Marguerite McLean 100021-TP

From: nicki.garcia@akerman.com
Sent: Thursday, February 25, 2010 4:50 PM
To: Filings@psc.state.fl.us
Cc: Charles Murphy; Jamie Morrow; mg2708@att.com; th9467@att.com; hwalker@babc.com; matthew.feil@akerman.com
Subject: Electronic Filing - Docket No. 100021-TP
Attachments: 20100225174426719.pdf

Attached is an electronic filing for the docket referenced below. If you have any questions, please contact either Matt Feil or Nicki Garcia at the numbers below. Thank you.

Person Responsible for Filing:

Matthew Feil
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 425-1614 (direct)
(850) 222-0103 (main)
matt.feil@akerman.com

Docket No. and Name: Docket No. 100021 -TP - In Re: Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T Florida Against LifeConnex Telecom, LLC f/k/a Swiftel, LLC

Filed on behalf of: LifeConnex Telecom, LLC

Total Number of Pages: 41

Description of Documents: LifeConnex Telecom, LLC's Joinder in NewPhone's Response in Opposition to AT&T's Motion for Consolidation and NewPhone's Motion to Dismiss and/or Stay.

Nicki Garcia
Office of:
Lila A. Jaber
Matthew Feil
Braulio Baez

Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 425-1677
Nicki.Garcia@Akerman.com

www.akerman.com

2/25/2010

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www.akerman.com

850 224 9634 *tel* 850 222 0103 *fax*

February 25, 2010

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket 100021-TP – Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T Florida Against LifeConnex Telecom, LLC f/k/a Swiftel, LLC

Dear Ms. Cole:

Please find attached for filing the LifeConnex Telecom, LLC's Joinder in NewPhone's Response in Opposition to AT&T's Motion for Consolidation and NewPhone's Motion to Dismiss and/or Stay.

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Matthew Feil

Attachments

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T Florida Against LifeConnex Telecom, LLC f/k/a Swiftel, LLC	)	Docket No. 100021-TP

LIFECONNEX TELECOM, LLC's JOINDER IN NEWPHONE'S RESPONSE IN OPPOSITION TO AT&T'S MOTION FOR CONSOLIDATION AND NEW PHONE'S MOTION TO DISMISS AND/OR STAY

LifeConnex Telecom, LLC f/k/a Swiftel, LLC ("LifeConnex") hereby joins in the Response in Opposition to AT&T's Motion for Consolidation and Motion to Dismiss and/or Stay ("Motion") filed on even date herewith by Image Access, Inc. d/b/a NewPhone ("NewPhone") in Docket No. 100022-TP[1] and further moves the Commission to grant in this docket the relief sought by NewPhone in its Motion. A copy of said NewPhone filing is attached hereto and incorporated herein.

WHEREFORE, LifeConnex respectfully requests that the Commission deny AT&T's Motion for Consolidation as set forth in the NewPhone Response in Opposition and moves the Commission to dismiss or, in the alternative, stay this proceeding, as set forth in the NewPhone Motion.

[1] The argument contained in NewPhone's Motion regarding AT&T's word-of-mouth promotions does not pertain to LifeConnex and is not adopted. NewPhone does not resell AT&T word-of-mouth promotions. LifeConnex does.

Respectfully submitted this 25th day of February, 2010.

Matthew Feil, Esq.
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 425-1614

Attorneys for LifeConnex Telecom, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 25th day of February, 2010.

Charles Murphy, Esq. Jamie Morrow, Esq. Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 cmurphy@psc.state.fl.us jmorrow@psc.state.fl.us	E. Earl Edenfield, Jr. Tracy W. Hatch Manuel A. Guardian c/o Gregory R. Follensbee 150 South Monroe Street Suite 400 Tallahassee, FL 32301 mg2708@att.com th9467@att.com
Henry M. Walker, Esq. Bradley Arant Boult Cummings, LLP 1600 Division Street, Ste 700 Nashville, TN 37203 hwalker@babc.com	

By: _____
Matthew Feil, Esq.

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

In Re: Complaint of BellSouth Telecommunications, Inc., d/b/a AT&T Florida Against Image Access, Inc. d/b/a NewPhone	)	Docket No. 100022-TP

MOTION TO DISMISS AND/OR STAY

AND RESPONSE IN OPPOSITION TO MOTION FOR CONSOLIDATION

Image Access, Inc. d/b/a NewPhone ("NewPhone") respectfully requests that the Florida Public Service Commission (the "Commission") enter an order dismissing the Complaint and Petition for Relief (the "Complaint") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Florida ("AT&T") in the above-referenced Docket on January 8, 2010, or, in the alternative, staying these proceedings pending resolution of Federal Communications Commission ("FCC") WC Docket No. 06-129, *In the matter of Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules* (the "FCC Resale Docket"), and pending resolution of the court cases cited below.

Moreover, because the FCC Resale Docket will determine the policy issue that AT&T urges the Commission to consider and to consolidate – whether AT&T can apply the resale discount to retail "cash-back" promotions offered by AT&T to resellers – the Commission should deny AT&T's Motion for Consolidation, without prejudice, as premature. The FCC Resale Docket already effectively consolidates this issue, and the FCC's decision will provide

guidance to AT&T and resellers on a national basis, rather than subjecting the parties to potential inconsistent state commission and appellate court decisions.

In support of this Motion to Dismiss and/or Stay and Response in Opposition to Motion for Consolidation, NewPhone asserts the following:

BACKGROUND

1. On June 13, 2006, NewPhone filed a Petition for Declaratory Ruling with the FCC (the "FCC Petition"), at FCC WC Docket No. 06-129, asking the FCC to remove uncertainty surrounding the resale of incumbent local exchange carrier ("ILEC") services subject to cash-back promotions, gift cards, coupons, checks, or other similar giveaways. Section 8.1 of the General Terms and Conditions of the parties' 2006 Interconnection Agreement states, "If the Parties are unable to resolve the issues relating to the dispute in the normal course of business then either Party shall file a complaint with the Commission or FCC to resolve such issues...."[1] In light of the nature of the disputes arising out of AT&T's interpretation of its resale obligations under federal law, NewPhone filed the FCC Petition asking the FCC to address issues related to the resale availability, pricing, and timing of ILECs' cash-back, non-cash-back, and mixed bundle promotional offerings.

[1] Interconnection Agreement between BellSouth Telecommunications, Inc. and Image Access, Inc. d/b/a NewPhone, dated April 19, 2006, as amended and extended on March 31, 2006 (the "2006 Agreement"), General Terms and Conditions, Section 8.1.

2. In response to the FCC's Public Notice requesting comments and reply comments from interested parties,[2] BellSouth Corporation and AT&T Inc.[3] both filed timely comments opposing the relief requested by NewPhone. This matter is currently pending before the FCC.

3. In January of this year, AT&T filed separate complaints against NewPhone and another reseller operating in Florida, LifeConnex Telecom, LLC, which AT&T seeks to consolidate. In its Complaint filed against NewPhone with this Commission, AT&T seeks a decision declaring that (a) NewPhone has breached its Interconnection Agreement by wrongfully withholding amounts due and payable, (b) AT&T has been financially harmed, (c) NewPhone is liable to AT&T, and (d) NewPhone is required to pay AT&T all amounts withheld, including late payment charges and interest.[4]

4. AT&T also filed substantively identical complaints against NewPhone in Louisiana, Mississippi, Alabama, Georgia, Tennessee, South Carolina, and North Carolina; in these various jurisdictions, AT&T also filed separate complaints against other resellers.

