Ruth Nettles

090258-TP

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Sent: Friday, December 11, 2009 4:21 PM
To: Filings@psc.state.fl.us
Cc: Manuel Gurdian; Chris Malish; Lee Eng Tan
Subject: Dkt No 090258 TP
Attachments: respmotcompel.pdf

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The Docket No. is 090258-TP. Complaint of dPi Teleconnect, LLC against BellSouth Telecommunications
This is being filed on behalf of dPi Teleconnect L.L.C.

Total Number of Pages is 9

Response to Motion to Compel

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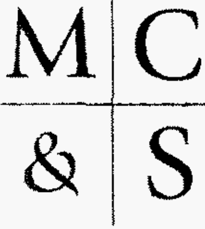

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December 11, 2009

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

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

Dear Ms. Cole:

Enclosed is the response of Pi Teleconnect, L.L.C. to AT&T Florida's Motion to Compel, which we ask that you file in the captioned docket.

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

Sincerely,

Norman H. Horton

NHH:bjm
enclosure

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: dPi Teleconnect, L.L.C. v.	)	
BellSouth Telecommunications, Inc.	)	Docket No. 090258-TP
	)	Filed December 11, 2009

dPi TELECONNECT'S RESPONSE TO AT&T FLORIDA'S MOTION TO COMPEL

dPi Teleconnect herewith files its response to AT&T Florida's Motion to Compel and as a response states:

1) Discovery is only allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence. Fla.R.Civ.P. Rule 1.280(b)(1); *see Alterra Healthcare Corp. v. Estate of Shelley*, 827 So.2d 936, (Fla. 2002); *Allstate Ins. Co. v. Langston*, 655 So.2d 91, (Fla. 1995). It is disallowed if the burden exceeds the probative value of the evidence. *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798 (Fla.App. 3 Dist. 1985); *aff'd*, 500 So.2d 533 (Fla.1987). "Relevant evidence is evidence tending to prove or disprove a material fact." Section 90.401, Florida Statutes (1997).

2) AT&T has presented dPi Teleconnect ("dPi") with nearly 20 discovery requests – interrogatories 9, 10, 11, 13, 14, 15, 16, 20, 22, 32, 33, 34, 35, 36, 37, 38, 42, and request for admission 4 – that are not relevant and cannot lead to the discovery of relevant evidence. These discovery requests seek information related to dPi's interactions with third parties – dPi's clients – which has no bearing on the core issue in this case: whether AT&T complied with its duty to extend to extend to dPi, a reseller, the same offers that AT&T extended to its retail customers.

A. The law on resale: AT&T may not impose a restriction on CLEC access to AT&T's

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retail offers unless it first secures Commission approval regarding the reasonableness and non-discriminatory nature of its restriction; therefore, the information that defendants request is completely irrelevant to the case at hand.

3) The law in this case is quite clear: any offer that an ILEC makes available at retail, it must make available to CLECs at wholesale. This includes promotional offerings. The FCC rules on resale are found in the Code of Federal Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

> **47 CFR § 51.605 Additional obligations of incumbent local exchange carriers.**
>
> (a) An incumbent LEC shall ***offer*** **to any requesting telecommunications carrier any telecommunications service that the incumbent LE*C* *offers*** **on a retail basis** to subscribers that are not telecommunications carriers for resale **at wholesale rates** ....
>
> ***
>
> (e) Except as provided in §51.613 [relating to cross-class selling and short term promotions], ***an incumbent LEC shall not impose restrictions on*** the ***resale*** by a requesting carrier of telecommunications services offered by the incumbent LEC.
>
> **47 C.F.R. § 51.613 Restrictions on resale.**
>
> (a) Notwithstanding §51.605(b), the following types of restrictions on resale may be imposed:
>
> > (1) Cross-class selling. [an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the only to a certain class of customers eligible for the promotin – i.e., if the ILEC's promotion is directed to residential customers, the CLEC cannot cross sell it to business class customers.]
> >
> > (2) 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.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a ***restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.***

4) The above recited principles of federal law are adopted and incorporated into the parties' interconnection agreement. The parties' contract concedes that:

a. the parties wish to interconnect "pursuant to Sections 251 and 252 of the Act" General Terms and Conditions ("GTC") p.1;

b. "... 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.

c. "...*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."Resale Attachment's General Provision sections 3.1, p. 3

d. "When dPi purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be be ... subject to the same conditions... that BellSouth provides to its ...End Users." General Terms and Conditions ("GTC") p. 4;

5) Accordingly, federal law dictates the obligations of the parties. Since federal law sets out the obligations of the parties, the only relevant questions in this case are weather or not AT&T has complied with federal law. In particular, the question is whether AT&T made the same offer to plaintiff as it made to its retail customers as required by 47 CFR § 51.605 (a). Of course, we know that they did not do so, which has given rise to this case.

6) Historically AT&T has justified its failure to extend the same cash back offers to

CLECs on the grounds that the cash back offers were not "services" subject to resale. But now it appears that AT&T wishes to argue that the discovery is needed to allow AT&T to prove that its restricting CLECs from these cash back offers was reasonable and non-discriminatory. In this instance, however, this argument is moot, because the rule allows AT&T to impose a restriction ***only after** proving to the state Commission that the restriction is reasonable and non-discriminatory.* 47 C.F.R. § 51.613(b).[1] In this instance, AT&T unilaterally went ahead and actually *imposed* a restriction on the resale of its cash back retail offerings from 2003 to 2007 ***without*** first proving to this Commission that such restrictions were reasonable and non-discriminatory. Thus, this exception to the rule is not available to AT&T in the present case.

