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 Subject: Docket No. 050863-TP: dPi v. AT&T FL - Posthearing statement of dPi Teleconnect, LLC

Attachments: dPi's post hearing brief 6.rtf



dPi's post hearing brief 6.rtf

Please file this Posthearing Statement of dPi Teleconnect, LLC and let me know if you need anything else. Thank you.

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- B. dPi Teleconnect, LLC v. BellSouth Telecommunications, Inc. - Docket No. 050863-TP
- C. dPi Teleconnect, LLC
- D. 27 pages including certificate of service
- E. Posthearing Statement of dPi Teleconnect, LLC

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:) DOCKET NO. 050863-TP
)
dPi Teleconnect, L.L.C. v.)
BellSouth Telecommunications, Inc.)

POSTHEARING STATEMENT OF dPi TELECONNECT, LLC

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:) **DOCKET NO. 050863-TP**
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dPi Teleconnect, L.L.C. v.)
BellSouth Telecommunications, Inc.)

POSTHEARING STATEMENT OF dPi TELECONNECT, LLC

Comes now, dPi Teleconnect, LLC ("dPi), through undersigned counsel, and pursuant to Order Nos. PSC-07-0322-PCO-TP, PSC-07-0571-PCO-TP, PSC-07-0814-PCO-TP, PSC-07-0959-PCO-TP and PSC-08-0122-PCO-TP submits this posthearing statement.

SUMMARY OF OVERALL POSITION

Strict construction of the LCCW promotion's language shows an order qualifies for discount with just basic service plus TouchStar Blocking Features, and because the evidence further shows that is how BellSouth originally interpreted the promotion for both its retail customers and other CLECs, dPi is entitled to the promotional pricing.

INTRODUCTION

1. The dispute in this matter arises from a disagreement regarding BellSouth Telecommunications, Inc. ("BellSouth")'s resale obligations under 47 U.S.C. 251(c)(4)(A) and 252(d)(3). These statutes require monopolists like BellSouth to offer their retail services to competitors like dPi Teleconnect, L.L.C. ("dPi") at a wholesale discount, so that dPi can attempt to resell those services in furtherance of its own business. More specifically, the question is whether BellSouth must extend to dPi "promotional" pricing for services which would be eligible for the promotion pricing

under the plain reading of the Line Connection Charge Waiver (“LCCW”) promotion BellSouth offered in Florida.

2. dPi ordered service for all of its end users with at least basic service plus two or more Touchstar feature blocks. The blocking features are identified by Universal Service Ordering Codes which are listed in BellSouth’s tariff amongst the rest of BellSouth’s Touchstar features.
3. dPi submitted requests for credit for each customer that (1) switched its local service to dPi from another provider and (2) purchased basic service with at least two features; and (3) did not have dPi service within ten days of the connection request. BellSouth denied some of these requests. Because dPi’s orders (1) were precisely within the qualifying criteria *drafted by BellSouth*, (2) mirror orders from other CLECs which were credited; and (3) mirror orders from BellSouth’s own retail customers which likewise received the promotion, dPi is entitled to the credits.

THE BURDEN OF PROOF

4. A party must prove its cause of action by a preponderance of credible evidence. Fla. Stat. § 120.57 (1)(j); *see also Citizens of the State of Fla. v. Pub. Serv. Commn.*, 43 So.2d 784, 787-788 (Fla. 1983). The evidence must be competent and substantial, and no decision can be arbitrary or unsupported by evidence. Fla. Stat. § 120.68; *Citizens of the State of Fla.*, 43 So.2d at 787-788.
5. Non-expert testimony is not competent evidence if it is not based on personal knowledge. *See Walker v. State Unemployment Appeals Commn.*, 720 So. 2d 278, 279 (Fla. App. 2 Dist., 1998) (the testimony of the employer's representative, who did not

have personal knowledge of the alleged incident, was not competent evidence); *Kelly v. Dade County Sch. Bd.*, 872 So. 2d 457, 458 (Fla. App. 2 Dist., 2004) (finding no competent substantial evidence to support the referee's determination in favor of the employer where the employer did not present any witnesses with personal knowledge of the claims and did not rebut the employee's allegations); *Elser v. Law Offices of James M. Russ, P.A.*, 679 So. 2d 309, 312 (Fla. App. 5 Dist., 1996) (affidavit was insufficient to support summary judgment because it was not made on personal knowledge, and therefore, the affiant was not competent to testify to the matters set forth therein); *Kelly v. Dept. of Health & Rehabilitative Servs.*, 596 So. 2d 130, 131 (Fla. App. 1 Dist., 1992); *S.M.M. v. State*, 569 So. 2d 1339, 1341 (Fla. App. 1 Dist., 1990); *Crosby v. Paxson Elec. Co.* 534 So.2d 787, 789 (Fla. App. 1 Dist., 1988); *Taylor v. State*, 425 So. 2d 1191, 1193 (Fla. App. 1 Dist., 1983).

6. Furthermore, Fla. Admin. Code 28-106.213 Evidence provides at section (3) that:

Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

7. The problem in this case is that Ms. Tipton simply was not competent to testify to any of the issues in this case: Ms. Tipton is essentially a trained witness with admittedly no personal knowledge of the substance of her testimony.¹ Thus, all of her “testimony” comes from “interviewing” people at BellSouth who may or may not have had personal knowledge of the events which Ms. Tipton attempts to testify upon – in other words, Ms.