5. In its Motion for Consolidation, however, AT&T asks that two issues it asserts are "in common" with the other complaint it filed in Florida be consolidated for "expeditious resolution." Specifically, AT&T suggests the common issues are: (1) whether AT&T can apply the resale discount established by the Commission to "cash-back" promotions offered by AT&T to its customers that AT&T makes available for resale, and (2) whether AT&T is required to

[2] Attached as Exhibit A.
[3] AT&T Inc. was the result of a merger of SBC Communications, Inc. and AT&T Corp. The opposition of AT&T Inc. in FCC WC Docket No. 06-129 included the company's ILEC subsidiaries.
[4] *See* Complaint pp. 3, 5 (¶9), 9 (part VI).

offer for resale certain customer referral marketing promotions (such as the "word-of-mouth" promotion).

ARGUMENT

6. As discussed below, the first issue raised by AT&T is already pending for resolution before the FCC. Therefore, AT&T's related claim against NewPhone should be dismissed without prejudice or stayed pending the FCC's decision.

7. The second issue raised by AT&T is not applicable to NewPhone as NewPhone has not sought credits associated with AT&T's customer referral marketing promotions (including the "word-of-mouth" promotion). Therefore, AT&T's Complaint fails to state a claim against NewPhone, and provides no basis for consolidation with respect to that issue.[5]

I. The Commission should dismiss or stay AT&T's Complaint as it relates to the resale issues being decided in the FCC's Resale Docket.

8. The Commission should dismiss AT&T's Complaint or, alternatively, stay the Complaint pending the FCC's decision in the FCC Resale Docket.

9. Each complaint, including AT&T's Complaint before the Commission, requires interpretation of FCC regulations regarding AT&T resale obligations to make retail promotions available to competitive local exchange carrier ("CLEC") resellers; nowhere does AT&T allege violation of a state commission regulation or state statue. Judicial economy and efficiency

[5] NewPhone has asserted the defense of no cause of action as to AT&T's word-of-mouth claim in its Answer, and New Phone will file a dispositive motion relating to that claim at the appropriate time in this proceeding, assuming AT&T does not voluntarily withdraw that claim forthwith, as it should.

would be best served by allowing the FCC, the governing body charged with promulgating and interpreting the regulations at issue, to provide guidance on the issues raised by AT&T in the complaints, and to interpret *its own* regulations.

10. An order by the FCC may be dispositive of the issues presented in AT&T's Complaint. Without a stay in this proceeding, the parties will most likely waste significant money and Commission resources developing their respective positions, only to have this proceeding mooted by an intervening order of the FCC. A dismissal or stay will help conserve Commission resources and help to avoid multiple appeals to various forums.

11. Consolidation of a regional issue involving interpretation of federal statutes and regulations can realize efficiencies only at a federal or national level — not on a state-by-state basis. Furthermore, state-by-state determinations raise the risk of inter-state conflicts and are duplicative of existing proceedings considering the same issues.

12. In fact, the issue concerning restrictions on the resale discount is already pending in three proceedings:

a. Interpretation of the Telecommunications Act of 1996 (the "Act") and FCC regulations relating to AT&T's resale obligations and the prohibition against imposing unreasonable or discriminatory conditions or limitations on resale are issues currently pending in the FCC Resale Docket. According to the FCC's Public Notice in the FCC Resale Docket (attached as Exhibit A), interested parties were invited to comment on whether

> ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail

promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion...[6]

This is the same as the first issue AT&T has raised in its Complaint before this Commission.

b. Issues of AT&T's resale obligations under the federal statute and regulations are also pending in *CGM, LLC v. BellSouth Telecommunications, Inc.*, Case No. 3:09-cv-00377 (W.D. N.C. 2009). The appellate court for that circuit has already ruled, in *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007), that the Act and FCC regulations thereunder require AT&T to make the promotions offered to retail customers available to CLEC resellers.

c. A U.S. District Court in Texas enjoined AT&T from engaging in restrictions on resale designed to reduce the amount of promotional discounts offered to CLEC resellers when compared to retail consumers. *Budget PrePay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, Case No. 3:09-cv-1494-P (N.D. TX 2009).[7] AT&T is currently appealing that decision to the United States Fifth Circuit Court of Appeals, Case Nos. 09-11188 and 09-11099.

13. Rulings made in these earlier-filed proceedings will clarify or determine AT&T's resale obligations under federal statutes and regulations and advance the resolution of the particular billing and payment issues in AT&T's Complaint against NewPhone.

14. Therefore, NewPhone asserts that resolution by the FCC of the issues presented in the FCC Resale Docket may render unnecessary any further proceedings in this Docket.

[6] FCC WC Docket No. 06-129, Public Notice, p. 1 (July 10, 2006).
[7] Attached as Exhibit B.

Accordingly, NewPhone respectfully moves that the Commission stay these proceedings while the FCC Resale Docket is pending before the FCC.

II. AT&T has no claim against NewPhone for amounts allegedly owed for the Word-of-Mouth Promotion.

15. AT&T has asserted a claim to hold NewPhone liable for credits allegedly due associated with its word-of-mouth promotion. NewPhone has not applied for credits, let alone withheld payments associated with, the word-of-mouth promotion. AT&T should therefore amend its Complaint against NewPhone to remove any claims relating to customer referral marketing promotions, including the word-of-mouth promotion.

16. As this claim relates to AT&T's Motion for Consolidation, NewPhone opposes the consolidation of the Complaint against it based on a word-of-mouth claim that does not exist. Thus, the only claim presenting a case and controversy between AT&T and NewPhone is that relating to AT&T's improper calculation of the cash-back promotional credits due – an issue already pending in the FCC Resale Docket.

17. In sum, judicial economy and efficiency would be best served by allowing the FCC, the governing body charged with promulgating and interpreting the regulations at issue, to provide guidance on the issues presently before the Commission. An order by the FCC may be dispositive of the issues raised by AT&T in the complaints. Without a stay in this proceeding, the parties will most likely waste significant money and Commission resources developing their respective positions, only to have this proceeding mooted by an intervening order of the FCC. A stay or abeyance will help conserve Commission resources and help to avoid multiple appeals to various forums.

III. Defer Consolidation Until the Appropriate Time.

18. If the Commission does not dismiss or stay this proceeding, and does not deny AT&T's Motion for Consolidation as set forth above, NewPhone requests the Commission defer ruling on the Motion for Consolidation until after any Issue Identification Conferences take place in the cases referenced in the AT&T Motion for Consolidation. Only after the Issue Identification Conferences will common issues be specified. As stated above, not all of the issues in the NewPhone case and the other Florida docket are identical. There may be some common issues and a viable means to consolidate those for purposes of hearing. However, this determination is best made after Issue Identification and with the input of staff; therefore, the Commission should defer ruling on AT&T's Motion and instead permit the parties to negotiate and, if necessary, submit comment on any consolidation after Issue Identification is complete

WHEREFORE, NewPhone requests that the Commission dismiss the Complaint filed by AT&T, or in the alternative, stay the proceeding in this Docket pending a resolution of the FCC Resale Docket and/or the court cases referenced herein. NewPhone further requests that the Commission deny AT&T's Motion for Consolidation, without prejudice, as premature. Further, if dismissal or a stay is not granted, ruling on the AT&T Motion for Consolidation should be deferred as set forth in the body of this Motion.

