dPi sought credit for the previous cash-back promotions but was rebuffed, leading to this complaint.[9]

DPi also argues that it should receive the full value of the cash-back promotion and that the value of the promotion should not be reduced by the wholesale discount rate applied to resale of regular services. For example, if AT&T Kentucky offers retail service to its customers at $20.00, it must sell it to dPi at a Commission-mandated discount of 16.79%. Therefore, dPi is able to purchase the service at $16.64. DPi argues, however, that if AT&T Kentucky offers a promotion for a certain monetary value, the discount rate does not apply to the promotional price. For example, if AT&T Kentucky offers a cash-back promotion of $50.00, it must offer dPi a credit for the whole $50.00 and not reduce that $50.00 by the wholesale discount.[10]

2. AT&T Kentucky's Argument

AT&T Kentucky argues that the obligation to provide promotional credits to resale applies only to "telecommunications services" and, because the promotion is not a "telecommunications service," it does not need to be extended to resellers like dPi.

AT&T Kentucky asserts that 47 U.S.C. § 156(46) defines "telecommunications services" as, "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available

[9] Id. at 10-11.

[10] Id. at 20-32.

directly to the public . . . ." and that 47 U.S.C. § 153(43) defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."

AT&T Kentucky argues that, based upon these statutory definitions, coupons that can be redeemed as checks are not telecommunications services. AT&T Kentucky asserts that they are merely marketing incentives designed to attract customers and that it has no obligation to resell such marketing incentives. AT&T Kentucky explains that it began offering the cash-back promotion for resale once it merged with AT&T because AT&T had been providing the cash-back promotion before the merger.[11]

AT&T Kentucky acknowledged that the Fourth Circuit Court of Appeals had recently determined that any promotion that involves a retail customer receiving something of value (such as a check) must be made available for resale.[12]

AT&T Kentucky acknowledges that any restrictions on retail have to be nondiscriminatory, and that the FCC has established a presumption that all restrictions are unreasonable and discriminatory. AT&T Kentucky, however, argues that the presumption is rebuttable, and only has to be rebutted once the

[11] AT&T Kentucky's Initial Brief at 9-10.

[12] VR at 2:06:30.

restriction becomes an issue of complaint, not when the restriction is first proposed.[13]

Citing to the Sanford[14] case out of the Fourth Circuit, AT&T Kentucky asserts that the "touchstone factor" in determining whether a restriction is unreasonable is whether it stifles or unduly harms competition. AT&T Kentucky argues that its restriction on cash-back promotions does not stifle or unduly harm competition.[15]

AT&T Kentucky asserts that it does not compete with dPi. DPi pays AT&T Kentucky $13.85 for basic service; AT&T Kentucky charges its customers $16.55. DPi charges its customers, including taxes and fees, $51.00 for the first month of service; $66.28 for the second month of service; and $56.28 for each month thereafter. Based on these prices, AT&T Kentucky asserts that dPi and it are not competing for the same customers and, therefore, any restriction on the cash-back promotions can have no impact on competition.[16]

AT&T Kentucky argues that, if it must make some sort of refund to dPi, the refund is less than dPi asserts it should be. AT&T Kentucky asserts that the refund should be adjusted by the following factors: (1) the amount of the claims must be reduced by the amount that dPi did not dispute in a timely matter

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[13] AT&T Kentucky's Initial Brief at 10-12.

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

[15] AT&T Kentucky's Initial Brief at 13-14.

[16] Id. at 14-15.

pursuant to the 2007 interconnection agreement; and (2) any amounts sought by dPi must be reduced by the 16.79 percent residential resale discount rate.

Regarding the first factor, AT&T Kentucky argues that the 2007 interconnection agreement superseded the previous interconnection agreement and that the new agreement requires the filing of disputes within 12 months of a dispute arising. AT&T Kentucky claims that this applies to $7,350.00 of the cash-back promotions for which dPi asks.[17]

Regarding the second factor, AT&T Kentucky argues that, to the extent dPi is entitled to any cash-back promotions not limited by the 12-month time restriction, the amount should be reduced by the 16.79 percent residential resale discount rate that the Commission has previously established. AT&T Kentucky argues that dPi should be entitled to no more credit for the cash-back component than it would be entitled to if AT&T Kentucky had simply reduced the retail price of the affected service by the same amount.[18]

The wholesale discount serves to set the rate that AT&T Kentucky charges a reseller for service, meaning that, if AT&T Kentucky charges its customers $16.00 for retail service, it must sell the service to dPi at $13.31. AT&T Kentucky argues that this discount applies to promotions that it applies to resellers. Therefore, if a reseller qualifies for a $50.00 promotion, it will actually receive $41.60 of the promotion, the $50.00 promotion minus the 16.79 percent discount.

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[17] Id. at 18-19.

[18] Id. at 22-26.

AT&T Kentucky also asserts that, when processing dPi's claims for promotional credits, AT&T Kentucky discovered that 27 percent of the claims were submitted in error. Thus, AT&T Kentucky argues, any award made to dPi should presume a similar error rate and be reduced by a similar amount.[19]

Discussion

In order to reach a decision on this case, the Commission makes the following determinations:

Although AT&T Kentucky originally argued that the cash-back promotion at issue did not have to be provided for resale because they are not "telecommunications services," AT&T Kentucky did not present this argument at oral argument. As discussed above, AT&T Kentucky concedes that the Fourth Circuit Court of Appeals found that if something of value is provided for a promotion, whether it is a telecommunications service or not, it has to be provided for resale; otherwise, it puts competitors at a competitive disadvantage.

The Commission agrees with the analysis of the Fourth Circuit and finds that the cash-back promotion has to be provided for resale. To find otherwise would provide an unreasonable advantage to AT&T Kentucky versus resellers as AT&T Kentucky could effectively reduce the retail rate by providing a cash-back promotion; a discount that the resellers could not extend to their own customers.

The first interconnection agreement governing the relationship was in effect from 2003 until 2007, the period of time over which the majority of the disputes arose. DPi argues that the interconnection agreement invokes federal

[19] Id. at 29.

law to control the offering of resale services as well as disputes arising out of those services. To the extent that federal law does not apply, Georgia state law governs and provides for a six-year window in which to bring a dispute.

AT&T Kentucky argues that the 2007 interconnection agreement superseded the previous interconnection agreement and that the new agreement requires the filing of disputes within 12 months of a dispute arising. AT&T Kentucky claims that this applies to $7,350.00 of the cash-back promotions for which dPi asks.

It appears that dPi made timely dispute for the claims arising out of the first interconnection agreement. The Commission finds that dPi made timely dispute of those charges and that the 2007 interconnection dispute does not apply retroactively to those disputes.

It also appears that dPi did not make timely disputes for some of the claims that arose after the 2007 interconnection agreement became effective. The 2007 agreement provides for only a 12-month window in which to dispute the denial of a promotional credit. To the extent that dPi did not make timely disputes under the 2007 agreement, the Commission finds for AT&T Kentucky and reduces any credit owed to dPi by $7,350.00.

As discussed above, the Commission finds that the promotional discount must be made available for resale because, if not made available, it would put resellers at a competitive disadvantage. Therefore, the Commission finds that restricting the cash-back promotion from resale is unreasonable.

