

Ruth Nettles

080631-TP

From: Mark Buechele [MarkBuechele@msn.com]
Sent: Monday, January 11, 2010 4:30 PM
To: Filings@psc.state.fl.us
Cc: Charles Murphy; emaldonado@dsl.net; 'Greer, Stan L'; 'Greene, Reginald A'; 'HATCH, TRACY W (Legal)'; 'Edenfield, Kip'; 'Gurdian, Manuel'
Subject: RE: 080631-TP Petitioner DSL Internet Corporation's Prehearing Statement
Attachments: Docket-080631-DSL-Prehearing-Statement.doc

- A. Mark E. Buechele, Esq.
P.O. Box 398555
Miami Beach, Florida 33239-8555
(305) 531-5286
MarkBuechele@msn.com
- B. Re: Docket No. 080631-TP: Petition for Commission to intervene, investigate and mediate dispute between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc.
- C. DSL Internet Corporation
- D. 12 pages total
- E. Petitioner DSLI's Prehearing Statement (in Microsoft Word Format)

DOCUMENT NUMBER DATE

00263 JAN 11 2010

FPSC-COMPLAINT/STIPULATION

1/12/2010

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Commission to intervene,)
investigate and mediate dispute between)
DSL Internet Corporation d/b/a DSLI and)
BellSouth Telecommunications, Inc.)
_____)

DOCKET NO. 080631-TP

FILED: JANUARY 11, 2010

DSLIS PREHEARING STATEMENT

Petitioner DSL INTERNET CORPORATION (“DSLi”), by and through its undersigned counsel and pursuant to Order No. PSC-09-0585-PCO-TP (issued August 31, 2009), hereby files this its Prehearing Statement.

A. Witnesses

DSLi proposes to call the following witness(es) to offer direct and rebuttal testimony on the issues in this proceeding:

<u>Witness</u>	<u>Issues</u>
Eduardo Maldonado (Direct and Rebuttal)	1, 2, 3, 4(a) and 4(b) (and as stated in his pre-filed direct and rebuttal testimonies)

DSLis witness(es) shall present facts, opinions and/or policy considerations that support DSLis positions on these issues. DSLi reserves the right to call additional witnesses, including witnesses to address or respond to inquiries from the Florida Public Service Commission (“Commission”), to address issues not presently designated that may be designated by the Prehearing Officer at the Pretrial Conference, and to address issues raised in any discovery, discovery response or testimony by witnesses for the Respondent BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a AT&T Florida (“AT&T Florida”) or Commission Staff.

B. Exhibits

DSLi may use any of the following exhibits at the hearing on this proceeding:

FILED: NUMBER-DATE
0263 JAN 11 2
FPSC-COMMISSION CLERK

*Eduardo Maldonado

- EM-1 Portions of Interconnection Agreement, dated July 4, 2003, between DSLi and AT&T Florida (then known as BellSouth) (“2003 ICA”).
- EM-2 Portions of Market-Based Rate Agreement, dated July 12, 2005, between DSLi and AT&T Florida (then known as BellSouth) (“2005 MBRA”).
- EM-3 Portions of Amendment to the Agreement Between DSL Internet Corporation d/b/a DSLi and BellSouth Telecommunications, Inc. Dated July 4, 2003, dated March 10, 2006, between DSLi and AT&T Florida (then known as BellSouth) (“3/10/06 Amendment”).
- EM-4 DSLi spreadsheets submitted to AT&T (then known as BellSouth) on March 10, 2006 containing a listing of DS1 and DS3 circuits and transport which DSLi believed had been delisted under the TRRO (“3/10/06 Spreadsheets”).
- EM-5 AT&T Florida’s (then known as BellSouth) revised spreadsheets containing a listing of DS1 and DS3 circuits and transport which had been delisted under the TRRO (“AT&T Revised Spreadsheets”).
- EM-6 Portions of Market-Based Rate Agreement, dated August 30, 2006, between DSLi and AT&T Florida (then known as BellSouth) (“2006 MBRA”).
- EM-7 Portions of Interconnection Agreement, dated February 2007, between DSLi and AT&T Florida (then known as BellSouth) (“2007 ICA”).
- EM-8 AT&T Florida’s May 28, 2008 “Facility Access Service Bill” to DSLi containing AT&T’S “True-Up” Billing of \$188,820.59 (“5/28/08 Access Bill”).
- EM-9 DSLi’s July 17, 2008 Billing Adjustment Request (“BAR”) Form disputing the “True-Up” Billing in the 5/28/08 Access Bill.
- EM-10 AT&T Florida’s August 20, 2008 spreadsheet which purports to provide a detail of the “True-Up” Billing in the 5/28/08 Access Bill.

