

MESSER CAPARELLO & SELF, P.A.

090258

Attorneys At Law

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May 1, 2009

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Ms. Ann Cole
Commission Clerk
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Dear Ms. Cole:

Enclosed for filing on behalf of dPi Teleconnect, L.L.C. is an original and fifteen copies of dPi Teleconnect, L.L.C.'s Complaint.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

Norman H. Horton, Jr.

NHH/amb
Enclosures

cc: Chris Malish, Esq.
Mr. Greg Follensbee

- COM _____
- ECR _____
- GCL 3 _____
- OPC 1 _____
- BGP _____
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- SGA _____
- ADM _____
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DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of dPi Teleconnect, L.L.C.)
With BellSouth Telecommunications, Inc.)
dba AT&T Florida regarding BellSouth's)
failure to extend Cash Back promotions to dPi)
_____)

Docket No.: 090258
FILED: May 1, 2009

COMPLAINT

COMES NOW, dPi Teleconnect, LLC. ("dPi Teleconnect," or "dPi") and files this complaint seeking to recover cash back promotional credits from BellSouth Telecommunications, Inc. dba AT&T Florida ("BellSouth") and in support thereof shows as follows:

I. IDENTIFICATION OF PARTIES

1. Complainant, dPi Teleconnect, L.L.C., is a Texas corporation headquartered at 2997 LBJ Freeway, Suite 225, Dallas, Texas 75234. dPi is a Competitive Local Exchange Carrier providing service to customers in Florida pursuant to authority issued by this Commission.

2. The names, addresses, and telephone numbers of the persons to whom all notices and other documents should be sent are:

Christopher Malish
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(512) 476-8591

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3. BellSouth is an "incumbent local exchange carrier" ("ILEC") as defined by Chapter 364, Florida Statutes and 47 U.S.C. §251(h). BellSouth is a Georgia corporation with its principal place of business in Atlanta.

4, The instant dispute arises under the Interconnection Agreement entered into by the parties and approved by this Commission and centers on credits which are due from BellSouth to dPi Teleconnect as a result of dPi Teleconnect's reselling of services subject to BellSouth promotional discounts.

5. Among other things, the parties' contract provides in relevant part the following:

- a. That the parties wish to interconnect "pursuant to Sections 251 and 252 of the Act" GTC p.1;
- b. Parity: "When DPI purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be ... subject to the same conditions... that BellSouth provides to its ...End Users." GTC p. 3
- c. Governing Law: "... this agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC..." GTC p. 15.
- d. Resale Attachment's General Provision sections 3.1: p. 4: "...Subject to effective and applicable FCC and Commission rules and orders, *BellSouth shall make available to DPI for resale those telecommunications services BellSouth makes available...to customers who are not telecommunications carriers.*"

6. Sections of the Act provide, among other things, the following requirements relevant to this proceeding:

- a. 47 U.S.C. § 251(c)(4)(A). ILECs have the duty to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."
- b. 47 U.S.C. § 251(c)(4)(B). ILECS have a duty not to "prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service."
- c. 47 C.F.R. § 51.613(a)(2). "The following types of restrictions on resale may be imposed: Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if: (i) Such promotions involve rates that will be in effect for no more than 90 days; and (ii) The incumbent LEC does

not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.”

7. This dispute arises because BellSouth has over the past months and years sold its retail services at a discount to its end users under various promotions that have lasted for more than 90 days. dPi Teleconnect is entitled to purchase and resell those same services at the promotional rate, less the wholesale discount. As a practical matter, BellSouth refuses to automatically charge dPi the correct, promotion-based rate; instead, dPi Teleconnect has been forced to buy these services at the regular retail-based rate, then request a credit for the difference between that rate and the promotional rate pursuant to “promotion credit requests.”

8. Of concern in this particular case, BellSouth has provided a number of “cash back” promotions going back to late 2003.¹ Although dPi met the same qualifications as BellSouth’s retail end users, and applied for these promotional credits, it has to this point not been notified one way or the other that BellSouth would pay the credits requested for the periods ending June 8, 2007. BellSouth has, however, paid the credits requested for service rendered after June 2007. The timing appears to coincide with the 4th Circuit’s decision in *BellSouth Telecommunications Inc. v. Sanford et al.*, 494 F3d 439 (C.A. 4 – N.C., 2007), in which the 4th Circuit upheld the North Carolina Commission’s decision that promotions that tend to reduce the retail price paid by BellSouth’s own retail customers must be made available to CLECs.

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The three promotions involved through July 2007 are designated by BellSouth as Cash Back \$100 Two Features - C2TF; Cash Back \$100 Discount Complete Choice \$100; and Cash Back \$50 2 Pack Plan (PAMA6) - CBP6

9. Although BellSouth has failed to either deny or accept dPi's promotional credit requests despite multiple inquiries by dPi, at this point it seems unlikely that BellSouth will make the promotion payments unless compelled to do so by the judiciary or the state commissions, making the filing of this case necessary.

10. The interconnection agreement between the parties provides at Section 18 of its Terms and Conditions that the Agreement will be governed by federal and state substantive telecommunications law, but in all other respects the "Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles." In Georgia, the limitations period for a breach of contract is six years. O.G.C.A. section 9-3-24. Furthermore, the contract clearly provides at General Terms and Conditions section 17 (16 in a later version of the contract) that "A failure or delay of either Party to enforce any of the provisions... or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions...."

11. In Florida, dPi qualified and applied for, but was not paid, approximately \$27,250 in cash back promotions. Across the nine (9) state BellSouth region, the total figure that dPi qualified and applied for, but was not paid, \$465,950, in cash back promotion credits.

12. dPi is entitled to the above mentioned promotional credits on these telecommunications services its has purchased from BellSouth, and BellSouth has admitted as much by paying them from July 2007 forward. However, BellSouth has neither accepted nor denied dPi's claims for identical credits for earlier periods; this, for all practical purposes, must now be treated as a denial or refusal to pay these credits to which dPi is entitled. dPi accordingly

requests that this Commission enter an order directing BellSouth to pay the credits together with interest at the contract rate.

WHEREFORE, PREMISES CONSIDERED, based upon the foregoing, dPi Teleconnect respectfully requests that the Commission accept this petition and schedule a hearing and following a hearing on the merits of the issues set forth above, the Commission issue a ruling:

1. that dPi is entitled to the cash back promotion credits it seeks to collect;
2. ordering BellSouth pay or credit dPi those amounts, plus interest at the contract rate; and
3. such other and further relief to which dPi may show itself entitled.

Respectfully submitted,

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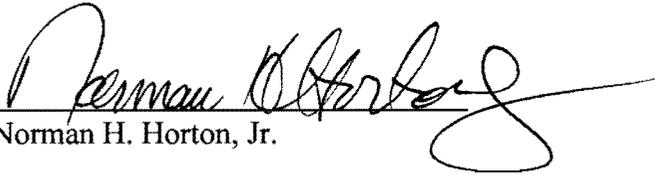

NORMAN H. HORTON, JR., ESQ.

Attorneys for dPi Teleconnect, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by U.S. Mail this 1st day of May, 2009.

Manuel A. Gurdian, Jr., Esq.
c/o Mr. Gregory Follensbee
AT&T Florida Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301


Norman H. Horton, Jr.