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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

CALIFORNIA ASSOCIATION OF COMPETITIVE
TELECOMMUNICATIONS COMPANIES,

Complainant

v.

PACIFIC BELL TELEPHONE COMPANY, D/B/A
AT&T CALIFORNIA (U-1001-C)

Defendant

C1009004

Case No. _____

**COMPLAINT AGAINST PACIFIC BELL TELEPHONE COMPANY D/B/A/ AT&T
CALIFORNIA FOR FAILURE TO ISSUE PERFORMANCE INCENTIVE PLAN
CREDITS**

September 1, 2010

Sarah DeYoung
Executive Director, CALTEL
50 California Street, Suite 500
San Francisco, CA 94111
Telephone: (925) 465-4396
Facsimile: (877) 517-1404
Email: deyoung@caltel.org

Clay Deanhardt
Law Office of Clay Deanhardt
21-C Orinda Way, #374
Orinda, CA 94563
Phone: (925) 258-9079
Email: clay@deanhardtllaw.com

Counsel for CALTEL

Pursuant to California Public Utilities Code section 1702 and Commission Rule of Practice and Procedure 4, the California Association of Competitive Telecommunications Companies (“CALTEL”)¹ respectfully files this complaint against Pacific Bell Telephone Company d/b/a AT&T California (“AT&T”).

INTRODUCTION AND REQUESTED RELIEF

1. CALTEL has recently learned, and is informed and believes, that AT&T has not issued remedy credits under any performance incentive plan (“PIP”) to the many California CLECs for performance shortfalls occurring after January 2009.
2. By failing to issue the PIP credits to many CLECs, AT&T has violated D.02-03-023, D.02-06-006 and D.08-12-032.
3. By failing to issue the PIP credits to many CLECs, AT&T has violated 47 U.S.C. §§ 251 and 271 by failing to provide non-discriminatory access to network elements, interconnection and its operating and support systems.
4. By failing to issue the PIP credits to many CLECs, AT&T has violated Public Utilities Code §§ 453(a) and 532 by providing privileges and lower rates to some CLECs while prejudicing others.
5. By failing to issue the PIP credits to many CLECs, CALTEL is informed and believes that AT&T has breached its interconnection agreements (“ICAs”) with those CLECs.

¹ CALTEL is a non-profit trade association working to advance the interests of fair and open competition and customer-focused service in California telecommunications. CALTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. The majority of CALTEL members are small businesses who help to fuel the California economy through technological innovation, new services, affordable prices and customer choice.

6. By violating these laws and engaging in a practice of avoiding its PIP obligations through subterfuge, AT&T has violated California Business & Professions Code § 17200 by engaging in unfair competition and unlawful business acts.

7. In response to this complaint, CALTEL requests that the Commission order that:

- a. Within 30 days, AT&T make retroactive PIP credits to all CLECs that did not receive one or more such credits for performance shortfalls occurring between January 2009 and the date of the Commission's order, but which had a California ICA with AT&T during that time; and
- b. That any CLEC that has an existing interconnection agreement with AT&T providing for that CLEC to receive PIP credits need not amend its interconnection agreement in order to continue receiving PIP credits; and
- c. That AT&T is prohibited from requiring CLECs to waive their right to recover PIP credits as a condition of entering any interconnection agreement amendment for any purpose

PARTIES AND COUNSEL

8. Complainant California Association of Competitive Telecommunications Companies is a non-profit trade association for competitive local exchange carriers in California. CALTEL's address is 50 California Street, Suite 500, San Francisco, CA 94111. Its telephone number is (925) 465-4396.

9. CALTEL is represented in this proceeding by Clay Deanhardt, Law Office of Clay Deanhardt, 21-C Orinda Way, #374, Orinda, CA, 94563. His telephone number is (925) 258-9079.

10. Defendant Pacific Bell Telephone Company d/b/a AT&T California is an incumbent local exchange carrier (“ILEC”) and regional Bell operating company (“RBOC”) authorized to provide telecommunications service in California.

BACKGROUND

The History of the PIP

11. The full history of performance measures and the PIP is set out by the Commission at pages 1-8 of D.02-03-023.

12. In brief, the Commission and the telecommunications industry collaborated through a series of proceedings and workshops, first to create a set of criteria to measure the performance of AT&T’s and Verizon’s operating and support systems (“OSS”). That collaboration resulted in a performance measures plan (“PMP”) approved by the Commission in D.01-01-037 and D.01-05-087.