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Exhibit 11, pp. 5-10.

Tipton's evidence is all hearsay. The result is that there is a divide between dPi and the Commission on the one hand, and, on the other hand, the people from BellSouth who really knew what was going on. Ms. Tipton's job is simply to help develop and relay BellSouth/BellSouth's corporate party line on the issues in this case. Such testimony would be inadmissible in any state in the Union under a time-tested system of rules of evidence, because over the centuries it has become clear that such hearsay evidence is inherently unreliable and not credible; that is why the rules of evidence the Commission must follow prohibit the Commission from relying on such testimony in this case too.

8. BellSouth has been repeatedly warned through objections about the impropriety of attempting to introduce Ms. Tipton's evidence on these matters in North Carolina and in this case; for example, in dPi's Motion to Strike heard in September 2007. Nevertheless, despite months in which it could have sought to remedy this problem by producing competent witnesses, BellSouth persists in attempting to foist Ms. Tipton's "evidence" upon the Commission, and as a consequence will not be unfairly prejudiced when her testimony is disregarded as required by law.

ANALYSIS AND ARGUMENT: SPECIFIC ISSUES AND POSITIONS

ISSUE 1(a): Is dPi entitled to the Line Connection Charge Waiver promotion when dPi orders Basic Service plus two or more of the TouchStar Blocking Features?

dPi is entitled to promotional credits because dpi qualified under the promotion's express terms by ordering basic service plus TouchStar Blocking Features; and because BellSouth interpreted and applied the LCCW promotion to waive Line Connection Charges for both other CLECs and its own retail customers with orders configured like dPi's.

9. At the end of the day, the question before the Commission is whether dPi qualified for BellSouth's Line Connection Charge Waiver promotion by purchasing Basic Local Service plus two or more of the BCR, BRD, and HBG Touchstar Blocking Features. Under the express written terms of the promotion, dPi does qualify for this promotional pricing. The Commission should interpret the language of the promotion based on a plain reading of the text of the promotion and hold that when dPi purchases a package consisting of plain telephone plus two or more Touchstar feature blocks, dPi qualifies for the promotional pricing. BellSouth initially interpreted the promotion in this way; it simply chose to change its interpretation of the promotion after it realized that CLECs such as dPi would benefit more from such an interpretation than its own customers, given the nature of the parties' respective customer bases.

A. dPi qualifies for the Line Connection Charge Waiver promotion pricing under the express language of the promotion

10. The interpretation or construction of a contract that is clear and unambiguous is a matter of law.² Under the Line Connection Charge Waiver, or "LCCW" promotion, BellSouth waives the line connection charge for those customers who sign up with BellSouth and take at least basic service with two Touchstar features. A review of the relevant language shows that all – *ALL* – dPi had to do to qualify for the line connection charge waiver is purchase Basic Service with one or more Touchstar features. According to its language, the LCCW provides that LCC will be waived when:

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Chipman v. Chipman, 875 So. 2d 603, 607 (Fla. App. 4 Dist., 2008); *Berloni S.P.A. v. Della Casa, LLC*, 972 So. 2d 1007, 1010 (Fla. App. 4 Dist., 2008); *Lipton v. First Union Natl. Bank*, 944 So. 2d 1256, 1258 (Fla. App. 4 Dist., 2007); *Caulkins Indiantown Citrus Co. v. Nevins Fruit Co.*, 831 So. 2d 727, 735 (Fla. App. 4 Dist.); *Smith v. Shelton*, 970 So. 2d 450, 451 (Fla. App. 4 Dist., 2007).

“The customer ... switch[es] their local service to BellSouth and purchase[s] any one of the following: BellSouth® Complete Choice® plan, BellSouth® PreferredPack plan, or BellSouth® basic service and two (2) custom calling (or Touchstar® service) local features.”

If one were to diagram this paragraph, it would show Line Connection Charge will be waived when the customer:

... purchase[s] any one of the following [packages]:

- [1] BellSouth® Complete Choice® plan,
- [2] BellSouth® PreferredPack plan, or
- [3] BellSouth® basic service and two (2) custom calling (or Touchstar® service) local features.”

11. Under the express written terms of the promotion, dPi qualified for this promotional pricing by purchasing basic service plus the BCR, BRD, and HBG Touchstar block Features.

1. dPi is entitled to the promotion pricing because the BCR, BRD, and HBG blocks are all Touchstar features.

12. dPi’s basic offering always includes at least two Touchstar blocks, including the call return block (known by its Universal Service Ordering Code [“USOC”] of “BCR”); the repeat dialing block (“BRD”); and the call tracing block (“HBG”). But despite having paid promotional credits to carriers and having credited its own retail customers with similar orders, BellSouth now seeks to avoid having to pay these credits to dPi by asserting these blocks are not “features,” and thus cannot qualify for the promotion. For example, Pam Tipton testified that they could not be features because they were blocks.³ This argument is made purely out of expediency, and is without merit.

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Tipton Rebuttal, Record 213.

13. First, we begin with noting that under Florida law, as with most jurisdictions, a contract – or in this instance, the Tariff – drafted by a party without significant negotiations must be construed in favor of the non-drafting party. *Clearwater Land Co. v. Koepp*, 778 So. 2d 1022, 1024 (Fla. App. 2 Dist., 2000); *Pasteur Health Plan, Inc. v. Salazar*, 658 So. 2d 543, 544 (Fla. App. 3 Dist., 1995); *Seaboard Finance Co. v. Mutual Bankers Corp.*, 223 So. 2d 778, 782 (Fla. App. 2 Dist., 1969). This will color all further examination of the interpretation of the tariff.