Respectfully submitted this 25th day of February, 2010.

Respectfully submitted,

Matthew Feil, Esq.
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 425-1614

Paul F. Guarisco (LA Bar Roll No. 22070)
W. Bradley Kline (LA Bar Roll No. 32530)
PHELPS DUNBAR LLP
II City Plaza, 400 Convention Street, Suite 1100
Post Office Box 4412
Baton Rouge, Louisiana 70821
Telephone: (225) 376-0241
Facsimile: (225) 381-9197
paul.guarisco@phelps.com

COUNSEL FOR IMAGE ACCESS, INC. d/b/a NEWPHONE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following by email, and/or U.S. Mail this 25th day of February, 2010.

Charles Murphy, Esq. Jamie Morrow, Esq. Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850 cmurphy@psc.state.fl.us jmorrow@psc.state.fl.us	E. Earl Edenfield, Jr. Tracy W. Hatch Manuel A. Guardian c/o Gregory R. Follensbee 150 South Monroe Street Suite 400 Tallahassee, FL 32301 mg2708@att.com th9467@att.com
Paul F. Guarisco Phelps Dunbar LLP II City Plaza 400 Convention Street-Suite 1100 P.O. Box 4412 Baton Rouge, LA 70821-4412 paul.guarisco@phelps.com	Jim Dry President Image Access, Inc. d/b/a NewPhone 5555 Hilton Avenue, Ste 605 Baton Rouge, LA 70808 jimdry@newphone.com

By: _____
Matthew Feil, Esq.

PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: http://www.fcc.gov
TTY: 1-888-835-5322

DA 06-1421
Released: July 10, 2006

PETITION OF IMAGE ACCESS, INC. d/b/a NEWPHONE FOR DECLARATORY RULING PLEADING CYCLE ESTABLISHED

WC Docket No. 06-129

COMMENTS: July 31, 2006
REPLY COMMENTS: August 10, 2006

On June 13, 2006, Image Access, Inc. d/b/a NewPhone (NewPhone) filed a petition for declaratory ruling regarding the resale of incumbent local exchange carrier (ILEC) services. Specifically, NewPhone asks the Commission to declare that:

- an ILEC's refusal to make cash-back, non-cash-back, and bundled promotional discounts available for resale at wholesale rates is an unreasonable restriction on resale and is discriminatory in violation of the Act and the Commission's rules and policies;
- for all promotions greater than 90 days, ILECs are required either to offer to telecommunications carriers the value of the giveaway or discount, in addition to making available for resale at the wholesale discount the telecommunications service that is the subject of the ILEC's retail promotion, or to apply the wholesale discount to the effective retail rate of the telecommunications service that is the subject of the ILEC's retail promotion;
- the effective retail rate for a giveaway or discount shall be determined by subtracting the face value of the promotion from the ILEC-tariffed rate for the service that is the subject of the promotion, and the value of the discount shall be distributed evenly across any minimum monthly commitment up to a maximum of three months;
- for all ILEC promotions greater than 90 days, ILECs shall make available for resale the telecommunications services contained within mixed-bundle promotions (promotions consisting of both telecommunications and non-telecommunications services) and apply the wholesale avoided cost discount to the effective retail rate of the telecommunications service contained within the mixed bundle;
- the effective retail rate of the telecommunications service component(s) of a mixed-bundle promotion shall be determined by prorating the telecommunications service component based on the percentage that each unbundled component is to the total of the bundle if added together at their retail, unbundled component prices; and
- telecommunications carriers shall be able to resell ILEC promotions greater than 90 days in duration as of the first day the ILEC offers the promotion to retail subscribers.

We invite comments on the NewPhone petition. Interested parties may file comments on or before **July 31, 2006** and reply comments on or before **August 10, 2006**. Comments may be filed using

the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[1] Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of the proceeding, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case, **WC Docket No. 06-129**. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). **Parties are strongly encouraged to file comments electronically using the Commission's ECFS.**

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, D.C. 20002.

- The filing hours at this location are 8:00 a.m. to 7:00 p.m.
- All hand deliveries must be held together with rubber bands or fasteners.
- Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. Parties should also send a copy of their filings to Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A361, 445 12th Street, SW, Washington, D.C. 20554 or by e-mail to lynne.engledow@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

Documents in WC Docket No. 06-129 are available for public inspection and copying during business hours at the FCC Reference Information Center, 445 12th Street, SW, Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com. People with disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files,

[1] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at telephone (202) 418-0530 or TTY (202) 418-0432.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. *See* 47 C.F.R. §§ 1.1200 *et seq*. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. *See* 47 C.F.R. § 1.1206(b)(2). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules. *See* 47 C.F.R. § 1.1206(b).

For further information, contact Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, (202) 418-2350.

- FCC -

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BUDGET PREPAY, INC. et al.,	§	
	§	
Plaintiffs	§	
	§	
v.	§	No. 3:09-CV-1494-P
	§	
AT&T INC. F/K/A SBC COMMUNICATIONS, INC. et al.,	§	
	§	
	§	
Defendants.	§	

ORDER

Now before the Court is

1. Defendants'[1] Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) filed on August 24, 2009.
2. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) filed on August 24, 2009.
3. Defendants Motion to Dismiss for Failure to State a Claim Upon which Relief may be Granted pursuant to Fed. R. Civ. P. 12(b)(6) filed on August 24, 2009.

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[1] AT&T, Inc., f/k/a SBC Communications, Inc. and its subsidiaries, including AT&T Operations, Inc., f/ka SBC Operations, Inc., Illinois Bell Telephone Company d/b/a AT&T Illinois, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc., which is in turn wholly owned by AT&T Inc.; Indiana Bell Telephone Company d/b/a AT&T Indiana, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc., which is in turn wholly owned by AT&T Inc.; Michigan Bell Telephone Company d/b/a AT&T Michigan, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Wisconsin Bell Telephone Company d/b/a AT&T Wisconsin, a corporation that is wholly owned by its corporate parent, AT&T Teleholdings, Inc.., which is in turn wholly owned by AT&T Inc.; Southwestern Bell Telephone L.P. d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas; and AT&T Southeast Inc. f/k/a BellSouth Telecommunications, Inc. d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky, AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, A&T South Carolina, and AT&T Tennessee (collectively, "AT&T" or "Defendants").

4. Plaintiffs'[2] Application and Motion for a Preliminary Injunction filed on August 12, 2009.

5. Defendants' Motion to Increase Bond filed on October 16, 2009.

After careful consideration of the law and the parties arguments for the reasons stated below Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED; Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED; Defendants' Motion to Dismiss for Failure to State a Claim is DENIED; Plaintiffs' Motion for a Preliminary Injunction is GRANTED; Defendants' Motion to Increase Bond is GRANTED; Defendants' Motion to Dismiss Plaintiffs' anti-trust and fraud claims is GRANTED, but Plaintiffs are GRANTED leave to amend their complaint to re-plead these claims; and Defendants' Motion to Dismiss Plaintiffs state law claims is DENIED.