7) Because AT&T did not get approval of their discriminatory pricing, the only issue before the Commission (as stated in dPi's complaint) is ***whether AT&T has complied with its obligation under FCC rules to offer reselling CLECs like dPi the same offers AT&T makes to its retail customers.*** The information sought (information about dPi's relations with third parties) is not relevant, since it inquires about issues that do not tend to prove or disprove whether AT&T has made ***the same offer*** it extends to AT&T's retail customers available to dPi.

8) Accordingly, the only information relevant to determining whether AT&T has met its obligations under the FTA and FCC's rules is (1) the terms and conditions under which AT&T makes certain offers to its retail customers; and (2) whether it makes the same offers available to resellers, like dPi.

9) However, the information sought by AT&T is information not related to the terms and conditions under which AT&T provides service to its retail customers, or to whether AT&T makes its retail offers available to resellers. Instead, AT&T seeks information about ***dPi's***

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(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC ***may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.***

interactions with third parties – dPi's customers, which is utterly irrelevant and inadmissible in this case.

B. The purpose of the Telecommunications Act of 1996 is to foster competition with incumbent providers, and granting this motion runs contrary to that purpose.

10) AT&T seeks to show that it should be allowed to discriminate because dPi's rates are higher than AT&T's. AT&T claims the information requested is relevant because it shows that dPi will not be able to offer a rate in line with AT&T even if it is given the promotional discount. But even were this true, it is again beside the point and irrelevant to the current case.

11) The FCC has given guidance as to the kinds of restrictions that permissible. For example, short term promotions need not be resold 47 C.F.R. § 51.613 (a)(2). Similarly, an ILEC may prevent a CLEC from accepting promotional offers targeted to *residential* customers and reselling them to *business* customers; this is called cross class selling, and an ILEC may restriction against such activity. 47 C.F.R. § 51.613 (a)(1). **Here, however, AT&T is essentially saying that it can restrict dPi's access to AT&T's retail offers because dPi's prices are already higher than AT&T's.** This kind of discrimination is simply not permitted by, and is contrary to the purpose of, the Telecommunications Act of 1996 (the "Act") under any circumstances. Taken to its logical conclusion, such an argument suggests that AT&T need not make available ***any*** services to dPi for resale.

12) "[The] provisions of the Telecommunications Act of 1996... were intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises" (*Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 476 (2002))[2] and also to promote competition with

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See also, AT&T Communications of Southern States, Inc. v. Bellsouth Telecommunications, Inc., 229 F.3d 457, 459 (4th Cir.2000)(The Telecommunications Act of 1996 was intended to break local telephone monopolies.)

them. *E.g., BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439,441 (4t h Cir.2007); *Alenco Communications, Inc. v. F.C.C.*, 201 F.3d 608, 623 (5th Cir.2000); *GTE Northwest Inc. v. Hamilton*, 971 F.Supp. 1350, 1352 (D.Or. 1997); *GTE Northwest, Inc. v. Nelson*, 969 F.Supp. 654, 656 (W.D.Wash. 1997); *GTE South Inc. v. Morrison*, 957 F.Supp. 800, 801 (E.D.Va. 1997); *Western PCS II Corp. v. Extraterritorial Zoning Authority of City and County of Sante Fe*, 957 F.Supp. 1230, 1237 (D.N.M. 1997). It is a perversion of this purpose to hold that AT&T can request extraneous information about plaintiff's dealings with third parties because AT&T charges a lower rate. Under the spirit of the Act AT&T cannot argue that it needs information about plaintiff's rates to show that AT&T should be allowed to discriminate and further increase the rate gap. Allowing this outcome would enable AT&T to *gain* market share and *reduce* competition, the antithesis of what the Act is designed to do.

12) AT&T has used its market position to stifle competition. AT&T has a far larger and far more stable customer base than any of its competitors, and because of this it spends less on customer service and collection, enabling it to charge lower rates. AT&T's near-monopolistic position is what allows it to cut its rates to further decrease competition. Allowing AT&T to benefit from its market dominance to further increase that dominance is contrary to Supreme Court precedent, and contrary to the purpose of the Act.

13) Concurrent with this response dPi has also provided Supplemental Responses to portions of the discovery to ATT.

Wherefore, for the forgoing reasons, dPi respectfully requests the Commission deny

AT&T Florida's Motion to Compel and grant any such further relief as the Commission deems appropriate.

Respectfully submitted,

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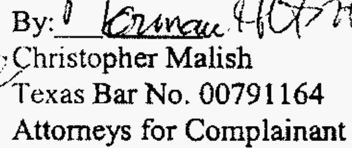
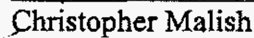
By: 
Christopher Malish
Texas Bar No. 00791164
Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing document has been served on Defendant AT&T through its attorneys on this 11th day of December, 2009 via email and First Class Mail.


Christopher Malish

CERTIFICATE OF SERVICE
Docket No. 090258-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 11th day of December, 2009, to the following:

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