14. Next, we note that in fact, BellSouth’s own employees – including dPi’s point of contact on this issue, Kristy Seagle as well as her boss, Gary Patterson, referred to these blocks as “features” when communicating with dPi.⁴

15. Further, according to the tariff, TouchStar Service is simply “a group of central office call management features offered in addition to basic local telephone service.”⁵

16. Despite Ms. Tipton’s bold general pronouncement that blocks are not features, it turns out blocks *are* features. After all, they are nothing if not “central office call management features offered in addition to basic local telephone service.”

17. Moreover, various different blocks are specifically identified as “features” within the BellSouth tariff. For example:

- a. Call Block; Tariff A13.19.2.E, Ex. PAT 5, p. 4.

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Bolinger, Record 65.

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Ex. PAT -5, BellSouth’s Tariff at p. 1, Sec. A 13.19.1.

- b. Calling Number Delivery Blocking – Permanent; Tariff A13.19.2.I, Ex. PAT 5, p.6. (note that there is no charge for this feature: Tariff A13.19.4.A.10, Ex. PAT 5, p. 13);
 - c. Calling Number Delivery Blocking – Per Call; Tariff A13.19.2.J, Ex. PAT 5, p. 6. – again, there is no charge for this feature, see Tariff A13.19.4.A.11, Ex. PAT 5, p. 13.
18. Even more telling is the fact that the call return block (“BCR”); the repeat dialing block (“BRD”); and the call tracing block (“HBG”), are all described in the Touchstar Service section of BellSouth’ tariff, where they are described at the bottom of the same section defining the features they block: A13.19.2(A) (call return); A13.19.2(B) (repeat dialing); A13.19.2(C) (call trace.)⁶
19. Furthermore, the BCR, BRD, and HBG TouchStar Blocking Features each have their own USOC and are listed in the rates and charges portion of the Touchstar tariff at section A13.19.4(A)(1)(c) (BCR); A13.19.4(A)(2)(c) (BRD); and A13.19.4(A)(3)(c) (HBG). Each of these features is specifically *referred to as a feature* in a footnote to this portion of a tariff.⁷
20. Finally, we know that on the UNE side of operations, these blocks are listed and billed as features.⁸
21. Given the foregoing, it becomes clear that BellSouth regards these blocks as features when it is profitable for them to do so (on the UNE side, where it charges for

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Ex. PAT -5, BellSouth’s Tariff at p. 2-4, Sec. A 13.19.2 (A)-(C).

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See Ex. PAT -5, BellSouth’s Tariff at p. 12, Sec. A13.19.4(A), Note 1: “These [BCR, BRD, HBG] *features* should not be included....[in calculating discounts not related to this case].” [Emphasis added.] Record 199.

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Bolinger, Record 31.

them) and chooses to regard them as something other than features when – as here – acknowledging them as features will result in costs to BellSouth. Under the entire set of circumstances, given the language of the tariff and the conduct of the parties prior to BellSouth’s identifying a way to avoid financial liability by disclaiming these blocks as features, it’s clear that the preponderance of the evidence establishes that these blocks are indeed Touchstar Features. Under the circumstances, BellSouth’s insistence that they are not features because they are blocks undermines BellSouth’s credibility not just on this issue, but on all other assertions it makes in this case.

2. dPi is entitled to the promotion pricing because it purchases in a single order a package consisting of Basic Local Service plus at least two features: the BCR, BRD, and HBG Touchstar features.

a. There is no requirement that the TouchStar features be purchased “at additional cost”

22. BellSouth’s next line of defense was that even if the BCR, BRD, and HBG blocks are features, they don’t qualify for the promotion credit because they weren’t purchased separately for a separate sum of money. This argument fails because BellSouth *is reading additional requirements into its promotion criteria that simply aren’t in the text*. Again, we begin by recalling that a contract drafted by a party without significant negotiations must be construed in favor of the non-drafting party. *Clearwater Land Co. v. Koepp*, 778 So. 2d 1022, 1024 (Fla. App. 2 Dist., 2000); *Pasteur Health Plan, Inc. v. Salazar*, 658 So. 2d 543, 544 (Fla. App. 3 Dist., 1995); *Seaboard Finance Co. v. Mutual Bankers Corp.*, 223 So. 2d 778, 782 (Fla. App. 2 Dist., 1969).

23. According to the plain language of the promotion, all dPi must do to qualify is ... purchase[s] any one of the following [packages]:

- [1] BellSouth® Complete Choice® plan,
- [2] BellSouth® PreferredPack plan, or
- [3] BellSouth® basic service and two (2) custom calling (or Touchstar® service) local features.⁹

Accordingly, dPi meets the requirements of the text of the promotion when it purchases the combination of basic local service plus the two or more Touchstar block Features. For BellSouth to impose added restrictions to these written terms – such as that the features must be “purchased at additional cost” – imposes qualifying criteria that simply don’t appear in the text.¹⁰

- b. **The assertion that this promotion could not have been meant to apply to “free” features is without merit since the goal was to win back market share from competitors and BellSouth routinely issues promotions that bring no immediate benefit to itself.**

24. BellSouth’s argument that the HBG, BCR, and BRD TouchStar blocking features could not possibly have been meant to count, since including them would be tantamount to giving something away for free, and that BellSouth would therefore lose money, is either disingenuous or inane: BellSouth routinely discounts things or waives charges in order to generate goodwill and win business, and the entire purpose behind the promotion

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See Record at 335, 336.