I. Background

Plaintiff are Competitive Local Exchange Carriers ("CLECs"). A CLEC is a small telephone company that buys telephone service from Incumbent Local Exchange Carriers ("ILECs") large telephone companies with existing telecommunications infrastructure. ILECs sell telephone service to CLECs for the retail rate minus a wholesale discount. CLECs then re-sell that telephone service to individual consumers

These type of arrangements are made possible by the Federal Telecommunications Act of 1996 (FTCA). Under the FTCA, ILECs are required to enter into an Interconnection Agreement ("ICA") which must then be approved by a state commission. In this case, there is an approved ICA between the parties in each individual state. Additionally, Plaintiffs fully acknowledge that prior to this dispute Defendants have always complied with the ICA, laws, and regulations.

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[2] Budget Prepay, Inc., Global Connection Inc. of America, Mextel Corporation LLC d/b/a Litel, Nexus Communications, Inc., and Terracom, Inc. (collectively "Plaintiffs").

About July 1, 2009, AT&T alerted CLECs that as of September 1, 2009, they would no longer be eligible for promotional discounts such as the "Win-back Cash Promotion."[3] Instead CLECs would only be entitled to a small fraction of the $50 cash-back that retail customers are entitled to receive. The amount that CLECs are entitled to receive back varies from $3.73 - $5.54 depending on the location. AT&T has imposed this new method of calculating the amount CLECs can receive under the promotion in an attempt to make the resale rate reflect consumers' failure to properly submit their rebate coupon. AT&T's reasoning for placing this restriction on resale is that only 33.33% of customers actually take the steps necessary- i.e. submitting the coupon - to receive the $50 cash back.

Though 47 C.F.R. 51.613(b) requires ILECs to obtain state approval before imposing restrictions like this on resale, Defendants began implementing this resale restriction on September 1, 2009 without the approval of any state commissions. Plaintiffs have brought claims for Defendants' failure to obtain state approval. Plaintiffs also claim that the new methodology used by AT&T to calculate credits available to CLECs under the Win-back Cash Back promotion (hereinafter "new calculation method") violates the ICA, and the Act. Further, Plaintiffs have sought an injunction claiming that without one they will lose customers, market share, and good will as a result of not being able to compete with AT&T's offer. The end result - according to Plaintiffs - is that each and every one of them will go out of business within a short period.

II. Request for Declaratory Judgment

Plaintiffs first cause of action is for Declaratory Judgment pursuant to 28 U.S.C. § 2201. Specifically, Plaintiffs ask the Court to issue a judgment declaring that the new calculation

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[3] The Win-back Cash Promotion seeks to attract new customers away from another carrier or wireless provider by offering no connection fees and $50 cash back.

method is a restriction on resale that is unreasonable and discriminatory in violation of 47 U.S.C. § 251(c)(4), 47 C.F.R. § 51.605(a), 47 C.F.R. § 51.613(b), and the ICA. (Pls.' Am. Compl. ¶ 44.) Defendants have sought to dismiss this claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), lack of personal jurisdiction pursuant to Rule 12(b)(2), and failure to state a claim pursuant to rule 12(b)(6).

A. Subject Matter Jurisdiction

Whether the Court has subject matter jurisdiction over Plaintiffs' claims is the first issue that the Court must address. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) ("When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."). Rule 12(b)(1) provides that an action must be dismissed when the court does not possess subject matter jurisdiction over the plaintiff's claims. Fed. R. Civ. P. 12(b)(1). A court may decide a Rule 12(b)(1) motion to dismiss "on any of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 176 (5th Cir. 1990). A motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Ramming*, 281 F.3d at 161.

Defendants argue that this Court lacks subject matter jurisdiction because Plaintiffs must bring their claims to a state commission before bringing those claims in district court. It appears that Defendants rely on two separate but overlapping arguments for why this claim must be heard by a state commission in the first instance. The first argument Defendants make is that

Plaintiffs have failed to exhaust administrative remedies. The Court can easily dispense with this argument because failure to exhaust administrative remedies is not required by the FTCA.

A case may only be dismissed for lack of subject matter jurisdiction based on a Plaintiffs failure to exhaust administrative remedies when exhaustion is required by statute. *Premiere Network Servs., Inc.* v. *SBC Commc'ns, Inc.*, 440 F.3d 683, 687 n. 5 (5th Cir. 2006) ("'Whenever the Congress statutorily mandates that a claimant exhaust administrative remedies the exhaustion requirement is jurisdictional.'") (quoting *Taylor v. United States Treasury Dep't*, 127 F.3d 470, 475 (5th Cir. 1997)). "But where a statute does not textually require exhaustion, only the jurisprudential doctrine of exhaustion controls [subjecting a claim to dismissal under Rule 12(b)(6)], which is not jurisdictional in nature." *Id.* Nothing in the FTCA textually requires exhaustion. *Id.* Plaintiffs failure to exhaust administrative remedies therefore has no bearing on whether the Court has subject matter jurisdiction over Plaintiffs' FTCA claims.

Defendants' however, also argue that the Court lacks subject matter jurisdiction because section 252(e)(6) only gives district courts the power to review "determinations" made by a state commission. Section 252(e)(6) states:

> In any case in which a state commission makes a determination under this section, 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 section 251 of this title and this section.

47 U.S.C. § 252(e)(6). It is true that section 252(e)(6) explicitly gives district courts the power to review state commission determinations. But section 252(e)(6)'s grant of jurisdiction to review state commission determinations plays no role in determining whether the Court has subject matter jurisdiction in this case.

Section 252(e)(6) does not play a role in determining whether the Court has subject matter jurisdiction in this case because the Court has jurisdiction under 28 U.S.C. § 1331- or

what is more commonly known as federal question jurisdiction. District courts have federal question jurisdiction "if 'the right of the [plaintiff] to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 643 (2002) (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89 (1998)). Though a statute may divest a district court of federal question jurisdiction, neither section 252(e)(6) nor any other part of the Act has divested district courts of this jurisdiction. *Verizon Md.*, 535 U.S. at 643-44 ("Nothing in 47 U.S.C. § 252(e)(6) purports to strip [federal question jurisdiction]. . . .Indeed, it does not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action."). The Supreme Court's holding in *Verizon Md.* has consistently been interpreted to mean that district courts need not look any further than 28 U.S.C. § 1331 to determine whether the court has subject matter jurisdiction over FTCA claims.[4]

Here, the Court has federal question jurisdiction because Plaintiffs' right to recover is based almost exclusively on the interpretation of federal law. Specifically, Plaintiff has asked this Court to declare that Defendants have violated 47 U.S.C. § 251(c)(4), 47 C.F.R. § 51.605(a), and 47 C.F.R. § 51.613(b). Accordingly, the Court finds it has federal question jurisdiction over

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[4] *Verizon Md. Inc. v. Global Naps, Inc.*, 377 F.3d 355, 362-63 (4th Cir. 2004), *on remand by* 535 U.S. 83 (2002) (addressing subject matter jurisdiction over FTCA claims the court only looked to whether the plaintiffs claims were substantially based on federal law); *Mich. Bell Tel. Co. v. MCIMetro Access Transm.Servs., Inc.*, 323 F.3d 348, 355 (6th Cir. 2003) ("[F]ederal courts have jurisdiction to review state commission orders for compliance with federal law, because provisions of the Act do not preclude jurisdiction under 28 U.S.C. § 1331."); *Core Comme'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007) (to determine whether federal question jurisdiction over an ICA dispute existed the court examined the complaint to determine whether the claims were substantially based on federal law); *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008) (We conclude that . . . whatever finality or exhaustion requirement § 256(e)(6) might impose does not affect the subject matter jurisdiction of the district court in this case. Rather, the district court has general federal question jurisdiction under 28 U.S.C. § 1331 . . .."); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 317 F3d 1270 (11th Cir.2003) (where plaintiffs challenged the state commissions interpretation of an ICA the district court had jurisdiction over the case pursuant to 28 U.S.C. § 1331).