AT&T Kentucky argues that any credit order to be provided to dPi should be reduced by a 27 percent error rate. AT&T Kentucky alleges that approximately 27 percent of dPi's requests for promotional discounts are made in error (in general, not just applied to the cash-back promotion). Therefore, AT&T Kentucky asserts that any credit awarded to dPi should be reduced by the error rate. The Commission finds that AT&T Kentucky shall not adjust any credit awarded to dPi by the proposed 27 percent error rate. The evidence in the record does not support or prove that the 27 percent error rate was accurate.

The Commission must also resolve whether the credit due dPi has to be reduced by the 16.79 percent wholesale discount. This issue carries greater significance than just this complaint case. Whether or not AT&T Kentucky may reduce any promotional discount by the wholesale discount is currently in litigation in 22 states and involves claims in excess of $100,000,000.[20]

DPi argues that wholesale prices always have to be lower than retail prices; therefore, it does not want the wholesale discount to apply to the promotional credit. For the sake of illustration, the Commission will assume the following facts, as presented by AT&T Kentucky at the hearing:

Wholesale Discount: 20%
Monthly Retail Service rate: $120
Cashback promotion: $100
Result: Monthly Promotional Price of $20

DPi would calculate the resale cost in one of the following ways:

$20 (promotional price)
-$24 (20% of $120 Standard Price)
(-$4) (AT&T pays to dPi $4/month)

[20] VR at 1:19:00.

or

$96 ($120 Retail Price discounted by 20%)
-$100 (Cashback Amount)
(-4) (AT&T pays to dPi $4/month)

In both of the scenarios, AT&T Kentucky must pay dPi for service that dPi orders from AT&T Kentucky. The promotion does not merely reduce the price of the retail service, it forces AT&T Kentucky to give $4.00 to dPi for service that dPi would normally pay AT&T Kentucky for.

AT&T Kentucky and the Fourth Circuit Court of Appeals calculate the resale cost in either of the following ways:

$20 (promotional price)
-$4 (20% of $20 Promotional Price)
-$16 (dPi pays AT&T $16/month)

or

$96 ($120 Retail Price discounted by 20%)
-$80 (Cashback Amount discounted by 20%)
-$16 (dPi pays AT&T $16/month)

Under AT&T Kentucky's calculations, dPi would pay a steeply discounted rate to AT&T Kentucky for the discounted service. The promotional price that AT&T Kentucky provides to its customers is $20.00 a month, whereas dPi would pay $16.00 ($20.00 discounted by 20 percent) for the service.

The Commission finds that any promotional discounts should be adjusted by the wholesale discount. To adopt dPi's position would be to put AT&T Kentucky in the position of paying its competitors to "purchase" AT&T Kentucky's service. Such a result is absurd and leads to an anti-competitive environment. AT&T Kentucky's position still results in dPi receiving a discount on service that

places the price below the promotional price that AT&T Kentucky provides its retail customers.

DPi argues that FCC regulations require any incumbent local exchange carrier ("ILEC") to first seek state Commission approval before placing any restrictions on resale. AT&T Kentucky argues that, although the FCC has concluded that any restrictions on resale are presumed to be unreasonable, it is a rebuttable presumption that only arises when the restriction is challenged. It is only upon a complaint to a state commission that the state commission needs to approve or deny any resale restriction.

The Commission finds that a telecommunications carrier does not have to seek preapproval for a restriction on resale. As a practical matter, it would be unduly burdensome to the Commission to have to review and approve all promotions that incumbents offer. Telecommunication carriers often have dozens of promotions running at the same time. The Commission has not reviewed promotions or any restrictions on resale since the enactment of the 1996 Telecommunications Act.

Moreover, requiring incumbent carriers to seek prior approval before offering a promotion or restriction on resale would harm customers by reducing the number of promotions offered. If an ILEC had to seek preapproval for any promotion that might be restricted from resale, it would constantly be before the Commission seeking such approval. The cost and time involved would remove any financial incentive for ILECs to provide promotional discounts and would remove downward pressure on retail prices for customers.

Based on the above, IT IS HEREBY ORDERED that:

1. The cash-back promotions at issue must be made available for resale.

2. DPi may recover for the credit disputes it brought under and during the 2003-2006 interconnection agreement.

3. DPi may not recover for credit disputes brought under the 2007 interconnection agreement.

4. The credits due dPi shall not be discounted by AT&T Kentucky's proposed 27 percent error rate.

5. Any promotional discount must be reduced by the wholesale discount.

6. An incumbent carrier does not need to seek preapproval from the Commission before placing a restriction on resale.

7. This is a final and appealable order.

By the Commission

ENTERED

JAN 19 2012

KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:

Executive Director

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

ORDER

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

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

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

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

dPi's Argument

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

[1] Motion for Rehearing at 4.

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

Discussion

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

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

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

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

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

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

By the Commission

ENTERED
MAR 02 2012
KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director

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

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

LOUISIANA PUBLIC SERVICE COMMISSION

ORDER NO. U-31364-A

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

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

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

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

Docket Number U-31364 In re: Consolidated Proceeding to Address Certain Issues Common to Dockets U-31256, U-31257, U-31258, U-31259, and U-31260.

ORDER

(Decided at the April 26, 2012 Business and Executive Session)

Background

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

AT&T Louisiana has also filed a complaint against Tennessee Telephone Service, Inc. d/b/a Freedom Communications USA, LLC ("Tennessee Telephone"). On November 1, 2010, a Stipulation Regarding Participation in Consolidated Proceeding on Procedural Issues was filed into this consolidated docket. The stipulation outlines the Tennessee Telephone petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Tennessee, Nashville Division. On September 24, 2010, the Bankruptcy Court entered an Agreed Order on Motion to Determine Automatic Stay Inapplicable or, Alternatively, For Relief from the Automatic Stay which, among other things, terminated, modified and annulled the automatic stay with respect to the Consolidated Proceedings in order

to allow them to proceed notwithstanding the bankruptcy filing. Accordingly, AT&T Louisiana and Tennessee Telephone entered into the following stipulations:

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

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

On April 9, 2012, a Joint Motion to Dismiss was filed in this docket by BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T Louisianaand Image access, Inc. d/b/a NewPhone, jointly moving that all claims, demands and counter-claims asserted by either of them be dismissed with prejudice, on the grounds that the parties have amicably resolved their disputes.

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

This consolidated proceeding was instituted for the limited purpose of addressing and resolving three issues identified in the joint motion, as well as any other common issues subsequently identified and approved for consolidation. The Parties also requested that all other pending motions in the proceedings be held in abeyance while the common issues were

addressed. It was determined that further proceedings in the five dockets should be stayed pending a resolution of issues in the consolidated proceeding, unless a subsequent Ruling or Order directed otherwise. The Parties, as outlined in the stipulations submitted at the time of the hearing, request a ruling on three basic issues that are to be decided in this consolidated docket, which are: Cashback Offerings, the Line Connection Charge Waiver ("LCCW") and Referral Marketing ("Word-of-Mouth"). A hearing was held on the consolidated issues on November 4 and 5, 2010.