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In any event, the word “purchase” does not have the limited meaning – “to pay cash for” – which BellSouth seems to ascribe to it. Among other things, “purchase” includes:

1: to gain or acquire; to acquire (real property) by means other than descent or inheritance

2: to obtain by paying money or giving other valuable consideration [such as choosing to do business with one over another]. *See* Webster’s; Merriam Webster law dictionary. “Purchase” also includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property. *See* U.C.C. § 1-201(32). *Cf.* Securities Exchange Act § 3: the term “purchase” includes any contract to purchase or otherwise acquire.

was in increase market share at the expense of its competitors – as evidenced by the fact that the promotion was directed only to “winover” or “reacquisition” customers. So BellSouth does “get something” when it waives the line connection charge for these customers: it gains goodwill, it expects to increase its customer base and market share – just as when it gives away promotional items at sporting events. Again, BellSouth’s assertion that these items don’t count because BellSouth would never intend to give anything away for free when they do so all the time, and where they are in fact attracting customers to rebuild their customer base, undermines BellSouth’s credibility not just on this issue, but on all other assertions it makes in this case.

c. Had BellSouth meant to exclude these features as qualifying for promotion, the promotion could have been written to either particularly include those features that qualified, or exclude those features that would not qualify.

25. If the Touchstar block Features were originally intended not to be “counted” towards fulfilling the promotion, BellSouth could easily have drafted its promotional language to so specify – as it did before in other promotions/tariff sections, which point out that the blocks could not be counted towards different discount pricing plans. The lack of such limiting language indicates BellSouth did not consider these features as not counting towards the promotion.

26. Alternatively, BellSouth could have specifically listed those limited features which it would allow to qualify for the promotion (i.e., “choose any two from the following list...”). But BellSouth did *not* so limit the list of features from which one

could choose. Again, this lack of limiting language indicates BellSouth did not consider these features as not counting towards the promotion.

d. Public Policy prohibits reconstructing the text of the promotion in favor BellSouth to include limitations that don't appear on its face.

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27. The fact that BellSouth honored the promotion for CLECs with the same kinds of orders as dPi,¹¹ and for its own retail customers with the same kinds of orders as dPi, and then took *eight months* – from September 2004 to April 2005¹² – to think of a colorable reason to justify not paying the credits suggests BellSouth had to “come up” with a reason not to pay these credits *after* the fact. Under the circumstances, there is no reason to favor BellSouth by reconstructing the text of the promotion to include limitations that don't appear on its face. The credits should be paid to dPi just as they were to other CLECs. As a matter of public policy, BellSouth, which has created a “promotion credit” system that universally overcharges its CLEC customers and requires the CLECs to hunt down the overcharges and apply for credits, should not be allowed to unjustly enrich itself at the expense of its competitors by changing its “interpretation” of the promotion in question to avoid paying credits that are due under a plain reading of the promotion.

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E.g., Budget Phone; Teleconnex. See Watson, Record 160.

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See Bolinger, Record 30, Watson, Record 160.

B. dPi qualifies for the Line Connection Charge Waiver promotion pricing under BellSouth's interpretation of, and practice of awarding, the promotion prior to the dispute.

28. Evidence of behavior prior to dispute is the best evidence of what BellSouth originally intended, as it shows how BellSouth handled the promotion before its policy was modified to suit BellSouth's goals for this litigation. In this case, the evidence shows that prior to the dispute between dPi and BellSouth, BellSouth waived the Line Connection Charge for both other CLECs and its own retail customers with orders configured like dPi's.

29. Furthermore, since dPi is entitled to the same treatment as BellSouth's retail customers get in practice, regardless of BellSouth's "policy," the fact that BellSouth waived the Line Connection Charge for its retail end users means that dPi is entitled to have the Line Connection Charge waived for its orders too.

1. The evidence shows the LCCW was extended to CLECs taking basic service plus the TouchStar Blocking Features.

30. The undisputed evidence in this case shows that BellSouth provided the Line Connection Charge to CLECs with orders mirroring dPi's in January 2005, February 2005. See, e.g., the testimony of Steve Watson, Record 168:

In short, using the words from Bellsouth's own promotion, dPi is entitled to the promotion because it has "purchase[d] ... Bellsouth Basic Service with at least one feature" and thus has "qualif[ied] for a waiver of the local service connection fee."

Bellsouth initially agreed with this interpretation because when we were first getting set up and running test batches together, it approved all orders configured this way. Furthermore, after initial testing, BellSouth was crediting other CLECs (such as Budget Phone) with millions for promotional rates for orders essentially identical to dPi's.

In August 2004, we began submitting credit requests for dPi pursuant to Bellsouth's procedures, as well as for other clients. Our computer program automatically scoures orders electronically reported by Bellsouth for our clients, and tallies those that contained new service plus two or more Touchstar features. A request for credit was made pursuant to those tallies.