Plaintiffs' cause of action for declaratory judgment and now turns to Defendants argument that the case should be dismissed pursuant to Rule 12(b)(2).

B. Personal Jurisdiction

The plaintiff bears the burden of establishing a district court's personal jurisdiction over a nonresident defendant. *See Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). The Court must accept as true all uncontroverted allegations in the complaint, and all factual conflicts presented by the parties must be resolved in favor of the plaintiff. *See id.* To exercise personal jurisdiction over a nonresident defendant, the Court must determine that due process standards are satisfied by engaging in a two-pronged analysis. First, the Court determines whether the defendant has purposefully established "minimum contacts" in the state. If so, the Court must then assess whether the exercise of personal jurisdiction would offend "traditional notions of fair play and substantial justice." *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-75, 476 (1985); *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990).

Sufficient minimum contacts can be established through a showing of the existence of general or specific jurisdiction. *See Freudensprung v. Offshore Technical Serv. Inc.*, 379 F.3d 327, 343 (5th Cir. 2003). "A court may exercise specific jurisdiction over a nonresident defendant if the lawsuit arises from or relates to the defendant's contact with the forum state." *Icee Distribs. Inc. v. J&J Snack Foods Corp.*, 325 F.3d 586, 591 (5th Cir. 2003). Specific jurisdiction exists where a defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475. The "purposeful availment" necessary for specific jurisdiction protects a defendant from being brought into a jurisdiction based solely on "random," "fortuitous," or "attenuated" contacts. *Id.* A single act may form a sufficient basis for personal jurisdiction if the

claim arises from that single act, and the defendant can reasonably foresee being brought into court in the forum state. *See Icee Distribs.*, 325 F.3d at 591.

Defendants argue that Plaintiff has failed to show that the Non-Resident ILEC Defendants (hereinafter "Non-Resident Defendants") have sufficient minimum contacts with Texas to establish personal jurisdiction. But Defendants arguments have all but ignored the pervasive contacts relating to the ICAs and the new calculation method. Instead, the Non-Resident Defendants would like the Court to look at all of the contacts the Non-Resident Defendants do not have with Texas. But in making this argument Defendants have essentially asked this Court to "pay no attention to the man behind the curtain." AT&T is the proverbial man behind the ICAs- the proverbial curtain. More importantly, AT&T is behind the new calculation method which is at the center of this dispute. Defendants do not deny these facts which in themselves assure the Court that personal jurisdiction exists over the Non-Resident Defendants. The Court finds that by completely relying on AT&T for the execution of ICAs, as well as support and advice relating to ICAs that the Non-Resident Defendants have purposefully availed themselves of Texas law. Both through the Acts of their agent, AT&T, and through their own actions.

C. Rule 12(b)(6) - Failure to State a Claim

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint when a defendant shows that the plaintiff has failed to state a claim for which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Iqbal v. Ashcroft*, --- U.S. ---, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual matter contained in the complaint must allege actual facts not legal conclusions

masquerading as facts. *Id.* at 1949-50 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Twombly*, 550 U.S. at 555). Additionally, the factual allegations of the complaint must state a plausible claim for relief. *Id.* A complaint states a "plausible claim for relief" when the factual allegations contained therein infer actual misconduct on the part of the defendant, not a "mere possibility of misconduct." *Id.*; *see also Jacquez v. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986). Determining whether a complaint states a plausible claim for relief necessarily requires looking to the elements a plaintiff must plead to state a claim implicated by the complaint. *Iqbal*, 129 S. Ct. at 1947 (citing *Twombly*, 550 U.S. at 553-557).

Plaintiffs claim that they are entitled to a declaration that Defendants breached the ICA and that Defendants have violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605, and 47 C.F.R. 51.613(b). Defendants argue that Plaintiffs have failed to state a claim for relief based on the jurisprudential doctrine of exhaustion. As discussed above, where exhaustion is not required by statute failure to exhaust administrative remedies may subject a claim to dismissal under Rule 12(b)(6). *Premiere Network Servs., Inc.*, 440 F.3d at 687 n. 5 (citing *Taylor*, 127 F.3d at 475). When a plaintiff is required to exhaust administrative remedies under the jurisprudential exhaustion doctrine the plaintiff is not entitled to judicial relief. *Taylor*, 127 F.3d at 476 (" '[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' ") (quoting *Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). Accordingly, dismissal pursuant to Rule 12(b)(6) is appropriate when the jurisprudential exhaustion doctrine is applied.

Sections 251 and 252 of the Act provide many requirements and procedures for ICAs. Generally, section 251 provides the obligations of local exchange carriers under the Act. *See generally* 47 U.S.C. § 251. In conjunction with the obligations of section 251, Section 252 provides the procedures for negotiation, arbitration, and approval of ICAs. *See generally* 47 U.S.C. § 252. The procedures of section 252 relate to the initial formation of an ICA. *See id.* But nothing in sections 251 or 252 of the Act statutorily grants state commissions the authority to resolve disputes between parties after the parties have entered into an ICA. *Core Commc'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007) ("Beyond [the state commissions role in approving an ICA] there is no real indication of what role the state commissions are to play, and the Act is simply silent as to the procedure for post-formation disputes."); *see also W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1184-99 (9th Cir. 2008) (discussing the absence of procedural requirements once an ICA has been formed). Noting the absence of any post-ICA formation dispute resolution procedures the Fifth Circuit, along with the other circuit courts, has interpreted the Act as whole to grant state commissions jurisdiction "to decide intermediation and enforcement disputes that arise after the approval procedures are complete." *Sw. Bell Tel. Co.* v. *Pub. Utils. Comm'n*, 208 F.3d 475, 476 (5th Cir. 2000) (hereinafter "*SWBT*"); *see also Illinois Bell Tel. Co. v. Global NAPS Illinois, Inc.*, 551 F.3d 587, 593-94 (7th 2008) ("[T]he Telecommunications Act does not expressly authorize a state commission, after it approves an interconnection agreement, to resolve disputes arising under it. . . . But such authority is a sensible corollary to the allocation of state and federal responsibilities made by the Act.").

SWBT did not, however, address whether the state commission had exclusive jurisdiction over disputes between parties that are bound by a previously formed ICA. Rather, *SWBT* addressed the narrow question of whether the state commission may intermediate and resolve

disputes between parties to an already existing ICA. Defendants argue that because *SWBT* holds state commissions have authority to intermediate and resolve disputes between parties to an already existing ICA in the first instance that state commissions have exclusive jurisdiction over such disputes. Further, Defendants argue that the FCC has spoken directly to this issue.