13. Second, the industry and the Commission worked together to create a plan of credits / incentives by the ILECs for deficient OSS performance (as measured by the PMP). This second component resulted in the PIP, which the Commission approved in D.02-03-023 and modified in D.02-06-006.

14. As the Commission explained in D.02-03-023, the California PIP “measures, evaluates, and imposes monetary charges on an ILEC for OSS performance that could inhibit competition by disadvantaging the competitive local exchange carriers (CLECs).”

15. As the Commission recognized, there is an important nexus between the PIP and the competitive requirements of the Telecommunications Act of 1996 (the “Act”). The Commission said:

To foster competition, the Act requires ILECs to provide competing carriers access to ILEC OSS infrastructure, including the incumbents’ pre-

ordering, ordering, provisioning, maintenance, billing, and other functions necessary for providing various telephony services. For competition to occur, the CLECs must be able to access these services in the same manner as the ILEC.” ... Under its authority to implement the Act, the Federal Communications Commission (FCC) has strongly encouraged establishment of regulatory incentives to ensure ILEC OSS performance does not present barriers to competition. ... As a consequence, we establish a performance incentives plan to identify and prevent or remove any competitive barriers. The three critical steps for any performance incentives plan are performance measurement, performance assessment, and the corrective actions necessary if performance is deemed harmful to competition. D.02-03-023, pp. 3-4.

16. In D.02-06-006, the Commission acted on its own motion to modify the PIP in response to concerns raised by Pacific Bell during its implementation of the PIP. **At the request of Pacific Bell,**² the Commission modified D.02-06-006 to provide that if a CLEC neither accepted the PIP nor received Commission approval of a different plan, the PIP would be implemented for that CLEC as if it had accepted the plan.

17. In D.02-06-006 the Commission ordered that ordering paragraph 2 of D.02-03-023 be modified to provide as follows:

2. The performance incentives plan, comprised of the performance measurements adopted in D.01-05-087, the decision model adopted in D.01-01-037 and as modified herein, and an incentive payment component adopted herein, shall be offered to all Pacific’s CLECs, both those with and without interconnection agreements, and where accepted, implemented for an initial period of at least six months or until otherwise modified by this Commission.

(a.) If a CLEC neither accepts the Commission’s Performance Incentives Plan, nor receives Commission approval of a different plan, the Performance Incentives Plan shall be implemented for that CLEC as if it had accepted the plan.

(b.) If a CLEC declines to receive the billing credits from any performance incentives plan, the Performance Incentives Plan shall be implemented for that CLEC as if it had accepted the plan, and all incentive credits

² D.02-06-006, p. 3 (“First, Pacific asked that we state that where a CLEC neither accepts the PIP, nor receives approval for a different plan, and the PIP is implemented for that CLEC, that the PIP will be implemented ‘as if it had accepted the plan.’”)

generated, through both Tier I and Tier II plan structures, shall be added to the Tier II credits for disbursement to the ratepayers under Tier II procedures.”

(c.) CLECs must either (I) file an amendment to their interconnection agreement (ICA), pursuant to Rule 6.2 of ALJ-181, noting that they have accepted the Performance Incentives Plan, (II) file an amendment to their ICA declining to receive performance incentives credits from the Commission’s Performance Incentives Plan, or (III) jointly file a motion with Pacific in this proceeding requesting that the Commission approve an alternate performance incentives plan.

(d.) If Pacific and CLEC choose to file a joint motion requesting the Commission approve an alternate performance incentives plan, until such approval is granted, the Commission’s Performance Incentives Plan shall apply.

18. In making these modifications, the Commission explained the importance of a PIP:

The primary purpose of the PIP billing credits is to motivate Pacific’s OSS performance. First and foremost, these credits are incentives. Opinion at 2, 41-50, 58-61, 63-64. We have crafted these clarifications to preserve the incentive nature of the PIP by maintaining the relationship between overall performance and incentive amounts. *Id.* For example, if CLECs declined to have any incentive plan or declined to accept incentive billing credits, the PIP’s incentive levels would decrease relative to performance levels. The PIP’s performance-incentive relationship would be altered. Consequently, to prevent unilateral alteration of the PIP’s core structure when a CLEC declines having a plan or credits, we require that any amounts, both Tier I and Tier II, that would be generated by the PIP if it were implemented for a CLEC be added to Tier II for disbursement.

The Agreement to Modify the PIP

19. In 2008, AT&T entered into a settlement agreement with four CLECs, Comcast Phone of California LLC, Covad Communications Company, tw telecom, and US TelePacific Corp. (the “Settling Parties”), to modify the PIP.