For some of our clients, Bellsouth paid essentially 100% of credit applied for. For example, Budget Phone, who has a claim roughly double the size of dPi's was paid in full. Previously, Bellsouth had similarly paid Teleconnex in full for these promotions. These entities' produce mix to their end users was also essentially very similar to dPi's.¹³

31. Bellsouth's claims that BellSouth made these credits by mistake, or that CLECs were "stealing" from BellSouth, is belied by the fact that *BellSouth never attempted to backbill or initiate collections activity for these amounts.*¹⁴

2. The evidence shows the LCCW was extended to BellSouth's own retail customers taking basic service plus the TouchStar Blocking Features.

32. Ms. Tipton – who had no contact with the particulars in this case until after the dispute arose – nevertheless told this Commission that BellSouth does "not qualify its own customers for the LCCW promotion if they requested only these call blocks."¹⁵ However, documentary evidence BellSouth was forced to produce after Ms. Tipton made this statement (and similar statements under oath in North Carolina) shows that, to the contrary, BellSouth retail customers taking orders configured the same as dPi's – just

13

Watson, Record 160.

14

Tipton, Record 326.

15

Tipton, Record p. 214.

basic service plus the BCR, BRD, and HBG TouchStar Blocking Features – repeatedly and systematically received waivers of the Line Connection Charge. This documentary evidence is BellSouth’s own billing and ordering data, which is reproduced at Exhibit 13.

33. The data can be used to identify those new service orders placed for:

- (1) 1FR (that is, basic service);
- (2) at least 2 of the Touchstar Blocking Features;
- (3) and no other features; and
- (4) that were or were not charged a line connection fee.

34. These were the retail orders that BellSouth processed that fit the criteria of being basic service plus two Touchstar Blocking Features and being granted the Line Connection Charge waiver. However, since there was no way to filter the data for those orders submitted by win-over or winback customers, there is no way to identify exactly what customers who met all the criteria were charged.¹⁶

35. All told, BellSouth’s data shows that 5,052 1FR + 2 Touchstar Blocks orders received Line Connection Charge waivers, and 20,074 did not from May 2003 to August 2007. Of course, the 20,074 orders not receiving the waiver are presumed to include all such orders placed by customers not entitled to promotion pricing because they were not win-overs or win-backs (and of course, the majority of BellSouth’s new customers are not win-overs or win-backs.) This information is shown as a pie chart in Appendix 2 A.

36. More detailed analysis of this data shows that orders for 1FR + 2 Touchstar Blocks were awarded Line Connection Charge waivers approximately 28% of the time

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A detailed analysis of this data is found in Appendix 1, with charts in Appendix 2.

from May 2003 to December 2004, with a sharp decline in late 2004. The average for January 2005 through August 07 was approximately 14%. The month-by-month percentages are shown in Appendix 2C; raw counts by month are shown in Appendix 2B.

37. Ultimately, the data shows that Line Connection Charge waivers were granted in each and every month during this time frame. The data show that the award of waivers was not rare, was not intermittent, and was not accidental. The graphs concisely show that not only did BellSouth provide a Line Connection Charge waiver to its end users with identical orders to dPi's orders, but they did it regularly and systematically.

38. BellSouth attempts to excuse or dismiss these results by claiming that their own systems are not trustworthy. However, they admit that the data is the best data to be had.¹⁷

39. BellSouth further attempts to excuse or dismiss these results by claiming they can be attributed to other causes – for example, reconnects following disconnects done in error, or reconnects after hurricanes.¹⁸ ***However, BellSouth was unable to produce any ordering documents backing up these assertions***, and at hearing BellSouth's witness was able to talk only in vague generalities about these "other explanations" for the number of orders receiving the waiver.

40. With regards to hurricanes, an examination of the data showed no correlation between the dates of hurricane activity in Florida and the amount of orders receiving the

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Tipton, Record 318-319.

18

Tipton, Record 332.

Line Connection Charge waiver. The dates and strengths of hurricanes and tropical storms in Florida are plotted on the line chart in Appendix 2C, and show there is no apparent correlation in Florida between the presence of a storm and the frequency of line connection charge waivers given to end users. This refutes BellSouth's contention that these end users had their line connection charge waived because they are simply reconnections of service disrupted by hurricanes.

41. BellSouth's next best excuse was BellSouth's claim that 15% of the orders receiving the waiver could be explained by having been reconnected after a disconnection in error.¹⁹ But again, no documentary evidence – e.g., the orders themselves– were produced to back this claim up, and in any event, BellSouth's witness could find no information on *the majority* of the orders allowing her to attribute their existence to something other than the Line Connection Charge Waiver.²⁰

42. Ultimately, the information that can be drawn from the data is the BellSouth provided its end users who ordered 1FR plus two Touchstar Blocking features a waiver of the line connection charge regularly since at least 2003, and that for most of these, there is indication that would allow one to attribute the waiver to something such as a hurricane or some other cause. In fact, only one conclusion can reasonably be taken from this data – that the Line Connection Charge was waived pursuant to the Line Connection Charge Waiver Promotion.

19

Tipton, Record 335.

20

Tipton, Record 335.

Issue 1(b): What amount is dPi owed in connection with the Line Connection Charge Waiver Promotions?

43. The uncontested evidence shows that amount in question that dPi was wrongfully denied was \$59,210 Line Connection Charge Waiver.²¹

CONCLUSION AND PRAYER

44. As matter of law, BellSouth's witness' testimony is not competent because she had no personal knowledge of the facts, and because this testimony it is not competent but is hearsay, it cannot be used to support ultimate findings in this case.