A Proposed Recommendation was issued in this matter on June 22, 2011. The Resellers filed Exceptions to the Proposed Recommendation on July 12, 2011. Staff also filed exceptions on July 12, 2011. While Staff agreed with the proposed recommendation concerning the LCCW and the Word-of Mouth promotion, Staff reurged that the proper treatment of Cash Back Offerings is that proposed by Staff in its Post-Hearing Brief. AT&T Louisiana filed its Opposition Memorandum to Exceptions of Resellers and Staff on July 25, 2011. AT&T Louisiana supported the Proposed Recommendation, requesting it be issued as the Final Recommendation. After consideration of those filings, the administrative law judge issued a Final Recommendation on August 18, 2011.

At the September 7, 2011 Business and Executive session, the Commissioners voted to send this matter back to the administrative law judge for further consideration of the calculation methodology to be applied to cash back promotions.[1]

In accordance with the Commission's order, the administrative law judge reopened the case for submission of post-hearing briefs and oral arguments. After argument was heard on November 30, 2011 and after considering the existing record in accordance with the Remand Order, a Final Recommendation of the Administrative Law Judge ("ALJ") on Remand was issued on April 13, 2012. It addresses the calculation methodology to be applied to cash back promotions.

The Final Recommendation on Remand was considered at the April 26, 2012 Commission Business and Executive Session. On motion of Commissioner Skrmetta, seconded by Commissioner Field, and unanimously adopted, the Commission voted to accept the ALJ Recommendation as follows: 1) that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the

[1] Order No. U-31364, Remand Order, September 28, 2011.

Resellers at the wholesale discount. A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service. This equals the standard retail price of the service discounted by the resale discount rate established by this Commission. The Commission has previously established the resale discount rate as 20.72%. When the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%. 2) That if the Resellers are entitled to receive a promotional credit for the LCCW, the Resellers are entitled to a credit of the LCCW, less the applicable resale discount rate. 3) That word-of-mouth promotions are not a "telecommunications service". The word-of-mouth promotion is the result of AT&T's marketing referral program and is not subject to resale.

Jurisdiction and Applicable Law

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

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

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

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

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

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

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

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

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

STIPULATIONS FOR CONSOLIDATED PHASE

In accordance with the Joint Motion on Procedural Schedule submitted in these Dockets on June 16, 2010, BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Louisiana ("AT&T Louisiana") and each of the Respondents in the above-referenced Dockets (collectively the "Parties") respectfully submit the following Stipulations for use in resolving the issues presented in the Consolidated Phase of these Dockets.[2]

I. Introduction

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

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

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

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

a. Cashback and LCCW (described at page 2, paragraphs 2(a) and 2(c), respectively, of the Joint Motion on Procedural Issues). As to these offerings, the Parties ask the Commission **in this Consolidated Phase** to assume that the Parties agree that a Respondent is entitled to receive a promotional credit and **that the only dispute is the amount of the credit** to which the Respondents are entitled.[3]

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

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

Similarly, the Parties agree that in the Consolidated Phase, it is neither practical nor necessary to address the facts specific to any Respondents' requested promotional credits, or AT&T's processing of those credits. In order to provide context for the Commission to decide

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

the issues presented in the Consolidated Phase, however, the parties submit the stipulations in Sections III and IV below. In reaching these Stipulations in the Consolidated Phase, no Party waives any of its rights, after the Commission has issued an order resolving the issues in the Consolidated Phase, to present additional evidence and arguments as to retail and wholesale requests for any offerings that are being or have been processed.

II. Representative Description of Promotions

a. Cashback Offerings

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

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

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

b. Word-of-Mouth Offerings

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

c. LCCW Offerings

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

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

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

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

4. An AT&T retail customer is billed the standard retail price for the telecommunications services subject to a "cashback" promotional offering. The

AT&T retail customer then requests the benefits of the cashback promotion either on-line or by mailing in a form within the allowable time period as described in the terms and conditions of the particular promotion. If the retail customer meets the qualifications of the promotional offering, AT&T mails a check, gift card, or other item (as described in the promotional offering) to the retail customer's billing address. This process is further described by AT&T in "frequently asked questions" found at https://rewardcenter.att.com/FAQ.aspx. Attachment E to these Stipulations is a copy of this description.

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

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

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

7. When a Respondent purchases for resale the telecommunications services that are subject to any of the offerings described herein, AT&T bills the Respondent the wholesale rate (the retail rate less the 20.72% residential resale discount established by this Commission) for those telecommunications services.

8. After being billed by AT&T, the Respondent submits promotional credit requests seeking any credits to which it believes it is entitled pursuant to the offering.[4]

9. Upon receipt of these requests, AT&T reviews them to determine whether it believes the Respondent is entitled to the credits it requests. To the extent AT&T determines that the Respondent is entitled to the requested credits, AT&T applies the credits that it believes are due on a subsequent bill to the Respondent.[5]

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

Witnesses

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

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

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

Overview of Party Positions

AT&T Louisiana's Positions

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

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

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

promotional price of the service. AT&T Louisiana avers it is correctly applying the 20.72% resale discount rate to the promotional price of the service.

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

Concerning the word-of-mouth program, AT&T Louisiana argues that these referrals are marketing promotions and are not subject to resale. Resale obligations apply only to "telecommunications services" AT&T Louisiana provides at retail, and a marketing referral program like "word-of-mouth" is not even arguably a telecommunications service. Rather it is a marketing activity that AT&T induces from its customers.

The Resellers Positions

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

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

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

for determining the wholesale price is to first calculate the amount of the avoided cost, then subtract the avoided cost from the actual sales price.

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

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

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

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

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

The LPSC Staff's Position

Staff concludes that:

1) the proper wholesale rate applicable when a "cashback" promotion is offered is the "effective retail price" of the telecommunications service multiplied by the LPSC's 20.72%

avoided cost. Staff uses the following equation: Wholesale Rate = (Retail Rate) – (Cash-back) x (Discount).

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

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

On remand, Staff adopts a compromise position concerning cashback promotions that result in a negative price scenario. Staff states that AT&T's methodology results in a greater benefit being provided to its retail customers than is provided to wholesale customers when the effective price is negative.[6] "In simple terms, AT&T should provide the same credit amount to a reseller than [sic] it provides to its retail customers, if the cash-back amount is greater than the price of the service."[7] Staff requests that the Commission adopt the position advanced by Staff with respect to the correct treatment of "cash-back" promotions. In the alternative, Staff respectfully requests consideration of Staff's alternative compromise that ensures Resellers receive equal benefits to those received by retail customers.

Issues and Analysis

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

Cashback Offerings

The Parties have requested for the Commission to assume that the Parties agree that Resellers are entitled to receive a promotional credit for cashback offerings. The Parties state the only dispute is the amount of the credit to which the Resellers are entitled.