Defendants rely on *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 (2000) for this proposition. The relevant part of *In re Starpower* states:

> [A]t least two federal courts [*SWBT* and *Ill. Bell Tele. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566 (7th Cir. 1999)] of appeal have held that inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements. These court opinions implicitly recognize that, due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements. Thus, we conclude that a state commission's failure to "act to carry out its responsibility" under section 252 *can in some circumstances* include the failure to interpret and enforce existing interconnection agreements.

In re Starpower, 15 F.C.C.R. at 11279-80 (emphasis added). Like Defendants, the Third Circuit has taken this part of *In re Starpower* to stand for the proposition that state commissions have exclusive jurisdiction over disputes that arise between parties to an already existing ICA.

In *Core Commc'ns, Inc.* v. *Verizon Pa., Inc.*, 493 F.3d 333 (3d Cir. 2007), the Court of Appeals for the Third Circuit upheld a district court's dismissal of the plaintiff's claims for breach of an ICA and violations of the FTCA because the plaintiff had not taken the claims to the state commission in the first instance. On appeal, the court interpreted *In re Starpower* to mean that state commissions have exclusive jurisdiction over disputes between parties to an existing ICA. *Core Commc'ns*, 493 F.3d at 344 ("Pursuant to FCC guidance, we hold that interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement must be litigated in the first instance before the relevant state commission."). In reaching this conclusion, the court noted that *In re Starpower* could be read to mean more than

one thing. *Id.* at 342. Nonetheless, the court determined that FCC's *In re Starpower* decision, as interpreted by the court, was entitled to *Chevron* deference.

This Court declines to read *In re Starpower* in this manner. *In re Starpower* does not give any indication that state commissions are the exclusive forum for resolving disputes over already existing ICAs. *See generally, In re Starpower, 15 F.C.C.R. at 11278-79.* As the *Core Communications* court recognized, *In re Starpower* can be read to mean more than one thing. More simply stated: *In re Starpower* is ambiguous. And an ambiguous agency decision is not the type of decision that is meant to fill gaps in a statute under *Cheveron.* Second, *In re Starpower* explicitly indicates that there are circumstances in which a state commission would not be shirking its responsibilities by failing to interpret and enforce existing ICAs. Based on this statement, the Court finds that if *In re Starpower* unambiguously stands for anything, it is that there are circumstances in which parties to an existing ICA need not bring their claims to a state commission in the first instance.

The facts and claims in this case provide exactly the type of circumstances in which a plaintiff should not be compelled to take their claims to a state commission in the first instance. Here, the Court is not being asked to interpret the ICA. Rather, the Court is being asked to interpret federal law. The Court recognizes that without the ICA Plaintiffs would not have standing to challenge Defendants actions. But the fact that the ICA gives Plaintiffs standing does not in itself mean that the Court must interpret the ICA to grant relief to Plaintiffs. Nor does the ability of an ICA to negate the requirements and responsibilities imposed by the Act mean that the Court must 'interpret' the ICA to grant relief to Plaintiffs.[5] Where an ICA adopts federal law

[5] *See* 47 U.S.C. § 252(a)(1) ("An incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.") 47 U.S.C. § 252(a)(1); *see also* 47 C.F.R. § 51.3 ("To the extent provided in

as controlling the parties contractual resale obligations for resale the Court need not interpret the ICA to determine whether the plaintiff is entitled to relief.[6] Rather, the Court must interpret federal law to determine if the plaintiff is entitled to relief.

Here, the ICA requires resale restrictions to be "consistent with regulations prescribed by the Commission under Section 251(c)(4) of the Act." (Defs' App. 57.) Additionally, the ICA provides that "[a]ll federal rules and regulations . . . also apply." (Id.) When a court is being asked to interpret federal law the policy of allowing the state commission to interpret the agreement it approved because it knows the interpretation it intended when approving the agreement does not apply.

Conversely, it would be bad policy to require Plaintiffs in this specific case to exhaust administrative remedies because it would allow Defendants to shift to Plaintiffs the duties imposed upon ILECs by the Act. The Act imposes on ILECs a duty to obtain state commission approval before placing restrictions on resale. 47 C.F.R. § 51.613(b). When an ILEC imposes a restriction on resale that is not permitted under 47 C.F.R. § 51.613(a), subsection (b) requires an ILEC "to prove to the state commission that the restriction is reasonable and nondiscriminatory" before imposing the restriction. Despite the regulation placing the duty of going to the state commission on ILECs, Defendants have asked the Court to require the Plaintiffs, CLECs, to go to the state commission before bringing a claim in federal court. Were the Court to oblige Defendants request it would allow them to contravene the requirements and

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section 252(e)(2)(A) of the Act, a state commission shall have authority to approve an interconnection agreement adopted by negotiation even if the terms of the agreement do not comply with the requirements of this part.").

[6] Though one could argue that merely determining federal law controls resale restrictions constitutes "interpreting" the ICA, this is not the type of interpretation that courts finding that exhaustion is required have been called upon to interpret. *See e.g. Express Tel. Servs., Inc.* v. *Sw. Bell Tel. Co.*, No. 3:02-CV-1082-M, 2002 U.S. Dist. Lexis 19645 (N.D. Tex. Oct. 16,2002).

intent of the Act. The facts of this case demonstrate how the requirements and intent of the Act would be contravened by forcing Plaintiffs to go to the state commission first when Plaintiffs' claims are predicated on Defendants failure to go to the state commission.

As previously discussed, Congress passed the FTCA with the intent of "opening previously monopolistic local telephone markets to competition." *SWBT*, 208 F.3d at 477. Congress entrusted the FCC with the duty of promulgating regulations that would ensure the Act's purpose would be met, including regulations that prevented ILECs from placing restrictions on resale that are unreasonable or discriminatory. 47 U.S.C. § 251(c)(4)(B). To that end, 47 C.F.R. § 51.613(b) requires ILECs to prove that restrictions on resale are reasonable and nondiscriminatory before imposing such restrictions. Requiring ILECs to obtain state commission approval prior to placing restrictions on resale demonstrates a recognition that resale restrictions can have a devastating effect on a CLEC's ability to remain competitive. More importantly, it clearly places the duty to gain state commission approval on ILECs – not CLECs.

Defendants did not gain state commission approval before implementing the new calculation methodology. Instead, Defendants notified Plaintiffs that the new methodology would go into effect on September 1, 2009. Plaintiffs, fearful that this restriction on resale would devastate their companies, sought refuge in federal court. Defendants ignored their own duty to gain state commission approval before placing restrictions on resale. Then after being hailed into court Defendants vehemently argue that Plaintiffs should be required to go to seventeen different state commissions before bringing any claims to one federal court. Where the jurisprudential exhaustion doctrine is policy motivated, the Court cannot allow Defendants to invoke the doctrine in this instance.

Finding that the jurisprudential doctrine of exhaustion is inapplicable to this case, the Court turns to the factual allegations of Plaintiffs' Complaint to determine if they have stated a claim for relief.