45. The competent and credible evidence in this case shows overwhelmingly that dPi qualified for the Line Connection Charge Waiver under the promotion's express terms by placing orders for basic service plus the TouchStar Blocking Features BRC, BRD, and HBG; and that BellSouth initially interpreted and applied the LCCW promotion to waive the Line Connection Charge for both other CLECs and its own retail customers with orders configured like dPi's; that BellSouth continued to waive the Line Connection Charge for its retail customers with orders configured like dPi's even after this dispute arose. Under these facts and the law, BellSouth is required to make this promotional pricing available to dPi and dPi is entitled to \$59,210.00 in credits relating to this promotion in Florida.

21

This dollar amount comes from BellSouth's response to Staff's Interrogatory No. 5. BellSouth has provided dPi with the raw data to calculate the number itself; however, it was in paper (non-manipulable) format. .

Respectfully Submitted,

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APPENDIX 1:

ANALYZING EXHIBIT 13: BellSouth'S BILLING AND ORDERING DATA FOR RETAIL ORDERS FOR BASIC SERVICE PLUS TOUCHSTAR BLOCKING FEATURES

dPi formed and served discovery requests designed to test BellSouth's assertion that it did not provide the Line Connection Charge Waiver to its own retail customers taking just basic service plus the TouchStar Blocking Features which make up the bulk of dPi's orders.

BellSouth responded in two parts. The first set, dated September 26, 2007, contained responsive data from January 2005 to August 2007. The second set, dated November 7, 2007, and contained data from May 2003 through December 2005.

The data was extremely voluminous and dense. Together there were 1089 pages, each page containing thirty-three to thirty-eight lines of entries, and each line containing nine to ten columns of data.

All this material is included in the Record as Exhibit 13.

The data can be used to identify those new service orders placed for:

- (1) 1FR (that is, basic service);
- (2) at least 2 of the Touchstar Blocking Features;
- (3) and no other features; and
- (4) that were not charged a line connection fee.

These were the retail orders that BellSouth processed that fit the criteria of being basic service plus two Touchstar Blocking Features and being granted the Line Connection Charge waiver.

One can count these orders on a page-by-page basis. Begin with the first page of Exhibit 13 in the record, Bates stamped 000001. Per the letter of Phil Carver, orders that had their line connection charge waived were indicated by a WNR, WLC, or WSO (collectively, “W codes”) in column 6, titled “Account Waiver Code.” For instance, on 000001, seven lines are highlighted which have W codes. However, in some cases, BellSouth reproduced the same order twice (presumably because two different W codes were applied to the same account); see e.g., the fourth and fifth highlighted lines, and the sixth and seventh highlighted lines. These entries should only counted once. Also, some orders were should not be counted at all if either a subsequent order showed the customer taking additional features later (*see e.g.*, p. 000002, lines 24 and 25 (line 25 shows account in line 24 taking “ESX” or call waiting)), or if the order showed that it was not an order for basic service (*see e.g.*, p. 0002, line 15 (“1FRCL” means Caller I.D. was on the line); and line 16 (“NXMCR” is an order for Basic Service plus Caller ID Deluxe with Anonymous Call Rejection)).

Performing the count allows one to tabulate the results by month, as shown on the final page of this Appendix, which summarizes the underlying orders, and how many had the line connection charge waived

All told, Exhibit 13 shows that 5,052 1FR + 2 Touchstar Blocks orders received Line Connection Charge waivers, and 20,074 did not from May 2003 to August 2007. Of course, the 20,074 orders not receiving the waiver are presumed to include all such orders placed by customers not entitled to promotion pricing because they were not win-overs or win-backs (and of course, the majority of BellSouth’s new customers are not win-overs or win-backs.) This information is shown as a pie chart in Appendix 2 A.

More detailed analysis of this data shows that orders for 1FR + 2 Touchstar Blocks were awarded Line Connection Charge waivers approximately 28% of the time from May 2003 to December 2004, with a sharp decline in late 2004. The average for January 2005 through August 07 was approximately 14%. The month by month percentages are shown in Appendix 2C; raw counts by month are shown in Appendix 2B.