20. Based on the facts set forth in this complaint, CALTEL is informed and believes that the “settlement” AT&T engineered was, in fact, part of a scheme cooked up by AT&T to allow it to stop issuing PIP credits to a majority of California CLECs. CALTEL

believes the purpose of this scheme was to (i) thwart the Commission's will expressed in D.02-03-023 (as modified by D.02-06-006) and D.02-09-051, (ii) eliminate the only real incentive for AT&T not to discriminate in the services it provides CLECs, and (iii) increase competitors' costs while enabling AT&T to reduce the quality of service provided to those competitors without penalty.

21. As part of the PIP settlement agreement, the four CLECs and AT&T agreed to make participation in the PIP "voluntary." As the Commission explained in D.08-12-032, "AT&T California also proposed that CLEC participation in the PIP be made voluntary rather than mandatory, and the voluntary nature of participation would be reflected in an interconnection agreement (ICA) amendment. The Settling Parties report that, after extensive discussion and negotiation, they agreed to certain changes to the PIP -- including that CLEC participation be made voluntary via an interconnection amendment."

22. For the four CLECs involved in the settlement negotiations, allowing AT&T to make the PIP "voluntary" was like giving away the sleeves off of a vest. After all, in this respect, the settlement changed nothing. Modified ordering paragraph 2 of D.02-03-023 already made the PIP voluntary -- providing that a CLEC could either opt into it, opt out of it, or agree with AT&T on a different set of incentives. Moreover, CLECs with existing ICAs that required PIP credits had already volunteered to receive those credits when they entered into those ICAs. For new entrants and new ICAs going forward, what company would not "volunteer" to receive PIP credits, when the alternative is less service at higher cost?

23. In D.08-12-032, the Commission approved the settlement agreement engineered by AT&T and adopted the modified PIP.

24. Paragraph 6.1.3 of the modified PIP provides:

Eligibility. CLECs are not eligible for incentive payments until 10 days after receipt by AT&T California of an executed (by CLEC) Interconnection Agreement, or an amendment to an existing Interconnection Agreement (“Receipt Date”), the terms of which have been agreed to by both CLEC and AT&T California, expressly referencing this provision. Incentive payments will be made, effective with the first full month of performance results after the Receipt Date, and will be payable from and after the date that the Interconnection Agreement or amendment is approved by the Commission. AT&T California will not unnecessarily delay filing of the Interconnection Agreement or amendment once both CLEC and AT&T California have signed. In addition, only CLECs who have submitted orders for services to AT&T during the month under report shall be eligible for incentive payments (reportable data on Measure 2).

AT&T’s Conduct with Respect to the Modified PIP

25. Significantly, the Commission did **NOT** grant AT&T authority to stop providing PIP credits in D.08-12-032. There is no language in the written decision, findings of fact, conclusions of law or the ordering paragraphs providing that AT&T may deprive a CLEC that was already receiving PIP credits from continuing to receive those credits.

26. D.08-12-032, moreover, **did not modify D.02-06-006 or D.02-03-023.**

Accordingly, ordering paragraph 2 of D.02-03-023, as modified by D.02-06-006, still requires the PIP adopted in D.08-12-032 to be implemented by AT&T for any CLEC that “neither accepts the Commission’s Performance Incentives Plan, nor receives Commission approval of a different plan.”

27. Despite the lack of permission to stop providing PIP credits, and despite the clear, unchanged mandate of D.02-06-006, AT&T intentionally interpreted the word “voluntary” to mean that AT&T could stop providing PIP credits until a CLEC entered

into a new interconnection amendment **even if a CLEC had voluntarily agreed to accept PIP payments in its existing ICA.**

28. Based on AT&T's conduct following D.08-12-032, CALTEL is informed and believes and therefore alleges that AT&T had a specific plan in mind when it asked to make the PIP voluntary: it intended from the beginning to interpret PIP paragraph 6.1.3 to allow AT&T to stop issuing PIP credits to CLECs that did not execute a new ICA amendment, even though those CLECs already had voluntarily agreed to participate in the PIP credit plan.

29. In furtherance of that plan, AT&T used its Accessible Letter distributions as the only means of notifying other CLECs of its intentionally incorrect interpretation of the word "voluntary," increasing the chance that the message would get lost in the morass of day-to-day Accessible Letters issued to CLECs and resulting in fewer CLECs actually requesting amendments to their ICAs.

30. In or about March 2009, AT&T stopped issuing PIP credits to CLECs that (a) were receiving PIP credits under their existing interconnection agreements before March 2009, (b) had volunteered to receive those credits by entering into ICAs that included them, but (c) had not entered into a new ICA amendment adopting the modified PIP.