- EM-11 DSLi's September 25, 2008 BAR Form renewing DSLi's dispute of the "True-Up" Billing in the 5/28/08 Access Bill.
- EM-12 Portions of AT&T Florida's FCC No. 1 Tariff purporting to reflect rates found in AT&T's August 20, 2008 spreadsheet supporting the "True-Up" Billing in the 5/28/08 Access Bill.
- EM-13 Portions of the General Terms and Conditions of the Interconnection Agreement, dated February 2007, between DSLi and AT&T Florida (then known as BellSouth) ("2007 ICA").
- EM-14 Portions of AT&T Florida's FCC No. 1 Tariff purporting to reflect payment terms and conditions applicable to the "True-Up" Billing in the 5/28/08 Access Bill.
- EM-15 Spreadsheet showing that \$136,445.47 of the total \$188,820.54 "True-Up" Billing amount is for the embedded base circuits or network elements that were in service prior to March 11, 2005.
- EM-16 Portions of Title 47 of the United States Code which are applicable to AT&T's "True-Up" Billing of \$188,820.54 (i.e. Sections 201, 202 and 415 of Title 47) and a copy of the FCC's 1997 ruling in The People's Network Inc. v. American Telephone and Telegraph Co., (FCC DA97-684).
- EM-17 Spreadsheet showing that at best only \$49,751.97 of the \$188,820.59 "True-Up" Billing was due within two years of the date this docket was filed (i.e. the summation of all charges for CABS billing dates after 9/9/2006).
- EM-18 Spreadsheet showing that only \$1,682.90 of the total amount of \$188,820.59 "True-Up" Billing was billed within one year after the service had been provided a year (i.e. for service provided after May 28, 2007); and that only \$2,655.50 of the total of \$188,820.59 "True-Up" Billing arose after the effective date of the 2007 ICA.

- EM-19 February 27, 2009 Letter from Reginald Greene (attorney for AT&T Florida) to Mark Buechele (attorney for DSLi).
- EM-20 Spreadsheet showing AT&T Florida's mistake in the credit for UNE USOC 1L5ND (Circuit No. 60.HFFU.755367..SB) resulting in an over-charge.
- EM-21 Portions of AT&T Florida's FCC No. 1 Tariff which contain long-term payment plans which might have been available to DSLi for elements billed in the "True-Up" Billing.
- EM-22 Portions of AT&T Florida's FCC No. 1 Tariff which contain long-term rates for various elements billed in the "True-Up" Billing.
- EM-23 Spreadsheet calculating overcharge of \$30,831.30 for Access USOC TMECS based upon the monthly rate as compared to the long-term rate for the same element.
- EM-24 Spreadsheet calculating overcharge of \$8,930.45 for Access USOC 1LPEA based upon the monthly rate as compared to the long-term rate for the same element.
- EM-25 Spreadsheet calculating overcharge of \$8,487.46 for Access USOC 1L5XX based upon the monthly rate as compared to the long-term rate for the same element.
- EM-26 Spreadsheet calculating overcharge of \$12,864.61 for Access USOC 1LPS8 based upon the monthly rate as compared to the long-term rate for the same element.
- EM-27 Spreadsheet calculating overcharge of \$36,567.76 for Access USOC 1LPE8 based upon the monthly rate as compared to the long-term rate for the same element.

*Any exhibits attached to any pre-filed testimony.

*Any exhibits sponsored by AT&T Florida's witnesses, Cindy Clark and P.L. (Scot) Ferguson.

*Any exhibits sponsored by FPSC Commission Staff.

*DSL_i's responses to any discovery requests propounded by either AT&T Florida or FPSC Commission Staff.

*AT&T Florida's responses to any discovery requests propounded by either DSL_i or FPSC Commission Staff.