Plaintiffs have alleged factual allegations that, taken as true, infer actual misconduct on the part of Defendants. For example, Plaintiffs have alleged that they were notified by Defendants of a new method that would be used to calculate the rates at which telecommunication services would be resold to Plaintiffs under certain promotional plans. This new method provided retail customers who switched to Defendants telephone company from a different telephone company with fifty dollars cash-back and a waiver of all nonrecurring charges associated with adding service. Plaintiffs that resold service to customers switching companies however, would not be entitled to offer the same fifty dollars cash-back or a waiver of nonrecurring charges to its customers. Though the complaint provides more factual allegations, these allegations alone indicate that Defendants may have violated the requirements of 47 U.S.C. § 251(c)(4) and 47 C.F.R. § 51.605. Moreover, as previously discussed, Plaintiffs allege that Defendants failed to obtain state commission approval before implementing the new calculation method in violation of 47 C.F.R. § 51.613(b).

Accordingly, the Court finds that Plaintiffs have stated a claim for relief and Defendants Rule 12(b)(6) motion is denied. Defendants however, have argued that another jurisprudential doctrine, the primary jurisdiction doctrine, warrants dismissal of Plaintiffs claims. Because the primary jurisdiction doctrine would only warrant staying these proceedings the Court addresses this argument separately from Defendants' Rule 12(b)(6) motion.

D. Primary Jurisdiction

"[P]rimary jurisdiction 'comes into play whenever enforcement of the claim requires the resolution of issues [which, under a regulatory scheme, have been placed] within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *Penny v. Sw. Bell Tele. Co.*, 906 F.2d 183, 187 (5th Cir. 1990) (quoting *Sw. Bell Tel. v. P.U.C.*, 735 S.W. 2d 663, 669 (Tex. App. – Austin 1987, no writ); *see also ASAP Paging, Inc. v. CenturyTel of San Marcos Inc., 137 Fed. Appx. 694, 697 (5th Cir. 2005)*("The doctrine of primary jurisdiction applies . . . when a court having jurisdiction wishes to defer to an agency's superior expertise.") (citing *Arsberry v. Illinois*, 244 F.3d 558, 563 (7th Cir. 2001)). Since '[n]o fixed formula exists for applying the doctrine of primary jurisdiction,' each case must be examined individually to determine whether it would be aided by the doctrine's application." *Penny*, 906 F.2d at 187 (quoting *Sw. Bell v. P.U.C.*, 735 S.W. 2d at 670).

Courts faced with the task of determining whether primary jurisdiction applies when a dispute arises between parties to an already existing ICA have noted that the statutory scheme complicates the issue. The statutory scheme complicates the issue because the appropriate agency to which the court would refer the issue is not one agency entrusted with carrying out this regulatory scheme, but multiple state commissions. *See W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1200 (9th Cir. 2008) ("The doctrine of primary jurisdiction . . . is . . . not a perfect fit for the statute before us. For one thing, the agency with 'regulatory authority' in this context, in the sense of having the authority to promulgate regulations, is the F.C.C., not the state commissions.") Additionally, the statutory scheme does not provide a procedural mechanism for referring issues to a state commission. *See Illinois Bell Tel. Co. v. Global NAPS Illinois, Inc.*,

551 F.3d 587 (7th 2008) ("The Act [does not] expressly authorize a federal court to refer such a dispute, if the dispute arises in a suit in federal court, to the state commission . . .."). Despite these complications, courts have routinely determined that issues may be referred to state commissions when appropriate. *Id.* (finding that a federal court's authority to refer issues to the state commission "is a sensible corollary to the allocation of state and federal responsibilities"); *see also Penny*, 906 F.2d at 187-88 (referral to state commission was procedurally proper where the state commission and district court had concurrent jurisdiction to determine whether rates where discriminatory under the FTCA).

Plaintiffs' FTCA claims bring forth two distinct issues. First, whether Defendants were required to obtain state commission approval before implementing the new calculation method. This issue is one that does not require agency expertise and therefore the Court need not refer it to the state commissions.

The second issue is whether the resale restriction is reasonable and nondiscriminatory. Determining whether a resale restriction is reasonable and nondiscriminatory is an issue routinely addressed by state commissions. Therefore, this issue is one that is appropriate for referral to the state commissions. The regulatory scheme bolsters this conclusion as it requires Defendants to prove to the state commission that a restriction on resale is reasonable and nondiscriminatory. Moreover, Defendants have indicated that they are now seeking approval of the new calculation method from state commissions. The Court can find no reason to thwart Defendants attempts to obtain the approval that should have been obtained before implementing the plan. Accordingly, the Court finds that it is appropriate to stay Plaintiffs' claims pending a resolution of this issue by each of the appropriate state commissions.

E. Preliminary Injunction

A preliminary injunction may only be granted if a plaintiff establishes four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is denied, (3) that the threatened injury outweighs any damage that the injunction might cause defendants, and (4) that the injunction will not disserve the public interest. *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999). A preliminary injunction is an extraordinary remedy which should only be granted when the plaintiff has clearly carried his burden of proof as to all four elements, *see Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1462 (5th Cir. 1990), and the decision is to be treated as the exception rather than the rule. *See Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

Here, Plaintiffs have clearly carried the burden of establishing all four elements making the entry of a preliminary injunction appropriate. Plaintiffs have established, and Defendants have admitted in open court, that state commission approval was not obtained prior to Defendants implementing the new calculation method which is a restriction on resale. As previously discussed, 47 C.F.R. § 51.613(b) requires ILECs to obtain state commission approval before implementing a resale restriction. Plaintiffs therefore, have established a strong likelihood of success on their claim that Defendants violated 47 C.F.R. § 51.613(b).[7]

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[7] Communications by Defendants to the Court further evidence that Plaintiffs' have a strong likelihood of success on their claim that Defendants violated 47 C.F.R. § 51.613(b). On the On October 5, 2009, Defendants informed the Court and Plaintiffs that they had received a letter from the Louisiana Public Service Commission concerning the new calculation method. The letter -- a copy of which Defendants provided to the Court -- indicates the Louisiana Public Service Commission's decision to suspend the effectiveness of the new calculation method. This decision was based on an initial finding that the new calculation method imposes a restriction on resale and AT&T's failure to take the proper steps to have the Commission find that the new calculation method is reasonable and non-discriminatory. Though the letter does not specifically state that the new calculation method is unreasonable and discriminatory, the Louisiana Public Service Commission's decision indicates a strong likelihood of such a finding.

Plaintiffs have also established that if Defendants were permitted to implement the new calculation method that they would suffer irreparable injury if the injunction is denied. The new calculation method would significantly impair Plaintiffs ability to compete with Defendants for new customers. There would be no ability to compete because Defendants would be able to entice new customers by offering $50 cash-back and a waiver of connection fees. Meanwhile, Plaintiffs would not be able to make the same offer because they would be purchasing service from AT&T at the normal retail price without $50 cash-back or waiver of connection fees.[8] In the absence of an injunction, Plaintiffs would be forced to pay more for service than they would have to pay without the resale restriction that has not been approved by any of the state commissions. Plaintiffs would have to make these payments while simultaneously losing money because of their inability to compete with Defendants. These circumstances would devastate Plaintiffs' business. In today's economy, this type of devastation could ultimately force Plaintiffs' out of business or at the least push them to the brink of being out of business-something from which they would be unlikely to recover.