Resale services must be sold at wholesale prices established by state commissions based on the retail rate less avoided costs. 47 U.S.C. § 252(d)(3). The duty to sell services to resellers at wholesale prices applies to promotional offerings of telecommunications services as well as to standard tariff offerings, except if the promotion is provided short term (i.e., rates that are in

[6] Staff's Brief on Remand, page 4.
[7] Staff's Brief on Remand, page 6.

effect for no more than 90 days and that are not used to evade the wholesale rate obligation). 47 C.F.R. § 51.613(a)(2); See *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007) ("Sanford"). The cashback offerings in this case are based upon a one-time rebate that is applied as a credit to AT&T retail customers as well as the Resellers. It is not necessary to determine what length of time must be considered in evaluating the promotions. AT&T grants the rebates to its customers if they stay for 30 days and complete the requisite paperwork. The same time frame applies to the Resellers.

Cashback offerings are used to entice customers to purchase service. A cashback promotion is a reduction in the price of a service and does not result in a change to tariffed rates. In the instance of AT&T, it is hoped that using such enticements will result in customers who will not only purchase the service, but keep it long term. "It would be irrational for AT&T to offer cashback promotions to woo customers who will stay with the company for only one month; . . . a proper understanding of the economics of a cashback promotion necessarily looks at a longer term."[8] The ruling in *Stanford* holds that if these cashback offerings are offered for more than 90 days, the promotional rates shall be available for resale at the wholesale discount. These promotions need not be refunded to the Resellers' customers. The Resellers are entitled to receive the cashback incentive in the month earned. It need not be averaged over several months.

A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service (which is the standard retail price of the service discounted by the 20.72% resale discount rate established by this Commission). When the Reseller requests a valid cashback promotional credit, the Reseller first receives a bill credit in the amount of the face value of the retail cashback benefit. AT&T discounts the retail cashback benefit by the 20.72% resale discount rate established by the Commission. Resellers oppose this practice of deducting the resale discount rate from the cashback benefit. Resellers argue that the avoided costs (the wholesale discount percentage of 20.7%) should not be applied to the promotional cash back amount but should only be applied to standard retail prices. Resellers argue that by AT&T taking this deduction, particularly when it results in a credit to AT&T's retail customers, it results in a pricing situation where the wholesale price is greater than the retail price. Resellers argue that wholesale must always be less than retail.

[8] Reply brief of AT&T page 14.

Avoided costs are calculated as a percentage of the retail price. This amount is then deducted from the retail price. It is a basic mathematical equation. Thus, avoided costs vary with the retail price. As the retail price increases, so does the amount attributable to the avoided costs. Accordingly, the lower the retail price, the lower the amount of the avoided costs. AT&T's method of calculation is correct. Although this theory does not embrace the calculation methods proposed by the Resellers or Staff, this result is consistent with the FCC's Local Competition Order and the orders of this Commission.

Example 1, with no promotional discount, the following calculation would apply:[9]

AT&T Standard Retail Price		$30
Estimated Avoided Costs = Standard Retail Price x 20%	($30 x 20% = $6)	$ 6
Wholesale Price (Standard Retail Price minus Estimated Avoided Costs)	$30-$6 =	$24

Therefore, the Resellers pay $24 for the services purchased from AT&T.

Example 2, with a $10 promotional discount (lasting over 90 days), the following calculation would apply:

Standard Retail Price		$30
Minus $10 promotional discount	--	$10
Net or Effective Retail price		$20
Estimated Avoided Costs = Standard Retail Price x 20%	($20 x 20% = $4)	$ 4
Wholesale Price (Net or Effective Retail Price minus Estimated Avoided Costs)	$20-$4 =	$16

Therefore, the Resellers pay $16 for the services purchased from AT&T.

Example 3, with a $50 promotional discount (lasting over 90 days), the following calculation would apply:

Standard Retail Price	$30
Minus $50 promotion	$-50
Net or Effective Retail price	$-20

[9] A hypothetical 20% wholesale discount percentage is used for demonstration purposes and mathematical ease only.

Given the scenario in Example 3, how much do the Resellers pay or receive, under these circumstances? It appears that all parties are in agreement as to the calculation of the Resellers' wholesale price in Examples 1 and 2. It is when the cashback promotion results in a credit to the AT&T retail customer that disputes about how to calculate the Resellers price (or credit) arise between the parties. This topic is in dispute in many venues. In this case alone, numerous briefs, extensive testimony, charts and calculations have been submitted to the Commission concerning how to handle this specific situation. AT&T, the Resellers and Staff have each proposed solutions and all are different.

AT&T's approach:

AT&T's wholesale price to Resellers	$24
Total cashback [cashback offer less estimated avoided costs($50 x 20%)]	(40)
Net amount paid	$(16)

The Resellers approach

AT&T's wholesale price to Resellers	$24
Total cashback [cashback equals promotional offer to retail customers]	(50)
Net amount paid	$(26)

Staff's Compromise Approach

Standard Retail Price	$30
Minus $50 promotion	$-50
Net amount paid	$-20

AT&T contends that Staff's formula is flawed because it adds the avoided cost estimate rather than subtracting it, causing AT&T to give resellers a high credit, which therefore increases the expense of the promotion to AT&T. AT&T postulates that "by making it more expensive for AT&T to offer these promotions, Staff's proposed new formula would discourage these pro-competitive promotions that are beneficial to consumers in Louisiana."[10] AT&T claims that the formula Staff proposes is an approach that was not addressed at the hearing. The Resellers aver that the Staff's proposal was not novel. The Resellers urge that the formula is the same as "Taylor's formula corrected for reality" proposed during the hearing by Reseller Witness Mr.

[10] Reply brief of AT&T page 14

Joseph Gillan and illustrated on Reseller Exhibit #4. AT&T contends that the formula it uses is the long standing fundamental formula Staff supports in all other circumstances. Staff correctly posits this as an alternative method of calculation.

The Resellers argue that they should receive the full-value of the cash-back promotion ($50). Resellers also aver that the value of the promotion should not be reduced by the wholesale discount rate applied to resale of regular services. In this example, for each eligible rebate, the Resellers want AT&T to provide the service for the Resellers' customer (a value of $24) and pay the Reseller $26. This would make the Wholesale Price $-26, or $6 less than the net or effective retail price. The Resellers argue that wholesale must always be less than retail.

In other words, the AT&T retail customer who qualified for the $50 cashback promotion would pay the standard retail price of $30. Then, upon AT&T's satisfaction that the retail customer qualified for the cashback promotion, the retail customer would receive a credit of $50, so that particular retail customer would effectively receive the service for free that month and get the equivalent of $20 back from AT&T. This results in a net or effective retail price of $-20.

The Resellers are asking the Commission to require AT&T provide the same $50 cash back promotion to them and not reduce that $50 by the wholesale discount. It is Resellers position that this is necessary to ensure that wholesale is always less than retail. The Resellers want the $50 cash back promotion deducted from the wholesale price of $24. This necessarily results in a "negative" price. For example: An AT&T retail customer would pay the Standard Retail Price of $30 and receive $50 from AT&T in a cashback promotion, as outlined in the preceding paragraph. This results in the AT&T customer being issued a credit that results in a credit to their account of $20.