31. CALTEL recently approached AT&T on behalf of some of its members to determine what amendment AT&T felt needed to be signed in order for those CLECs to begin receiving PIP credits again.

32. Attached as Exhibit 1 is a true copy of the "Amendment to Interconnection Agreement" and "Appendix Remedy Plan" AT&T provided to Telekenex, Inc. and said must be executed before Telekenex can receive PIP credits.

33. CALTEL is informed and believes and on this basis alleges that the documents in Exhibit 1, or some similar form of them, are the same documents AT&T provides to any CLEC with an existing interconnection agreement that wants PIP credits, including without limitation the Settling CLECs.

34. Significantly, neither the Amendment to Interconnection Agreement nor the Appendix Remedy Plan drafted by AT&T “expressly reference” paragraph 6.1.3 of the PIP as required by that paragraph. AT&T’s position that strict adherence to paragraph 6.1.3 is required for a CLEC to receive PIP credits is thus contradicted by the interconnection amendment AT&T itself drafted, which does not comply with paragraph 6.1.3.

35. CALTEL is therefore informed and believes and on this basis alleges that AT&T has provided PIP credits to some CLECs who have not complied with Paragraph 6.1.3 of the PIP by executing an amendment “expressly referencing this provision,” but has failed to provide PIP credits to other CLECs who have not complied with Paragraph 6.1.3.

AT&T’s Conduct Violates Federal Law

36. AT&T’s conduct, as described above, violates AT&T’s service and non-discrimination obligations under the Telecommunications Act of 1996, and more specifically under 47 U.S.C. §§ 251 and 271.

37. AT&T is an incumbent local exchange carrier (ILEC) required by 47 U.S.C. § 251(c) to provide resale, interconnection and access to unbundled network elements “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”

38. By making PIP credits to some CLECs, but not others, as alleged above, AT&T illegally discriminated against the CLECs not receiving PIP credits in violation of 47 U.S.C. § 251(c) in one or more of the following ways:

- a. AT&T violated § 251(c) because it made PIP credits to some CLECs that did not comply with section 6.1.3 of the PIP but not to others; and
- b. AT&T violated §251(c) because the PIP credits effectively reduced the rates for interconnection and access to network elements that AT&T charged to the CLECs it favored as compared to those it did not; and
- c. AT&T violated § 251(c) because, as the Commission recognized in D.02-03-032 and D.02-06-006, AT&T had less incentive to provide adequate service to CLECs not receiving PIP credits after March 2009 – even if those CLECs previously elected to receive those payments.

39. AT&T is also a regional Bell operating company (RBOC) and provides interLATA services under the requirements of 47 U.S.C. § 271. In order to provide such services, AT&T must comply with the requirements of 47 U.S.C. § 271(c)(2)(B) that it provide interconnection and nondiscriminatory access to network elements as described by § 251(c).

40. In D.02-09-051, the Commission pointed directly to the existence of the PIP as a lynchpin to its finding that AT&T had met the 14-point checklist in 47 U.S.C.

§ 271(c)(2)(B). The Commission said:

To ensure that an ILEC's application for Section 271 approval is in the public interest, the FCC has listed five important characteristics for a performance incentives plan.³³⁵ The CPUC's performance incentives plan has these characteristics. D.02-09-051, p. 227.

41. The Commission also focused on the importance of the PIP to preventing AT&T backsliding after the granting of AT&T's § 271 application.

Regardless of the quality of Pacific's performance results, we could never consider the DD if we had to update analyses for all performance results every month, and Pacific's long distance competition would be permanently stalled. So we must perform a "triage," recognizing that the Commission can only update and re-analyze a select few sub-measures each month. Where Pacific has already passed, or where trends show future performance is likely to be acceptable, the added burden of a re-analysis offers relatively little gain. Because of this burden we must rely instead on the anti-backsliding protection of the performance incentives plan. *Id.*, fn. 77 p. 55.

42. By stopping PIP credits to CLECs, AT&T has undermined the basis for the Commission's order in D.02-09-051 and created a situation where the Commission can no longer rely on the PIP to prevent AT&T backsliding. AT&T's conduct also violates AT&T's § 271 non-discrimination obligations with respect to interconnection and access to unbundled network elements under § 251(c), as described in paragraph 41 of this complaint.

**FIRST CAUSE OF ACTION:
VIOLATION OF COMMISSION DECISIONS**

43. CALTEL specifically incorporates paragraphs 1-42 of this complaint as if specifically set forth here again.

44. By failing to issue PIP credits to CLECs as alleged, AT&T violated Ordering Paragraph 2 of D.02-03-032 as modified by D.02-06-006.