Plaintiffs have also demonstrated the threatened injury to them outweighs any damage that the injunction might cause Defendants. It is of considerable importance to comparing the possible injuries that it is likely that if Plaintiffs were forced to pay millions of dollars at this time that it would be into an escrow account. Accordingly, Defendants would not actually be deprived of any income during the period in which this case is pending because the money would remain in an escrow account. Conversely, Plaintiffs would be forced to pay money that they do

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[8] At most, Plaintiffs could offer new customers the $3-$7 cash-back that Defendants are willing to give Plaintiffs under the new calculation method. As a result, the Plaintiffs sales pitch would be something to the effect of "No, we can't offer you $50 cash-back like AT&T. But AT&T has assured us that there is only a 33% chance that you will take the necessary steps to receive that $50 cash-back. So why not sign-up with us and we will knock $3.47 off your initial month of service." This certainly, is not the type of sales pitch that would allow Plaintiffs to remain competitive with Defendants.

not have into an escrow thereby depriving of them of that money immediately. Therefore, the Court finds that the irreparable injury that would be caused to Plaintiffs in the absence of an injunction would outweigh any damage that the injunction might cause Defendants.

Finally, Plaintiffs have demonstrated that the injunction will not disserve the public interest. An injunction in this case will promote competitiveness by ensuring that the statutes and regulations of the FTCA are met. Enjoining Defendants from implementing the new method of calculation without obtaining state commission approval will serve the public interest by providing enforcement of the regulations promulgated by the FCC. Were this Court to simply refer this case to the many appropriate state commissions without issuing a preliminary injunction then Defendants could go back to implementing the new calculation method prior to obtain approval from the state commission. In so doing, Defendants may be able to force Plaintiffs completely out of business before ever obtaining that approval. Forcing Plaintiffs out of business would leave Defendants as one of the few providers of telephone service in the relevant market. With far fewer telephone providers there will be far less competition. During these hard economic times this Country needs more competition not less competition. Accordingly, the Court finds that *not* issuing an injunction would disserve the public interest.

F. Bond

Though Defendants' Motion to Increase Bond was made in reference to the bond ordered by the Court when issuing the T.R.O., the motion can also be read as requesting that bond be increased upon the entry of a preliminary injunction. Accordingly, the Court addresses Defendants' motion now.

Rule 65(c) states:

> The Court may issue a preliminary injunction . . . only if the movant gives security in an amount *that the court considers proper* to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c) (emphasis added). The italicized language indicates that determining the proper amount of bond is within the discretion of the district court. *Id.*; *see also Petro Franchise Sys., LLC v. All Am. Props., Inc.*, 607 F. Supp. 2d 781, 801 (W.D. Tex. 2009) ("[d]istrict courts have discretion over the amount of the security"). As discussed above, the Court finds that it is substantially likely that Plaintiff will succeed in demonstrating that Defendants failed to obtain state approval prior to implementing the new calculation method. In large part, this conclusion is based on Defendants own admissions in open court. Accordingly, the Court finds that it is highly unlikely that Defendants are being wrongfully restrained from implementing the new method of calculation prior to obtaining approval from the appropriate state commissions. The unlikelihood that Defendants are being wrongfully restrained, coupled with the fact that Plaintiffs otherwise valid claim would be obviated by being forced to post an inordinately large bond amount, leads this Court to conclude that the $1,000,000 bond Defendants request would be improper.

Nonetheless, the Court does find that the amount of the bond posted should be increased to more properly reflect the guidance given by Rule 65(c). Using this guidance, the Court herby increases the bond from $5,000 to $50,000. Accordingly, Defendants' Motion to Increase Bond is granted.

III. Plaintiffs' Anti-Trust and Fraud Claims

Defendants argue that Plaintiffs' anti-trust and fraud claims should be dismissed pursuant to Rule 12(b)(6). Plaintiffs have essentially admitted that the Amended Complaint does not state

a claim for relief for anti-trust violations or fraud. Plaintiffs have requested leave to amend to correct these errors. Though the Court believes that Defendants may be correct in their assertion that leave to amend would be futile in light of *Verizon Commc'ns Inc. v. Trinko,* 540 U.S. 398, 407 (2004), the Court is not prepared to reject Plaintiffs' contention that it can plead facts that will state an anti-trust claim for relief. Accordingly, the Court believes that Plaintiffs should be granted leave to amend the complaint. In so doing, the Court directs Plaintiffs to be mindful of *Trinko* when pleading their anti-trust claims and to be mindful of the heightened pleading standards of Fed. R. Civ. P. 9 when pleading their fraud claims.

IV. Plaintiffs State Law Claims

Defendants only argument for dismissal of Plaintiffs' state law claims is that if this Court dismisses Plaintiffs' federal claims it will not have jurisdiction over Plaintiffs' state law claims. The Court however, has not dismissed Plaintiffs' federal claims. Supplemental jurisdiction over Plaintiffs' state law claims is therefore proper.

V. Conclusion

For the above stated reasons, the Court Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction is DENIED; Defendants' Motion to Dismiss for Lack of Personal Jurisdiction is DENIED; Defendants' Motion to Dismiss for Failure to State a Claim is DENIED; Plaintiffs' Motion for a Preliminary Injunction is GRANTED; Defendants' Motion to Increase Bond is GRANTED; Defendants' Motion to Dismiss Plaintiffs' anti-trust and fraud claims is GRANTED, but Plaintiffs are GRANTED leave to amend their complaint to re-plead these claims; and Defendants' Motion to Dismiss Plaintiffs state law claims is DENIED.

The Court ORDERS Defendants to desist and restrain from:

1. Discriminating against Plaintiffs as resellers by proceeding to use the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048)[9] to calculate credits available to Competitive Local Exchange Carriers (CLECs) under the Win-back Cash Back promotion.
2. Implementing or further implementing any plans to impose restrictions on the resale of the cash back or other promotional offers lasting longer than 90 days to Plaintiffs where such plans calculate the credits available to CLECs using the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048) without first obtain approval from the appropriate state commission.
3. Pursuing collection activities against Plaintiffs in connection with amounts related to the dispute over the calculation of credits using the methodology announced in the July 1, 2009, Accessible Letter (Number CLECALL09-048). This includes a prohibition against Defendants from demanding payment of charges in excess of the promotional rate reduced by the wholesale discount, withholding preferential pricing discounts to Plaintiffs, requiring additional security or amounts placed in escrow, or suspending or disconnecting service to Plaintiffs, for amounts connected to this dispute.

IT IS FURTHER ORDERED that:

4. Plaintiffs post bond in the amount of $50,000.
5. Defendants submit their plans to implement the new calculation method to the appropriate state commissions.

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[9] (Pls.' Am. Compl. Ex. 3)

These proceedings will be stayed until each state commission has reached a decision determining whether Defendants' new calculation method is reasonable and nondiscriminatory. Plaintiffs shall file their Amended Complaint, if any, once the stay has been lifted. Though the proceedings will be stayed, the preliminary injunction will continue in effect until the stay has been lifted or until it is otherwise altered by a written and signed order of the Court.[10]

IT IS SO ORDERED.

SIGNED this 30th day of November, 2009.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

[10] The Court will consider appropriate alterations of the preliminary injunction should Defendants obtain approval to implement the new calculation method from a state commission prior to the stay being lifted.