The Resellers' argument yields the following result:

Standard Retail Price		$30
Estimated Avoided Costs = Standard Retail Price x 20%	--	$ 6
Wholesale Price (Standard Retail Promotional Price minus Estimated Avoided Costs)		$24
Net or Effective Retail Price with a $50 cashback promotion	--	$50
	--	$26

The Resellers would receive a credit from AT&T of $26, thus making the net effective retail price -$26. The Resellers urge that this is the correct application because it provides them with a lower price than AT&T's retail customers, or "wholesale must always be less than retail". This is not always the case. There are certainly times during limited promotions where the wholesale price is greater than the retail price and this is permissible. The Resellers are not entitled to the entire rebate because they will receive a reimbursement that is greater than the price they paid for the service. The Resellers do not pay the net or effective retail price. They pay less because the percentage attributable to the avoided costs is deducted from the price AT&T charges Resellers.

If the same scenario were applied to "positive" numbers you would have the following: Standard Retail Price is $100. AT&T provides a $50 cashback promotion and the retail customer winds up paying $50 for the service. The Resellers would only pay $40 for the same service.

Is the 20.72% resale discount rate to be applied to the standard retail price of the affected service and not to the cashback benefit or to the retail promotional price of the service? Currently, when the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%. AT&T argues that this is the correct calculation: applying the 20.72% resale discount rate to the promotional price of the service. We have thoroughly reviewed AT&T's, the Resellers' and Staff's proposals and concur with AT&T's calculation. To do otherwise results in the Resellers being paid to take service from AT&T. The Resellers should be entitled to no more credit for the cash-back component than it would be entitled to if AT&T had simply reduced the retail price of the affected service by the same amount.

This Commission finds that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the Resellers. The Reseller requesting a telecommunications service is to be billed the standard wholesale price of the service. The standard wholesale price of the service equals the net or effective retail price of the service discounted by the resale discount rate previously established by this Commission as 20.72%.

Waiver of Line Connection Charge

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

Word of Mouth Promotion

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

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

receive the cash or near-cash offerings. This word-of-mouth referral is not a "telecommunications service" AT&T provides at retail. It is the result of AT&T's marketing referral program and should not be subject to resale.

In accordance with the conclusions reached in this consolidated docket;

IT IS HEREBY ORDERED that when AT&T extends cashback offerings to its retail customers for more than 90 days, the promotional rates shall be available for resale to the Resellers at the wholesale discount. A Reseller that requests a telecommunications service is to be billed the standard wholesale price of the service. This equals the standard retail price of the service discounted by the resale discount rate established by this Commission. The Commission has previously established the resale discount rate as 20.72%. When the Reseller requests a valid cashback promotional credit, the Reseller receives a bill credit in the amount of the face value of the retail cashback benefit, discounted by the resale discount rate of 20.72%.

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

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

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA
May 25, 2012

/S/ FOSTER L. CAMPBELL
DISTRICT V
CHAIRMAN FOSTER L. CAMPBELL

/S/ JAMES M. FIELD
DISTRICT II
VICE CHAIRMAN JAMES M. FIELD

/S/ ERIC F. SKRMETTA
DISTRICT I
COMMISSIONER ERIC F. SKRMETTA

/S/ LAMBERT C. BOISSIERE
DISTRICT III
COMMISSIONER LAMBERT C. BOISSIERE, III

EVE KAHAO GONZALEZ
SECRETARY

/S/ CLYDE C. HOLLOWAY
DISTRICT IV
COMMISSIONER CLYDE C. HOLLOWAY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

NEXUS COMMUNICATIONS, INC.,
Plaintiff,

-vs-

Case No. A-12-CA-555-SS

CHAIRMAN DONNA L. NELSON, KENNETH W. ANDERSON, JR., ROLANDO PABLOS, and SOUTHWESTERN BELL TELEPHONE COMPANY,
Defendants.

ORDER

Before the Court are Nexus Communications, Inc.'s Abbreviated Initial Brief and Motion for Summary Judgment, filed January 2, 2013 [#23]; Nexus Communications, Inc.'s Expanded Initial Brief and Motion for Summary Judgment, filed January 2, 2013 [#24]; AT&T Texas' Response to Nexus' Initial Brief and Motion for Judgment, filed January 31, 2013 [#28]; The Commissioners of the Public Utility Commission of Texas' Cross-Motion for Summary Judgment and Response to Nexus Communications, Inc.'s Expanded Initial Brief and Motion for Summary Judgment, filed January 31, 2013 [#29]; and Nexus Communications, Inc.'s Reply Brief on Motion for Summary Judgment, filed March 1, 2013 [#30]. The Court conducted a hearing on the matters on March 20, 2013. Having considered the motions, responsive pleadings, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

I. BACKGROUND

Nexus Communications, Inc. ("Nexus") brings this action against the Commissioners of the Public Utility Commission of Texas ("PUCT"), specifically Chairman Donna L. Nelson, Kenneth W. Anderson, Jr. and Rolando Pablos. Southwestern Bell Telephone Company d/b/a AT&T Texas ("AT&T Texas") was granted permission to intervene as the real party in interest. Nexus seeks declaratory and injunctive relief from the April 5, 2012 order of the PUCT granting AT&T Texas'

motion for summary decision and dismissing Nexus' claims as well as the June 14, 2012 denying Nexus' motion for reconsideration of the April 2012 order. At issue is the legality of prices charged by AT&T Texas to Nexus under provisions of the Telecommunications Act of 1996, Texas state law and their contractual agreement, A brief review of the historical backdrop of this action will more properly set the stage for the specifics of the dispute.

A. Telecommunications Act of 1996

The Telecommunications Act of 1996 ("the Act") was enacted "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Preamble, Pub. L. No. 104–404, 110 Stat. 56 (1996). To achieve its goals, the Act divides various responsibilities between states and the federal government, "enlist[ing] the aid of state public utility commissions to ensure that local competition was implemented fairly and with due regard to the local conditions." *Global Naps, Inc. v. Mass. Dep't of Telecomms. & Energy*, 427 F.3d 34, 46 (1st Cir. 2005).

Prior to the Act, local telephone monopolies, also known as incumbent local exchange carriers ("ILECs"), controlled the physical networks necessary to provide telecommunications service. The Act directed creation of a system of compulsory licenses from the ILECs to would-be competitors or competitive local exchange carriers ("CLECs"). The compulsory licenses are known as "interconnection agreements," or "ICAs." In pertinent part, the Act requires ILECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A). This provision allows CLECs to establish a market presence by reselling the ILECs' telecommunications services without building their own physical infrastructure.

"For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." *Id.* § 252(d)(3). Simply put, the wholesale rate consists of the retail rate, less whatever costs an ILEC will save by selling the services in bulk to a CLEC. *See* 47 C.F.R. § 51.607 (wholesale rate shall equal rate for telecommunications service, less avoided retail costs). In addition, an ILEC must pass along any promotional rate of services to a CLEC unless the promotion is short-term, defined as lasting less than ninety days. *Id.* § 51.613(a)(ii). Parties are specifically permitted by the Act to negotiate an ICA "without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1); *see also Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 276 (5th Cir. 2010) (ILEC and CLEC have ability to negotiate around substantive requirements of resale and interconnection provisions in the Act). The Public Utility Regulatory Act ("PURA") grants authority to the PUCT to regulate the telecommunications industry in Texas. TEX. UTIL.CODE ANN. § 52.002. PURA generally tracks the competitive provisions set forth in the Act. *Id.* §§ 52.001–65.252.