45. By failing to issue PIP credits to CLECs that had voluntarily agreed to receive such credits via existing ICAs, AT&T violated D.08-12-032.

**SECOND CAUSE OF ACTION:
VIOLATION OF PUBLIC UTILITIES CODE SECTION 453**

46. CALTEL specifically incorporates paragraphs 1-45 of this complaint as if specifically set forth here again.

47. California Public Utilities Code § 453(a) provides that “(a) No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.”

48. By providing adequate notice of AT&T’s interpretation of D.08-12-032 to some CLECs, but not others, as alleged above, AT&T prejudiced and disadvantaged the CLECs to which it did not provide adequate notice in violation of P.U. Code § 453(a).

49. By making PIP credits to some CLECs, but not others, as alleged above, AT&T illegally prejudiced and disadvantaged the CLECs not receiving PIP credits, and granted preferences and advantages to the CLECs it did pay, in violation of P.U. Code § 453(a) in one or more of the following ways:

- a. AT&T violated § 453(a) because it made PIP credits to some CLECs that did not comply with section 6.1.3 of the PIP but not to others; and
- b. AT&T violated § 453(a) because the PIP credits effectively reduced the rates that AT&T charged to the CLECs it favored as compared to those it did not; and
- c. AT&T violated § 453(a) because, as the Commission recognized in D.02-03-032 and D.02-06-006, AT&T had less incentive to provide adequate service to CLECs not receiving PIP credits after December 19, 2008 – even though those CLECs previously elected to receive those credits; and

- d. AT&T violated § 453(a) by failing to provide a service to the CLECs denied PIP credits, to their prejudice and disadvantage.

**THIRD CAUSE OF ACTION:
VIOLATION OF PUBLIC UTILITIES CODE SECTION 532**

50. CALTEL specifically incorporates paragraphs 1-45 of this complaint as if specifically set forth here again.
51. California Public Utilities Code § 532 provides that no public utility shall “extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons.”
52. By providing adequate notice of AT&T’s interpretation of D.08-12-032 to some CLECs, but not others, as alleged above, AT&T failed to uniformly extend its interconnection agreements and the privileges discussed above to all corporations in violation of P.U. Code § 532.
53. By making PIP credits to some CLECs, but not others, as alleged above, AT&T failed to extend privileges offered to some companies to the CLECs not receiving PIP credits, thus violating P.U. Code § 532 in one or more of the following ways:
 - a. AT&T violated § 532 because it made PIP credits to some CLECs that did not comply with section 6.1.3 of the PIP but not to others; and
 - b. AT&T violated § 532 because the PIP credits effectively reduced the rates that AT&T charged to the CLECs it favored as compared to those it did not; and
 - c. AT&T violated § 532 because, as the Commission recognized in D.02-03-032 and D.02-06-006, AT&T had less incentive to provide adequate

- service to CLECs not receiving PIP credits after December 19, 2008 – even though those CLECs previously elected to receive those credits; and
- d. AT&T violated § 532 by failing to provide a service to the CLECs denied PIP credits, to their prejudice and disadvantage.

**FOURTH CAUSE OF ACTION:
BREACHES OF INTERCONNECTION AGREEMENTS**

54. CALTEL specifically incorporates paragraphs 1-45 of this complaint as if specifically set forth here again.
55. CALTEL is informed and believes and on this basis alleges that the “Interconnection Agreement Under Section 251 and 252 of the Communications Act of 1934, as Amended, by and between Pacific Bell Telephone Company d/b/a AT&T California and MCIMetro Access Transmission Services LLC” (the “MCI ICA”) is and at all times described in this complaint has been the governing ICA between AT&T and many CLECs in California. CALTEL recently retrieved a copy of the MCI ICA from AT&T’s website, where it was identified as AT&T’s current ICA with Utility Telephone, Inc.
56. MCI ICA paragraph 3.2 provides in pertinent part:
- AT&T CALIFORNIA shall provide services pursuant to the provisions of this Agreement. Except as otherwise specifically provided for in this Agreement, AT&T CALIFORNIA shall not discontinue or refuse to provide any service provided or required under this Agreement without MCI’s prior written agreement.
57. MCI ICA paragraph 19.1 provides:
- 19.1 Notices given by one Party to the other Party under this Agreement shall be in writing (unless specifically provided otherwise herein), and unless otherwise expressly required by this Agreement to be delivered to another representative or point of contact, shall be:

19.1.1 delivered personally;

19.1.2 delivered by express overnight delivery service;

19.1.3 mailed, via certified mail or first class U.S. Postal Service, with postage prepaid, and a return receipt requested; or

19.1.4 delivered by facsimile; provided that a paper copy is also sent by a method described above, and such method is noted on the facsimile.