DSL_i reserves the right to file exhibits relating to any discovery response or testimony that may be filed under the circumstances identified in Section "A" above. DSL_i also reserves the right to introduce exhibits for cross-examination, impeachment, or any other purpose authorized by the applicable Florida Rules of Civil Procedure, Florida Rules of Evidence, Florida Administrative Code and the Rules of the Commission.

C. DSL_i's Statement of General Position

In 2003, DSL_i and AT&T Florida entered into an Interconnection Agreement, dated July 4, 2003 ("2003 ICA") under Sections 251 and 252 of the Telecommunications Act. On February 4, 2005, the FCC released its Triennial Review Remand Order ("TRRO") in CC Docket No. 01-338 (Order No. FCC 04-290) eliminating various network elements under Sections 251 and 252 of the Telecommunications Act; and thus effective March 11, 2005, AT&T Florida was no longer obligated to provide DS1 and DS3 loops and DS1 and DS3 transport in certain wire centers and routes. For loops and dedicated transport in service as of March 11, 2005 (i.e. "Embedded Base"), the FCC provided a one-year transition period beginning March 11, 2005. On March 2, 2006, this Commission entered an order in Docket No. 041269-TP (Order No. PSC-06-0172-FOF-TP) adopting certain generic amendment changes to existing interconnection agreements to implement the TRRO ("TRRO Amendment"). On March 10, 2006, DSL_i executed the TRRO Amendment and submitted spreadsheets to AT&T identifying circuits to be converted to special access. In February 2007, DSL_i entered into its current Interconnection

Agreement with AT&T (“2007 ICA”). On or about May 28, 2008, AT&T Florida back-billed DSLi \$188,820.59 for “Interstate Special Access” (i.e. “True-Up” Billing”). DSLi disputed the back-billing and AT&T threatened to disrupt DSLi’s service under the 2007 ICA. On or about October 9, 2008, DSLi filed this docket seeking to resolve this back-billing dispute.

Apart from a calculation error now acknowledged by AT&T Florida, the “true-up” billing was calculated as the difference between AT&T’s charge for that element on AT&T’s FCC No. 1 Tariff and the 2003 ICA rate for the comparable network element (which DSLi had previously paid). Since the services and elements billed in the “true-up” billing were specifically removed from Sections 251 and 252 of the Telecommunications Act and the interconnection agreements by the FCC’s TRRO the TRRO Amendment, and was billed by AT&T Florida under AT&T’s FCC No. 1 Tariff, federal law governs this dispute. The applicable law can found in Title 47 of the United States Code, including 47 U.S.C. Sections 201, 202 and 415, together with applicable and related FCC rules and FCC opinions including the FCC’s 1997 ruling in The People’s Network Inc. v. American Telephone and Telegraph Co., (FCC DA97-684). The “true-up” back-billing violates the standards provided for in 47 U.S.C. Sections 201 and 415. Under Section 201(b) and the FCC’s ruling in the People’s Network, AT&T Florida’s back-billing is an unreasonable and unlawful practice in violation of Section 201(b). Moreover, under the two-year statute of limitation in 47 U.S.C. Section 415, most (if not all) of AT&T’s “true-up” back-billing would be barred by the statute of limitation. Furthermore, to the extent AT&T Florida argues that the 2007 ICA applies, only \$1,682.90 of the total billed would be allowed by the back-billing limitations in that agreement.

Apart from DSLi’s defenses related to the timeliness of the back-billing, AT&T Florida did not calculate the “true-up” accurately for at least two reasons. First, because AT&T Florida

effectively denied DSLi the ability to obtain long-term rates found in the applicable tariff and second, because of a computational error which AT&T Florida has since acknowledged.

AT&T Florida first took the position that its failure to timely back-bill DSLi was a result of DSLi not timely providing AT&T Florida with certain spreadsheets for conversion to special access. However, in its rebuttal testimonies, AT&T Florida appears to concede that DSLi did timely provide such spreadsheets. Because of this apparent reversal in position, DSLi reserves the right to seek as an offset conversion charges which DSLi may have paid AT&T related to the “true-up” back-billing.

D. DSLi’s Statement of Position On The Issues

ISSUE 1: WHAT DOCUMENT(S) AND/OR APPLICABLE LAW GOVERNS THE PARTIES’ RELATIONSHIP AS IT RELATES TO AT&T’S “TRUE-UP” BILLING FOR \$188,820.59 PLUS LATE PAYMENT CHARGES AS APPLICABLE?