B. The Parties' Dispute[1]

AT&T Texas is an ILEC and Nexus is a CLEC. They are parties to an ICA ("the ICA") last amended in June 2008 under which AT&T Texas sold telecommunications services to Nexus at wholesale rates. Pursuant to FCC regulations, the PUCT in a 1996 arbitration established a single uniform discount rate of 21.6% for determining wholesale prices. In other words, if the retail rate is $100, an ILEC would provide the same service to a CLEC at a wholesale rate of $78.40. The ICA specifically incorporates this rate by providing that AT&T Texas will make services available to Nexus for resale "at the wholesale discount rate ordered by the State Commission."

[1] As the facts underlying this matter are undisputed, the Court finds citations to the record largely unnecessary.

During 2008 and 2009 AT&T Texas offered two cash back promotions. Each promotion entitled qualifying retail users to receive $50 cash back. AT&T Texas treated the promotion as a $50 reduction in the retail price, and calculated the promotional credits due to Nexus by subtracting the 21.6% wholesale discount percentage from the $50 face amount of the promotion, resulting in a cash back credit amount of $39.20. Nexus, in turn, claimed it was due promotional credits in the full $50 retail face amount of the promotion.

Nexus filed a complaint with the PUCT challenging AT&T Texas' method of calculating promotional credits, asserting Nexus should receive the full $50 face amount of the promotions. The matter was referred to the PUCT's arbitrators. The arbitrators ordered the parties to file simultaneous motions for summary decision addressing a single threshold legal question: "Does AT&T Texas' method for calculating cashback promotional offerings available for resale comply with all applicable federal and state law and the terms of the parties' interconnection agreement?"

The arbitrators ruled "AT&T Texas' method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the terms of the parties' interconnection agreement." On April 5, 2012, the PUCT entered an order granting AT&T's motion for summary decision "for the reasons contained in that motion and AT&T Texas' supporting documentation." Nexus filed a motion for reconsideration. The motion was denied by the PUCT by order dated June 14, 2012. Nexus then filed this action, appealing the PUCT's order.

Nexus and the PUCT have filed cross motions for summary judgment. AT&T Texas has filed a response to Nexus' motion. The Court conducted a hearing on the matters on March 20, 2013. The matters are now ripe for determination.

II. STANDARD OF REVIEW

The Act grants state commissions, including the PUCT, power both to approve and to interpret and enforce ICAs. *Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Tex.*, 208 F.3d 475, 480 (5th

Cir. 2000). "In any case in which a State commission makes a determination [regarding an ICA], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of" the Act. 47 U.S.C. § 252(e)(6). The district court reviews the orders of a state commission to determine whether an ICA comports with federal law and can review the state commission's interpretation and enforcement of the ICA. *Id.* at 482. In such an appellate posture, a district court reviews *de novo* a state commission's determination of whether an ICA comports with the requirements of the Act, and reviews "all other issues" determined by the state commission under an arbitrary and capricious standard. *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 276 (5th Cir. 2010).

III. ANALYSIS

Although presented as numerous sub-arguments, the core of Nexus' challenge to the decision of the PUCT is that the decision violates a single immutable principle enshrined in the Act, PURA and the ICA. Namely, Nexus contends all applicable authority requires that the wholesale rate be lower than the retail rate. Nexus maintains, because the result of AT&T Texas' method for calculating the credit due Nexus from the $50 cash back promotion results in a wholesale rate higher than the retail rate, the method must be contrary to law and the ICA. Nexus concludes any other result would violate the competitive purposes and policies of the governing legal authorities.

In support, Nexus first points out the Act, and accompanying regulations, speak in terms of setting the wholesale rate by reducing the retail rate by avoided costs. See 47 U.S.C. § 252(d)(3) (wholesale prices for telecommunication services are to be determined on the basis of retail rates excluding portion for marketing and other costs that will be avoided); 47 C.F.R. § 51.607 (wholesale rate ILEC may charge for telecommunications service provided for resale "shall equal the rate for the telecommunications service, less avoided retail costs"). Texas statutes, codified in PURA, generally require provision of telecommunication services to a CLEC for resale on "terms

that are no less favorable" than the terms provided a retail customer of the LEC. TEX. UTIL. CODE ANN. § 60.042(c). PURA further specifically requires, for promotions lasting longer than ninety days, that the telecommunications service be provided to the CLEC "at a rate reflecting the avoided-cost discount, if any, from the promotional rate." *Id.* The parties' ICA also tracks this language, requiring AT&T Texas to provide "services available at the avoided cost discount from the promotional rate" for promotions of more than ninety days. (AT&T Texas Resp. Ex. C ¶ 3.2).

Similarly, the FCC's Local Competition Order[2] addresses calculation of wholesale rates at a percentage below retail rates. *See* Local Competition Order ¶ 910 (adopting default range permitting state commission "to select a reasonable default wholesale rate between 17 and 25 percent below retail rate levels"). In discussing promotions, the Local Competition Order specifically refers to a discount to be taken. *See Id.* ¶ 950 (establishing presumption that promotional prices offered for 90 days or less "need not be offered at a discount to resellers" but lengthier promotional offerings "must be offered for resale at wholesale rates" in order to "preclude the potential for abuse of promotional discounts"). *See also Id.* ¶ 948 (reiterating wholesale requirement applies to promotional price discounts).

Nexus also contends the principle that wholesale rates must always be below retail rates is key to the leading appellate case on promotions, *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007). Specifically, the Fourth Circuit held promotional offers involving gift cards, checks, coupons for checks and similar incentives which extended for more than ninety days created a "promotional retail rate" which effectively "chang[es] the actual retail rate to which a

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[2] Congress directed the FCC to establish rules to achieve the local competition goals of the Act within six months of the Act's enactment. .The result was an order referred to as the Local Competition Order. *In re Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 15605, ¶ 202 (1996). The provisions of the Local Competition Order were largely affirmed by the Supreme Court. *Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 407 n.4 (5th Cir. 1999) (citing *AT & T v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721 (1999)).

wholesale requirement or discount must be applied." *Sanford*, 494 F.3d at 442. The court found failing to account for promotional credits "would obviously impede competition." *Id.* at 451.

Undoubtedly, Nexus is correct in asserting the common-sense interpretation of terms setting a wholesale rate as a "discount from" or "less avoided retail costs" in relation to the retail rate would result in a wholesale rate which is below that of the retail rate. However, in viewing the statutes, regulations and case law it is key to note the authorities solely address the wholesale rate as the result of a calculation. That is, calculation of a wholesale rate requires calculation first of the retail rate, followed by application of the discount percentage. Although Nexus is correct that the implication of the authorities is that the wholesale rate will be below the retail rate, no authority unequivocally states that proposition. Rather, the authorities simply dictate the proper method for calculating the wholesale rate.

Moreover, as AT&T Texas argues, the simple response to Nexus' argument that the relevant legal authorities require the wholesale rate be less than the retail rate is that the Act itself specifically provides that the value of short-term promotions, those lasting less than ninety days, do not have to be passed along to CLECs. In such situations, the wholesale rate thus may well be, and generally will be, higher than the retail rate. Accordingly, Nexus' argument that wholesale must always be less than retail as an absolute fails for this reason alone.