58. MCI ICA section 45 provides:

45.1 No provision of this Agreement shall be deemed amended or modified by either Party unless such an amendment or modification is in writing, dated, and signed by an authorized representative of both Parties. The rates, terms and conditions contained in the amendment shall become effective upon approval of such amendment by the Commission and such amendment will not require refunds, true-up or retroactive crediting or debiting prior to the approval of the Amendment unless agreed to by the Parties or specifically ordered by the Commission.

45.2 Neither Party shall be bound by any preprinted terms additional to or different from those in this Agreement that may appear subsequently in the other Party's form documents, purchase orders, quotations, acknowledgments, invoices or other communications.

59. Section 2 of Appendix Performance Measurements to the MCI ICA provides as follows:

2. PERFORMANCE INCENTIVES

The Commission issued Decisions 01-01-037 and 02-03-023 in R.97-10-016/I.97-10-017 adopting a performance incentives plan. The parties hereby stipulate that the terms and conditions of that performance incentives plan and modifications thereto, including but not limited to liquidated damages/remedies, adopted by Commission in any subsequent decision are incorporated by reference into this document. Any Commission ordered additions, changes or deletions to the performance incentives program issued after the effective date of this interconnection agreement shall be deemed incorporated into this appendix as of the effective date of said decision. Said performance incentives plan shall remain in effect unless and until modified pursuant to Section 23 of the General Terms and Conditions of this Agreement in accordance with a final appeal of such decision. Any conflict between any terms contained in this document and the Commission's decision adopting performance incentives shall be resolved in favor of the Commission's decision.

60. CALTEL is informed and believes and on this basis alleges that other AT&T ICAs contain provisions substantially similar, if not identical to, those quoted in paragraphs 56 through 59 of this complaint.

61. AT&T's failure to make PIP credits to CLECs with the MCI ICA or ICA's containing similar provisions, as alleged above, breaches those ICAs in one or more of the following ways:

- a. AT&T stopped making PIP credits even though the entire PIP plan adopted by the Commission in D.08-12-032 was automatically incorporated into existing ICAs by virtue of Section 2 of the Appendix Performance Measures and its equivalent in other ICAs.
- b. AT&T discontinued providing PIP credits without CLECs' prior written agreement in violation of MCI ICA paragraph 3.2 and its equivalent in other ICAs.
- c. AT&T failed to provide notice to CLECs of the changes it contends eliminate PIP credits to those CLECs as required by MCI ICA paragraph 19.1 and its equivalent in other ICAs.
- d. AT&T deemed ICAs amended to exclude PIP credits without the signature of the CLEC parties to those ICAs in violation of MCI ICA Section 45 and its equivalent in other ICAs.

**FIFTH CAUSE OF ACTION:
VIOLATION OF BUSINESS & PROFESSIONS CODE SECTION 17200**

62. CALTEL specifically incorporates paragraphs 1-64 of this complaint as if specifically set forth here again.

63. AT&T's conduct as alleged above constitutes unfair competition and an unlawful, unfair or fraudulent business act or practice violating Business & Professions Code Section 17200.

SCOPING MEMO INFORMATION

64. CALTEL proposes that this is an adjudicatory proceeding that will require discovery and hearings to determine issues including the following:

- a. Whether AT&T failed to provide PIP credits to many California CLECS beginning on or about March, 2009.
- b. Whether and how AT&T provided CLECs with adequate and required notice of its interpretation of D.08-12-032.
- c. Whether AT&T provided some CLECS with PIP credits even though those CLECs did not enter into ICA amendments that referenced Paragraph 6.1.3 of the modified PIP as required under AT&T's interpretation of the PIP.
- d. Whether AT&T illegally discriminated against some California CLECs by failing to provide those CLECs with PIP credits even though AT&T did provide PIP credits to other CLECs that did not comply with AT&T's interpretation of Paragraph 6.1.3 of the modified PIP.
- e. Whether AT&T's conduct, as alleged in this complaint, violated Commission decisions D.02-03-023, as modified by D.02-06-006, and D.08-12-032.
- f. Whether AT&T's conduct, as alleged in this complaint, violated Public Utilities Code §§ 453(a) and 532.