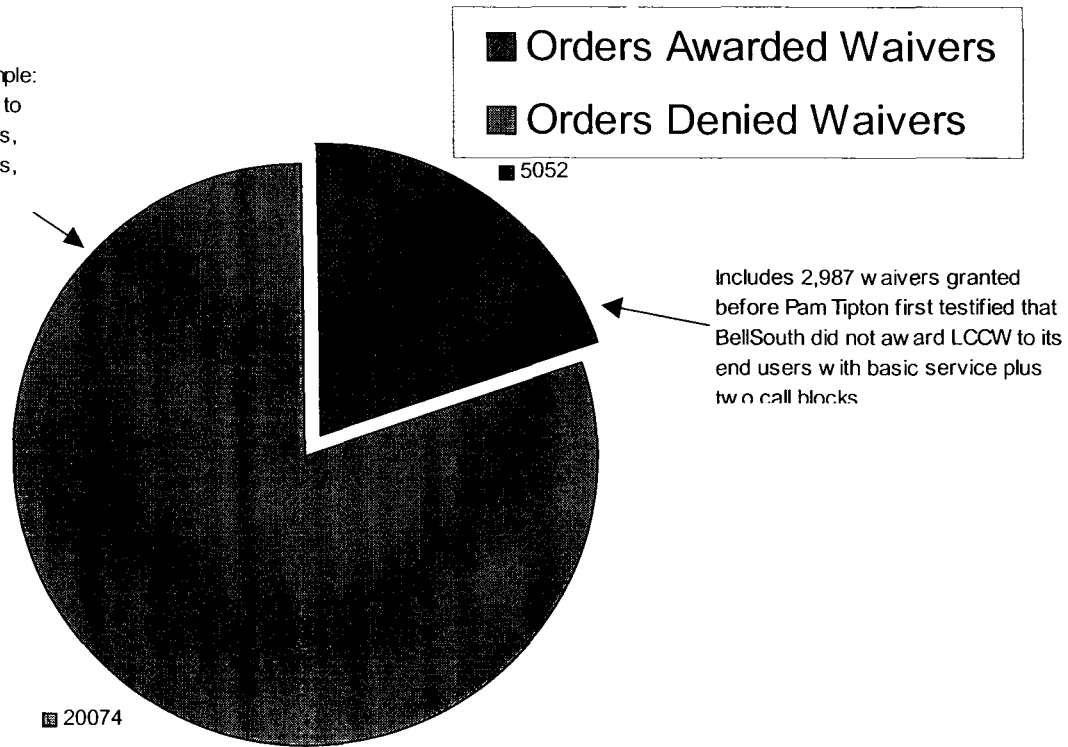
The dates and strengths of hurricanes and tropical storms in Florida are plotted on the line chart in Appendix 2C, and show there is no apparent correlation in Florida between the presence of a storm and the frequency of line connection charge waivers given to end users. This refutes BellSouth's contention that these end users had their line connection charge waived because they are simply reconnections of service disrupted by hurricanes.

Ultimately, the data shows that Line Connection Charge waivers were granted in each and every month during this time frame. The data show that the award of waivers was not rare, was not intermittent, and was not accidental. The graphs concisely show that not only did BellSouth provide a Line Connection Charge waiver to its end users with identical orders to dPi's orders, but they did it regularly and systematically.

APPENDIX 2A

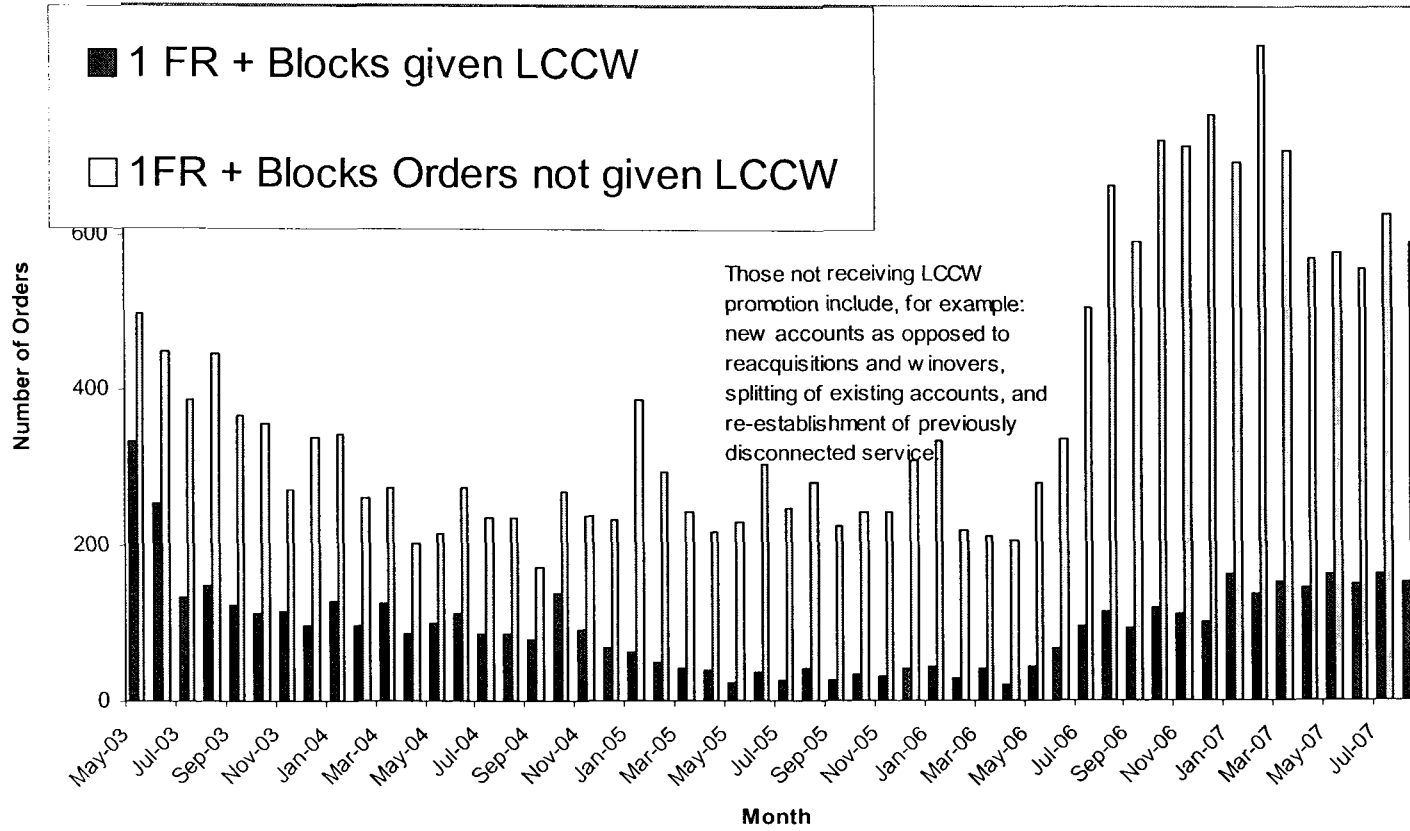
BellSouth Retail: Comparison of 1FR + 2 Blocks Orders Granted v. Not Granted LCCW from May 2003 through August 2007