In addition, Nexus' argument runs clearly counter to the *Sanford*, the decision all parties treat as the seminal authority on this issue. As set forth above, the court in *Sanford* held monetary incentives such as gift cards, checks or coupons for checks were the type of long-term promotions which must be passed along to CLECs under the Act. *Sanford*, 494 F.3d at 442. The specific example used by the court in approving the decision of the North Carolina Utilities Commission was as follows:

> Suppose BellSouth offers its subscribers residential telephone service for $20 per month. Assuming a 20% discount for avoided costs, BellSouth must resell this service to competitive LECs for $16 per month, enabling the competitive LEC to

> compete with BellSouth's $20 retail fee. Now suppose that BellSouth offers its subscribers telephone service for $120 per month, but sends the customer a coupon for a monthly rebate check for $100. According to the NC Commission's orders, the appropriate wholesale rate is still $16, because that is the net price paid by the retail customer ($20), less the wholesale discount (20%).

Id. at 450. Under *Sanford* it is clear that the retail rate in a cash back situation is the standard retail rate less the cash back. The discount percentage is then applied to calculate the wholesale rate. In other words, a CLEC is entitled to receive the *effect* of the cash back on the retail rate, but not the cash back itself. See *Sanford*, 494 F.3d at 443-44 (although value of promotion must be factored into retail rate for purposes of determining wholesale rate, promotion itself need not be provided to would-be competitors; rather, price lowering impact of promotion on retail price is determined and benefit of reduction is passed on to resellers by applying wholesale discount to lower actual retail price). This is precisely the calculation AT&T Texas is using and thus it is in compliance with *Sanford*.

The Court is not unsympathetic to Nexus' complaint that, due to the "quirk" of negative numbers, the application of the process set out in *Sanford* to this case results in a wholesale rate greater than the retail rate.[3] Nonetheless, as Nexus itself points out, all the relevant legal authorities direct calculation of the wholesale rate by subtracting the discount rate from the retail rate. The inexorable reality of math in this case results in a wholesale rate "greater than" the retail rate.

Further, as AT&T Texas points out, Nexus' proposed calculation would actually give Nexus the benefit of a wholesale rate which itself violates the relevant legal authorities. For the sake of example, assume the applicable retail rate is $100, the discount rate is 20% and AT&T Texas gives a $50 cash back rebate. Under Nexus' proposed calculation, the proper way to account for the

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[3] The normal retail rate per month for AT&T Texas customers is $26. With the $50 rebate, the retail rate becomes -$24 for a single month. Using a 20% discount rate for the sake of convenience, AT&T Texas calculates the wholesale rate by subtracting 20% of -24 (-$4.80) from -$24 to get -$19.20 as the wholesale rate. Nexus, in turn, argues the wholesale rate in this circumstance should be calculated by subtracting (positive) $4.80 from the retail rate, for a total of -$28.80.

rebate is to apply the 20% discount rate to the $100 and then subtract the $50, providing a wholesale rate of $30. In contrast, under AT&T Texas' method, the appropriate calculation is to apply the 20% discount to the actual retail rate, which would be $50 in this example, not $100, thus the wholesale rate would be $40. Nexus' calculation would result in a boon, and more importantly, a violation of the discount rate established by the PUCT in compliance with the relevant law and regulations.

Perhaps most tellingly, Nexus' method would violate the ICA. This is significant because, as noted above, the Act specifically grants parties the authority to contract in a manner which is not consistent with the Act and its accompanying regulations. *See* 47 U.S.C. § 252(a)(1) (permitting parties to negotiate ICA without regard to standards of the Act); *Budget Prepay*, 605 F.3d at 276 (ILEC and CLEC have ability to negotiate around substantive requirements of resale and provisions in the Act). In pertinent part, the ICA provides:

> Resale services offered by [AT&T Texas] through promotions will be available to CLEC on terms and conditions no less favorable than those [AT&T Texas] makes available to its End Users, provided that for promotions of 90 days or less, [AT&T Texas] will offer the services to CLEC for resale at the promotional rate without a wholesale discount. For promotions of more than 90 days, [AT&T Texas] will make the services available at the avoided cost discount from the promotional rate.

(AT&T Texas Resp. Ex. C ¶ 3.2). Nexus urges the Court to look solely to the statement in the first clause of the first sentence of this paragraph as compelling AT&T Texas to provide it the full amount of the $50 cash back promotion. However, it is undisputed in this case that the second sentence governs as the promotion at issue lasted "more than 90 days." The clear language of the ICA requires AT&T Texas to do precisely what it did. That is, AT&T Texas was required to caculate the promotional rate and then substract the discount from that rate. In challenging this calculation Nexus is essentially asking this Court to grant it equitable relief from a contract Nexus entered into

freely. The Court finds Nexus has cited no legal authority supporting such a position, nor is the Court aware of any such authority.[4]

At the oral hearing on these matters, counsel for Nexus argued this dispute is subject to a *de novo* standard of review. As set forth above, the Fifth Circuit has made clear "a district court reviews *de novo* a state commission's determination of whether an ICA comports with the requirements of the Act, and reviews 'all other issues' determined by the state commission under an arbitrary and capricious standard." *Budget Prepay*, 605 F.3d at 276. The Fifth Circuit recently reiterated this holding, stating "[i]t is binding law in this circuit that a federal court reviews a state utility commission's interpretation of an ICA under an arbitrary and capricious standard." *Dixie-Net Commc'n, Inc. v. BellSouth Telecomm, Inc.*, No. 12-60685 (5th Cir. Mar. 21, 2013). A ruling is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 699 F.3d 427, 437 (5th Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983)). "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998).

In applying the arbitrary and capricious standard, it is worth noting that the position urged by Nexus has been rejected not just by the PUCT. AT&T Texas has attached to its response decisions from the state commissions of North Carolina, Kentucky, Louisiana and Mississippi, which have all approved the method used by AT&T Texas to determine wholesale rates when cash

[4] The Court notes Nexus is, of course, free to negotiate a new ICA with AT&T Texas which would directly address the effect of the "quirk" of negative numbers on cash back promotions.

back rebates are provided to retail customers. (AT&T Texas Resp. Exs. F-I). In addition, the decision of the North Carolina commission was upheld on review by the federal district court. *dPi Teleconnect, L.L.C. v. Finley*, 844 F. Supp. 2d 664 (E.D.N.C. 2012). The repeated rejection of Nexus' position by other state commissions is alone strong support for concluding the PUCT's determination in this action was not arbitrary and capricious.

In sum, Nexus has failed to carry its burden to show the PUCT's determination that "AT&T Texas' method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the terms of the parties' interconnection agreement" was arbitrary and capricious or contrary to the relevant legal authorities.

In accordance with the foregoing:

IT IS ORDERED that Nexus Communications, Inc.'s Abbreviated Initial Brief and Motion for Summary Judgment [#23] and Nexus Communications, Inc.'s Expanded Initial Brief and Motion for Summary Judgment [#24] are DENIED;

IT IS FURTHER ORDERED that The Commissioners of the Public Utility Commission of Texas' Cross-Motion for Summary Judgment [#29] is GRANTED.