Position: The applicable document relating to AT&T’s “true-up” billing is AT&T’s FCC No. 1 Tariff, less amounts previously paid by DSLi (which amounts were supposed to be the rates found in the 2003 ICA). The services and elements billed in the “true-up” billing were specifically removed from Sections 251 and 252 of the Telecommunications Act and the interconnection agreements by the FCC’s TRRO the TRRO Amendment; and were billed by AT&T Florida under AT&T’s FCC No. 1 Tariff. Moreover, the applicable law is found in Title 47 of the United States Code, including 47 U.S.C. Sections 201, 202 and 415, together with applicable and related FCC rules and FCC opinions including the FCC’s 1997 ruling in The People’s Network Inc. v. American Telephone and Telegraph Co., (FCC DA97-684).

ISSUE 2: WAS THE “TRUE-UP” AMOUNT AT&T SEEKS TO COLLECT FROM DSLI (\$188,820.59 PLUS LATE PAYMENT CHARGES AS APPLICABLE) CALCULATED IN ACCORDANCE WITH THE DOCUMENT(S) AND/OR APPLICABLE LAW IDENTIFIED IN ISSUE 1?

Position: No. Setting aside DSLi's defenses related to the timeliness of the back-billing, AT&T did not calculate the "true-up" accurately for at least two reasons. First, AT&T's FCC No. 1 Tariff contains charges for network elements for both monthly and longer term rates. Since AT&T delayed so long in back-billing, DSLi was effectively denied the opportunity to acquire long-term rates for any of the network elements. The difference in the "true-up" billing between the monthly and applicable long-term rates for Access USOC TMECS is \$30,831.30; for Access USOC 1LPEA it is \$8,930.45; for Access USOC 1L5XX it is \$8,487.46; for Access USOC 1LPS8 it is \$12,864.61; and for Access USOC 1LPE8 it is \$36,567.76. In addition to AT&T's failure to allow for longer term rates, AT&T also made a mistake in the credit for USOC 1L5ND (Class of Service UNC3X, Circuit No. 60.HFFU.755367..SB) which AT&T concedes resulted in an overcharge of \$13,361.33. Lastly, to the extent AT&T contends that any of the circuits back-billed were part of the Embedded Base, DSLi reserves the right to assert the transition rate of 115% the 2003 ICA rate for the applicable period.

ISSUE 3: WAS THE "TRUE-UP" AMOUNT AT&T FLORIDA SEEKS TO COLLECT FROM DSLI (\$188,820.59 PLUS LATE PAYMENT CHARGES AS APPLICABLE) BILLED IN ACCORDANCE WITH THE DOCUMENT(S) AND/OR APPLICABLE LAW IDENTIFIED IN ISSUE 1?

Position: No. The back-billing violates the standards provided for in 47 U.S.C. Sections 201 and 415. Section 201(b) states in part that: "*All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.*" Section 415(a) states in part that: "*All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.*" In The People's Network Inc.

v. American Telephone and Telegraph Co., (FCC DA97-684), the FCC held that attempting to collect an untimely back-billing was an unlawful practice in violation of Section 201(b). In that particular case, the FCC held that back-bills for services rendered more than four months after the charges were incurred, were unreasonable and in violation of Section 201(b). Furthermore, to the extent AT&T Florida argues that the 2007 ICA applies, that agreement contains a provision which limits back-billing to within a year after the services have been provided. An analysis of the “True-Up” Billing shows that \$136,445.47 of the total \$188,820.54 claimed was for embedded base circuits or network elements that were in service prior to March 11, 2005; only \$49,751.97 of the total was first due within two years prior to the date this docket was filed; only \$1,682.90 of the total was billed within one year after the service had been provided; and only \$2,655.50 of the total arose after the effective date of the 2007 ICA. Accordingly, the back-billing was not charged in accordance with the applicable law identified in Issue 1 (above).