- g. Whether AT&T's conduct, as alleged in this complaint, breached CLEC interconnection agreements with AT&T.
- h. Whether AT&T's conduct, as alleged in this complaint, violated California Business and Professions Code § 17200.
- i. What are the appropriate remedies for these alleged violations of law.

65. CALTEL proposes the following procedural schedule for this adjudicatory proceeding:

Deadline	Day
Complaint	0
Answer to Complaint	30
Prehearing Conference	40
Scoping Memo	60
Discovery Begins	65
Discovery Ends	155
Hearings Begin	200
Hearings End	203
Opening Briefs (simultaneous)	218
Reply Briefs (simultaneous)	225
Presiding Officer Decision	260

CONCLUSION

66. As a result of the violations alleged above, AT&T has deprived many CLECs of PIP credits to which they are entitled and, perhaps more significantly, created a climate

where it has no incentive to live up to the performance measures adopted by this Commission. *See* D.02-06-006.

WHEREFORE, CALTEL respectfully requests that the Commission find:

1. That AT&T violated D.08-12-032; and
2. That AT&T violated D.02-03-032, as amended by D.02-06-006; and
3. That AT&T violated PU Code § 453; and
4. That AT&T violated PU Code § 532; and
5. That AT&T breached its interconnection agreements with California CLECs; and
6. That AT&T violated Business & Professions Code Section 17200.

CALTEL further respectfully requests that the Commission order:

1. AT&T to calculate PIP credits for each CLEC having an interconnection agreement with AT&T for shortfalls occurring after January 2009 and through effective date of the Commission's order; and
2. That, based on those calculations, AT&T issue PIP credits to all such CLECs that have not received one or more PIP credits during that time period; and
3. That the foregoing take place within 30 days of the effective date of the Commission's order; and
4. That any CLEC that has an existing interconnection agreement with AT&T providing for that CLEC to receive PIP credits need not amend its interconnection agreement in order to continue receiving PIP credits; and

5. That AT&T is prohibited from requiring CLECs to waive their right to recover PIP credits as a condition of entering any interconnection agreement amendment for any purpose; and
6. Such other financial and / or equitable relief as the Commission may find reasonable or necessary.

Respectfully submitted,

September 1, 2010

/S/ Clay Deanhardt

<p>Sarah DeYoung Executive Director, CALTEL 50 California Street, Suite 500 San Francisco, CA 94111 Telephone: (925) 465-4396 Facsimile: (877) 517-1404 Email: deyoung@caltel.org</p>	<p>Clay Deanhardt 21-C Orinda Way Orinda, CA 94563 Phone: 925-258-9079 Email: clay@deanhardtlaw.com Counsel for CALTEL</p>
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VERIFICATION

I am Sarah DeYoung, Executive Director of the California Association of Competitive Telecommunications Companies. I have read the foregoing Complaint and know its contents. The factual statements in the Complaint are true and correct based on my own knowledge, except for those statements that are made on information and belief, and as to those statements I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification is executed on September 1, 2010, in Walnut Creek, California.



Sarah DeYoung
Executive Director
CALTEL

EXHIBIT 1

to

COMPLAINT AGAINST PACIFIC BELL TELEPHONE COMPANY D/B/A/ AT&T
CALIFORNIA FOR FAILURE TO ISSUES PERFORMANCE INCENTIVE PLAN
CREDITS

AMENDMENT TO
INTERCONNECTION AGREEMENT
BETWEEN
PACIFIC BELL TELEPHONE COMPANY D/B/A AT&T CALIFORNIA
AND
TELEKENEX, INC.

This Amendment modifies the Interconnection Agreement by a nd between Pacific Bell Telephone Company¹ d/b/a AT&T California ("AT&T California") and Telekenex, Inc. ("CLEC"). AT&T and CLEC are hereinafter referred to collectively as the "Parties" and individually as a "Party". This Amendment applies in AT&T's service territory in the State of California.