SIGNED this the 26th day of March, 2013.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE

DOCKET NO. 39028

PETITION OF NEXUS COMMUNICATIONS, INC. FOR POST-INTERCONNECTION DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS UNDER FTA RELATING TO RECOVERY OF PROMOTIONAL CREDIT DUE	§ § § § § § § § §	**PUBLIC UTILITY COMMISSION** **OF TEXAS**

ORDER NO. 15
GRANTING AT&T'S MOTION FOR SUMMARY DECISION

I.
Summary

The Motion for Summary Decision of Southwestern Bell Telephone Company d/b/a AT&T Texas' ("AT&T Texas") is granted and the Motion for Summary Decision and Petition of Nexus Communications, Inc. ("Nexus") are denied. The arbitrators conclude that AT&T Texas' method for calculating cash back promotional offerings available for resale complies with applicable federal and state law and the terms of the parties' interconnection agreement.

II.
Background

On December 28, 2010, Nexus filed a petition against AT&T Texas for failing to calculate the credits on cash back promotions correctly.[1] Nexus filed the petition for post-interconnection dispute resolution pursuant to the Public Utility Regulatory Act (PURA), the Federal Telecommunications Act of 1996 (FTA) and P.U.C. PROC. R. 21.1 – 21.129, P.U.C.

[1] *Nexus Communications, Inc.'s Petition for Post-Interconnection Dispute Resolution with Southwestern Bell Telephone Company d/b/a AT&T Texas under FTA Relating to Recovery of Promotional Credit Due* (December 28, 2010).

PROC. R. 22.1 – 22.284, and P.U.C. SUBST. R. 26.1 – 26.469. AT&T Texas filed its response to Nexus' petition on January 7, 2011.[2]

On August 10, 2011, the arbitrators issued Order No. 10, *Requesting Briefs on Threshold Legal Issue*. In Order No. 10, the arbitrators determined that the threshold legal issue in this docket is:

> *Does AT&T Texas' method of calculating cash back promotional offerings available for resale comply with all applicable federal and state law and terms of the parties' interconnection agreement?*

Nexus' filed its Motion for Summary Decision on September 16, 2011 and filed its Reply Brief on Threshold Issues/Motion for Summary Decision on October 14, 2011. In its Motion for Summary Decision, Nexus asserted that AT&T Texas' method of calculating cash back promotions for resellers violates state and federal law and the terms of the parties' interconnection agreement (ICA) because AT&T Texas refuses to provide resellers with the same amount of credit that AT&T Texas provides its own retail customers thereby violating the principal that wholesale rates should be less than retail rates.[3] According to Nexus, AT&T Texas' calculations create the opposite effect, which are wholesale rates greater than retail rates.

Nexus claims that the wholesale discount percentage of 21.6% (avoided costs) should not be applied to the promotional cash back amount but should only be applied to standard retail prices. Nexus argued that the formula that should be used by AT&T Texas to calculate the wholesale price associated with special sales or promotions is the standard retail price subtracted by the full cash back promotional amount subtracted by the avoided costs (wholesale price = (retail price – promotional cash back) – avoided costs). In Nexus' formula, avoided costs are calculated by multiplying the standard retail prices by the wholesale discount percentage (the promotional discount is not reduced by avoided costs).[4]

On September 16, 2011, AT&T Texas filed its Motion to Dismiss and filed its Response to Nexus' Brief on Threshold Issue/Motion for Summary Decision on October 14, 2011. AT&T Texas avers that the parties' ICA, which incorporates the resale provisions of the Federal Telecommunications Act (FTA), provides that "[f]or promotions of more than 90 days, [AT&T]

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[2] *AT&T Texas' Response to Nexus Communications, Inc.'s Petition for Post-Interconnection Dispute* (January 7, 2011).

[3] *Nexus Communication's, Inc.'s Brief on Threshold Issues/Motion for Summary Decision* at 1(September 16, 2011).

[4] *Id* at 14-16.

Texas will make the services to [Nexus] available at the avoided cost discount from the promotional rate."[5] AT&T Texas asserts that this provision was interpreted in the *Bell South Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 441 (4th Cir. 2007) (*Sanford*) case. AT&T Texas goes on to say that in *Sanford*, the Fourth Circuit held that "the price lowering impact of any ...90-day-plus promotions on the real tariff or retail list price [must] be determined and ...the benefit of such a reduction [must] be passed on to resellers by applying the wholesale discount to the lower actual retail price." AT&T Texas applies the wholesale discount of 21.6% both to the amount Nexus pays for the underlying service and to the retail value of any cash back credit. The formula used by AT&T Texas to determine the wholesale retail price on a promotional offering over 90 days is: wholesale price = [retail price – (avoided costs X retail price)] – [promotional cash back – avoided costs X promotional cash back)].[6]

AT&T Texas explained that in the FCC's *Local Competition Order*, the FCC stated that avoided costs for incumbent local exchange carriers' (ILECs) services should be calculated by taking the portion of a retail price that is attributable to avoided costs by multiplying the retail price by the discount rate. AT&T notes that the FCC further stated in this order that when a promotion, like the cash back promotion at issue in this docket, is extended to resellers, the "retail price" by which the discount percentage is to be multiplied is the promotional retail price. The FCC ruled that a promotional offering that lasts longer than 90 days is not short-term "and must therefore be treated as a retail rate."[7]

AT&T Texas asserts that even though the terms of the parties' ICA and federal law are unambiguous, Nexus claims that it is entitled to receive the full retail amount of any cash back promotion even though it is not an end user, but a reseller that purchases AT&T Texas's services at wholesale prices for resale to its own end users.[8]

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[5] *AT&T Texas Motion for Summary Decision* at 4 (September 16, 2011).
[6] *Id* at 4-5.
[7] *Id* at 6-7.
[8] *Id* at 5.

III.

Ruling

The Arbitrators find that AT&T Texas' motion should be granted for the reasons contained in that motion and AT&T Texas' supporting documentation. All pending requests for relief of Nexus are hereby denied and this case is dismissed without prejudice.

SIGNED AT AUSTIN, TEXAS the 5th day of April, 2012.

PUBLIC UTILITY COMMISSION OF TEXAS

LIZ KAYSER
ARBITRATOR

SCOTT SMYTH
ARBITRATOR

PUC DOCKET NO. 39028

PETITION OF NEXUS COMMUNICATIONS, INC. FOR POST-INTERCONNECTION DISPUTE RESOLUTION WITH SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS UNDER FTA RELATING TO RECOVERY OF PROMOTIONAL CREDIT DUE	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ON MOTION FOR RECONSIDERATION OF ORDER NO. 15

This Order addresses the motion for reconsideration of Order No. 15 by Nexus Communications, Inc. The Commission finds that the determination of the arbitrators in Order No. 15 is correct. Therefore, the Commission denies Nexus's motion for reconsideration and upholds the arbitrators' ruling in Order No. 15.

SIGNED AT AUSTIN, TEXAS the 14th **day of June, 2012.**

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

ROLANDO PABLOS, COMMISSIONER

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Exhibit 7