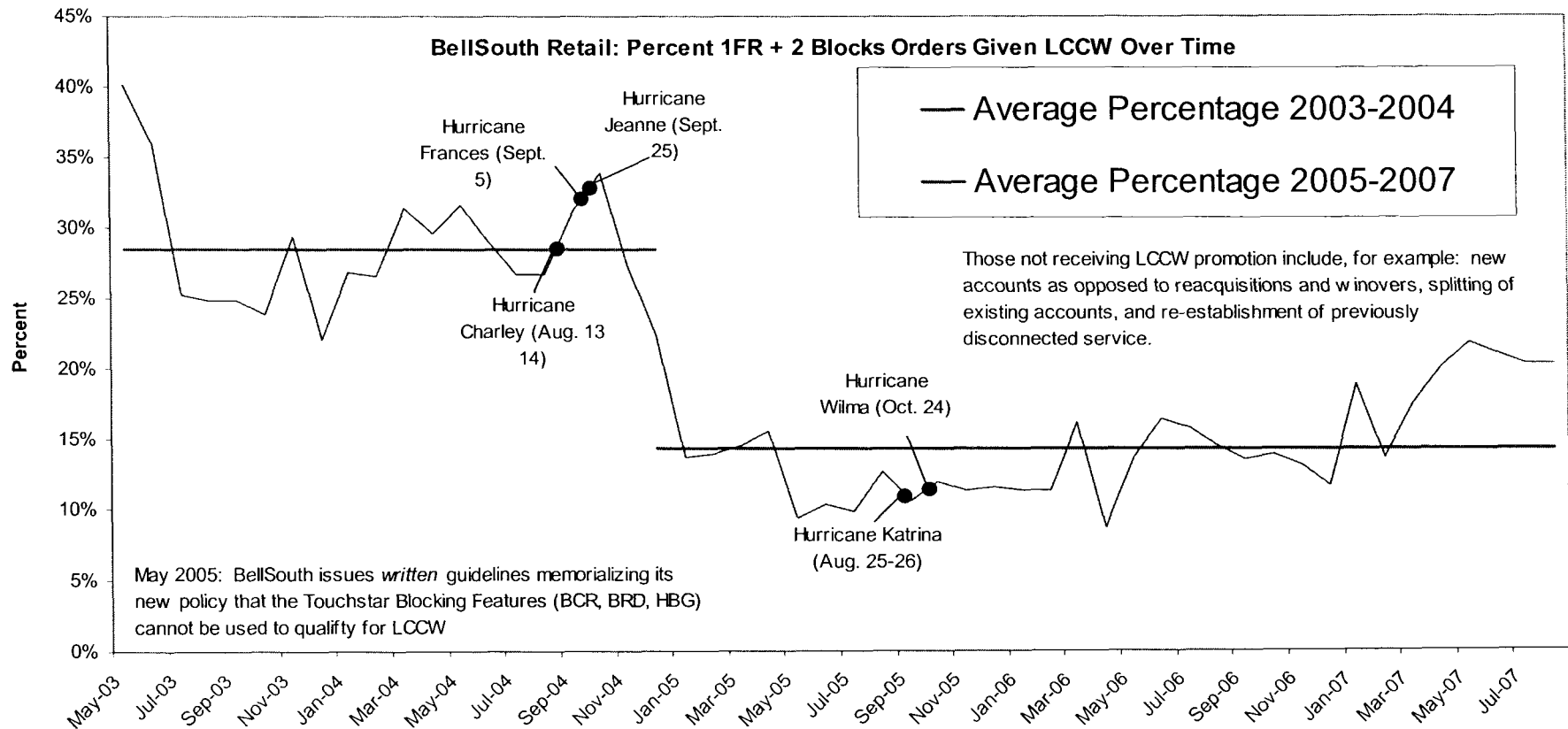
Those not receiving LCCW promotion include, for example: new accounts as opposed to reacquisitions and winovers, splitting of existing accounts, and re-establishment of previously disconnected service



APPENDIX 2B

BellSouth Retail:
Comparison of 1 FR + Blocks Granted v. Not Granted Waiver Over Time





Hurricane Strength in Florida

Charley (a category 4 storm) passed through Florida August 13-14, 2004, from Punta Gorda on the Southwest coast to Orlando on the Midwest coast.

Frances (a category 2 storm) passed through Florida September 4 and 5, 2004, from near Seawall's Point on the east coast to Tampa on the Gulf, then up through the panhandle at St. Marks on September 5.

Jeanne (a category 3 storm) passed through Florida September 25, 2004, closely following Frances' path from the East coast till it reached Pasco County near the middle of the peninsula, where it went North up the middle of the state.

Katrina (a category 1 storm) passed over southern Florida and the Keys August 25 and 26.

CERTIFICATE OF SERVICE

I hereby certify that the above document was served on counsel below as indicated on the 30th day of April, 2008

/s/ Chris Malish
Christopher Malish

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