WITNESSETH:

WHEREAS, AT&T and CLEC are Parties to an Interconnection Agreement under Sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"), approved October 5, 2002 (the "Agreement"); and

WHEREAS, the California P ublic U tilities C ommission (CPUC) recently approved c hanges t o t he California Performance Incentive Plan (PIP); and

WHEREAS, pursuant to Section 252(a)(1) of the Act, the Parties wish to amend the Agreement to implement the new PIP by updating the existing remedies provisions of the Agreement as set forth herein;

NOW, THEREFORE, in consideration of the promises and mutual agreements set forth herein, the Parties agree to amend the Agreement as follows:

1. The Parties agree that the Agreement should be amended by replacing the existing remedy provisions of the underlying Agreement with the new Appendix Remedy Plan attached hereto.
2. Conflict between this Amendment and the Agreement. This Amendment shall be deemed to revise the terms and provisions of the Agreement only to the extent necessary to give effect to the terms and provisions of this Amendment. In the event of a conflict between the terms and provisions of this Amendment and the terms and provisions of the Agreement this Amendment shall govern, *provided, however*, that the fact that a term or provision appears in this Amendment but not in the Agreement, or in the Agreement but not in this Amendment, shall not be interpreted as, or deemed grounds for finding, a conflict for purposes of this paragraph 2.
3. Scope of Amendment. This Amendment shall modify the Agreement only to the extent set forth expressly in paragraph 1 of this Amendment. Nothing in this Amendment shall be deemed to amend or extend the term of the Agreement, or to affect the right of a Party to exercise any right of termination it may have under the Agreement. Nothing in this Amendment shall affect the general application and effectiveness of the Agreement's "change of law", "intervening law", "successor rates" and/or any similarly purposed provisions.
4. This Amendment may require that certain sections of the Agreement shall be replaced and/or modified by the provisions set forth in this Amendment. The Parties agree that such replacement and/or modification shall be accomplished without the necessity of physically removing and replacing or modifying such language throughout the Agreement.
5. Pursuant to Resolution ALJ 181, this filing will become effective, absent rejection of the Advice Letter by the Commission, upon thirty days after the filing date of the Advice Letter to which this Amendment is appended ("Effective Date"). Provided however, the new Appendix Remedy Plan shall be implemented as of the date this Amendment is fully executed.
6. Reservation of Rights. In entering into this Amendment, neither Party waives, and each Party expressly reserves, any rights, remedies or arguments it may have at law or under the intervening law or regulatory

¹ Pacific Bell Telephone Company, a California corporation, is now doing business in California as "AT&T California".

change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review.

Telekenex, Inc.

Pacific Bell Telephone Company d/b/a AT&T
California by AT&T Operations, Inc., its authorized
agent

By: _____

By: _____

Printed: _____

Printed: _____

Title: _____
(Print or Type)

Title: Director-Interconnection Agreements

Date: _____

Date: _____

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CLEC OCN # 8886

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APPENDIX REMEDY PLAN

1. INTRODUCTION

- 1.1 **AT&T CALIFORNIA** means Pacific Bell Telephone Company d/b/a AT&T California. The Remedy Plan referenced herein, notwithstanding any provisions in any other appendix in this Agreement, is not intended to create, modify or otherwise affect Parties' rights and obligations. The existence of any particular remedy, or the language describing that remedy, is not evidence that CLEC is entitled to any particular manner of access, nor is it evidence that **AT&T CALIFORNIA** is limited to providing any particular manner of access. The Parties' rights and obligations relating to such access are defined elsewhere, including the relevant laws, FCC and state Commission decisions/regulations, tariffs, and within this Interconnection Agreement.
- 1.2 "**AT&T California Remedy Plan**" is the Plan approved by the California Public Utilities Commission in Decision Number 08-12-032. By including this Appendix in its Interconnection Agreement, CLEC elects to receive Remedy Payments pursuant to Ordering Paragraph 2 of Decision Number 08-12-032.
- 1.3 Any future Commission-ordered additions, modifications and/or deletions to the AT&T California Remedy Plan in a generic docket or rulemaking proceeding, to which no Party has objected, shall be automatically incorporated into this Interconnection Agreement by reference in the first full month following the effective date of the Commission's order, or as otherwise agreed by the Parties.
- 1.4 **AT&T CALIFORNIA's** agreement to implement this Remedy Plan will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating to **AT&T CALIFORNIA's** performance. **AT&T CALIFORNIA** and CLEC agree that CLEC may not use the existence of this Plan as evidence that **AT&T CALIFORNIA** has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. **AT&T CALIFORNIA's** conduct underlying its performance measures, and the performance data provided under the performance measures, however, are not made inadmissible by these terms. Any CLEC accepting this Remedy Plan agrees that **AT&T CALIFORNIA's** performance with respect to this Plan, including the payment of remedies under this Plan, may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation.
- 1.5 Nothing herein shall be interpreted to be a waiver of **AT&T CALIFORNIA's** right to argue and contend in any forum, in the future, that sections 251 and 252 of the Telecommunications Act of 1996 impose no duty or legal obligation to negotiate and/or mediate or arbitrate a self-executing liquidated damage and remedy plan.