ISSUE 4: (A) **BASED ON THE DOCUMENT(S) AND/OR APPLICABLE LAW IDENTIFIED IN ISSUE 1, AND ANY AFFIRMATIVE DEFENSES, WHAT AMOUNT, IF ANY, DOES DSLI OWE FOR AT&T’S “TRUE-UP” BILLING OF \$188,820.59 PLUS LATE PAYMENT CHARGES AS APPLICABLE?**

(B) **WHEN SHOULD ANY SUCH OWED AMOUNT BE DUE?**

Position: In regards to Issue 4(a), AT&T Florida’s back-billing violates 47 U.S.C. Sections 201 and is an unreasonable billing practice under that section and the FCC’s decision in The People’s Network Inc. v. American Telephone and Telegraph Co., (FCC DA97-684). In this regard, all of the amounts sought by AT&T Florida are barred as an unreasonable billing practice. Furthermore, to the extent AT&T Florida argues that the 2007 ICA applies, since that agreement limits back-billing to within a year after the services have been provided, only \$1,682.90 of the total “true-up” billing of \$188,820.54 would be allowed under the 2007 ICA

since all but \$1,682.90 of the “true-up” billing was for services provided more than one year prior to the 5/28/08 Access Bill (when the “true-up” billing was first rendered). Additionally, AT&T’s “true-up” billing is barred by the two-year statute of limitations set forth in 47 U.S.C. 415. Although this docket was filed by DSLi in early October 2008, AT&T has never filed a claim for affirmative relief. Since the last bill dates in the “true-up” billing are for October 2007, it is clear that more than two years have elapsed since that last bill date. Nevertheless, assuming that the filing of this docket suspends the statute of limitation, only \$49,751.97 of the total “true-up” billing was first due within two years prior to the date this docket was filed; and thus AT&T would be limited to no more than this amount.

Lastly, AT&T Florida first took the position that its failure to timely back-bill DSLi was a result of DSLi not timely providing AT&T Florida with certain spreadsheets of circuits and network elements for conversion to special access. However, in its rebuttal testimonies, AT&T Florida appears to concede that DSLi did timely provide such spreadsheets. Because of this apparent reversal in position, DSLi reserves the right to seek as an offset conversion charges which DSLi may have paid AT&T related to the “true-up” back-billing.

In regards to Issue 4(b), since no amounts are due to AT&T Florida, there should be no date for making any such payments. Nevertheless, assuming some amounts are found to be due, AT&T Florida’s FCC No. 1 Tariff would control when payment should be made. Based upon Section 2.4.1(B)(3)(c) of AT&T Florida’s FCC No. 1 Tariff, sums disputed will only be due upon a final resolution or settlement of the billing dispute; which if not resolved amicably would include a final conclusion of all proceedings related to a resolution of this dispute.

E. Stipulations

There are no stipulations at this time.

F. Pending Motions

The parties have pending an Agreed Motion For Continuance, which was filed by AT&T Florida on January 8, 2010. AT&T Florida also filed a Motion to Compel on January 6, 2010; but it appears that the parties have or will have resolved that matter amicably.

G. Pending Confidentiality Claims Or Requests

DSLi has no pending confidentiality claims or requests.

H. Compliance with Order No. PSC-09-0585-PCO-TP

DSLi has complied with all requirements of the Order Establishing Procedure entered in this docket. However, as mentioned previously, AT&T Florida first took the position that its failure to timely back-bill DSLi was a result of DSLi not timely providing AT&T Florida with certain spreadsheets of circuits and network elements for conversion to special access. In its rebuttal testimonies, AT&T Florida appears to concede that DSLi did timely provide such spreadsheets. Because of this apparent reversal in position, DSLi reserves the right to seek as an offset conversion charges which DSLi may have paid AT&T related to the "true-up" back-billing.

WHEREFORE PETITIONER DSL INTERNET COPORATION hereby serves this its Prehearing Statement.

Respectfully Submitted,

MARK E. BUECHELE, ESQ.
P.O. Box 398555
Miami Beach, Florida 33239-8555
Telephone: (305) 531-5286
Facsimile: (305) 531-5287

By: /s/ Mark E. Buechele
MARK E. BUECHELE
Florida Bar No. 906700

CERTIFICATE OF SERVICE

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

Florida Public Service Commission
Charles Murphy, Staff Counsel
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
cmurphy@PSC.STATE.FL.US

AT&T FLORIDA
E. Earl Edenfield, Jr.
ke2722@att.com
Tracy W. Hatch
th9467@att.com
Manuel A. Gurdian
mg2708@att.com
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301

By: */s/ Mark E. Buechele*
MARK E. BUECHELE
Florida Bar No. 906700