

Ruth Nettles

090258-TP

From: Ann Bassett [abassett@lawfla.com]
Sent: Wednesday, December 16, 2009 3:10 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 090258-TP
Attachments: 2009-12-16, 090258, dPi Teleconnect, LLC's Prehearing Statement.pdf; WordPerfect 6.1

The person responsible for this electronic filing is:

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Docket No. 090258-TP - Complaint by DPI-Teleconnect, L.L.C. against BellSouth Telecommunications, Inc. for dispute arising under interconnection agreement

This filing is being made on behalf of dPi Teleconnect, L.L.C.

Total Number of Pages is 8

Prehearing Statement of dPi Teleconnect, L.L.C.

The document is also attached in WordPerfect format.

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12/16/2009

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December 16, 2009

BY ELECTRONIC FILING

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

Re: Docket No. 090258-TP

Dear Ms. Cole:

Enclosed for filing on behalf of dPi Teleconnect, LLC is the Prehearing Statement of dPi Teleconnect, LLC in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Norman H. Horton, Jr.

NHH/amb
Enclosures

cc: Chris Malish, Esq.
Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

PREHEARING STATEMENT OF DPI TELECONNECT, L.L.C.

Pursuant to the Florida Public Service Commission order of July 15, 2009, dPi Teleconnect, L.L.C. ("dPi") hereby files its prehearing statement.

A. WITNESSES

<u>Witness</u>	<u>Subject Matter</u>	<u>Issues</u>
Tom O'Roark (Direct and Rebuttal)	Mr. O'Roark's testimony concerns the promotional credits available to dPi based on services ordered from AT&T. It also evaluates AT&T's position.	1 and 2(a) and 2(b)

B. EXHIBITS

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
O'Roark (Rebuttal)	dPi	Exhibit 1	Spreadsheet showing cashback promotion amounts owed to dPi Teleconnect, LLC

C. BASIC POSITION

dPi is owed by AT&T approximately \$29,850 in promotional credits which AT&T has failed to provide in violation of federal law. Federal law and regulation is reincorporated in the parties' interconnection agreement and states that AT&T is required to extend to dPi, at wholesale rates, any

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offer that AT&T makes to its retail customers.¹ This requirement extends fully to discounted or promotional offerings.²

AT&T has provided these promotions to dPi from 2007 to present, but denied promotions prior to 2007 on the grounds that the promotions were not "services subject to resale." Because the question is no whether a promotion is a "service" but whether the promotion affects the effective rate at which the service was sold, dPi is entitled to the credits.

D. ISSUES

1. **Are dPi's claims time-barred for any reason, including without limitation the applicable statute of limitations, the terms of the parties' interconnection agreements, or application of equitable doctrines such as laches, estoppel, or waiver?**

dPi's Position:

dPi's requests for these promotion credits were timely, as they came within six years of the service date for all services provided under the contract in effect from 2003 to May 2007, and within

¹ 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."

47 U.S.C. § 251(e)(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."

47 C.F.R. § 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 LEC *OFFERS* on a retail basis to subscribers that are not telecommunications carriers for resale at wholesale rates

² The FCC found that the resale requirement of Section 251(c)(4) of the Act: "*makes no exception for promotional or discounted offerings*, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶948 (rel. Aug. 8, 1996)(footnote omitted)(emphasis added).

12 months of the service date for all services rendered under the contract in effect after May 2007.

From 2003 to the present, dPi and AT&T operated under two nearly identical interconnection agreements. The first was in effect from 2003 to May 2007. The second was in effect from May 2007 to the present. The contracts are found in the record as Exhibit PLF-1 to AT&T witness' Ferguson's testimony.

The services in dispute, for which dPi was overcharged, were provided from 2003 to June 2007 (after June 2007, AT&T began extending the cash back promotions to dPi.) Thus, the key contract for the purposes of this dispute is the first contract, in effect from 2003 to May 2007.

The contract in effect from 2003 to May 2007 provides at Section 18 of its Terms and Conditions that the Agreement will be governed 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.C.G.A. section 9-3-24. Since the earliest bill date at issue in this case is from November 2003, this case was filed well within the limitations period.

AT&T suggests that claims that were filed more than 12 months after they arose are "barred by the contract." But this would be true only for claims *that arose after the effective date of the second contract* – the one dated April 2007 and in effect from May 2007 to the present. This second contract that went into effect May 2007 does have a 12 month limitations period in it. However, this

second contract specifically provides that "*the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date.*" General Terms and Conditions sec. 2.1.³

The "Effective Date is defined as the date that the Agreement is effective for purposes of rates, terms, and conditions and shall be 30 days after the [April 2007] date of the last signature executing the Agreement." General Terms and Conditions, Definitions (p. 2), making the effective date May 2007. Accordingly, dPi's claims that arose while the old contract was in effect are governed by the old contract, in which the limitations period is six years. So, claims from prior to April 2007 were in fact timely filed.

2. (a) Is dPi entitled to credits from AT&T for the three promotions, Cash Back \$100 Two Features (C2TF), Cash Back \$100 Discount Complete Choice, and the Cash Back \$50 2 Pack Plan?

dPi's Position:

dPi is entitled to credits from AT&T relating to these promotions. As discussed above federal law and FCC regulation show that AT&T must provide the full value of promotional discounts to dPi. dPi submitted to AT&T requests for credits on lines that met the standards that AT&T set out for the promotion. dPi used a third party contractor to ensure that the requests were filed with AT&T correctly and that each individual line met the criteria for the promotion. AT&T has rejected the credit requests without providing definitive information as to why the requests were

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The second agreement does have a merger clause at section 30.1 that provides that orders placed under the prior agreement but not filled until the effective date of the new agreement, and services commenced under prior agreements but provided under the new agreement would be governed by the new agreement going forward. This provision is intended to confirm that services commenced or ordered under the earlier contract, but filled or provided after the new contract goes into effect are governed by the new contract. However, this provision does not apply to orders and service completed under the old contract. In any event, *all of dPi's claims at issue in this case were made within 12 months of the new agreement going into effect.*

rejected, although their position in the past has been that these promotions were not “services subject to resale.” Because the proper question is how the promotions affect the effective retail rate at which the service is sold, dPi is entitled to the promotional credits.

(b) If so, in what amount?

dPi’s Position:

dPi is owed by AT&T approximately \$8,100 related to the “Cash Back \$100 Complete Choice” promotion offer; \$8,900 related to the “Cash Back \$100 Two Features (C2TF)” promotion offer; and \$12,850 related to the “Cash Back \$50 2 Pack Plan” promotion offer. In total AT&T owes dPi approximately \$29,850

E. STIPULATED ISSUES

The parties have not stipulated any issues.

F. PENDING MOTIONS

dPi does not have any pending motions.

G. PENDING REQUESTS OR CLAIMS FOR CONFIDENTIALITY

dPi does not have any pending requests or claims for confidentiality

H. OBJECTIONS TO A WITNESS’ QUALIFICATIONS AS AN EXPERT


dPi is not aware that AT&T will provide any expert witnesses and as such has no objections.

I. ANY OTHER REQUIREMENT THAT CANNOT BE COMPLIED WITH

There are no other requirements that dPi cannot comply with.

Respectfully submitted,

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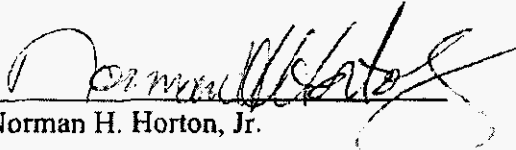
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by electronic mail (*) and/or U.S. Mail this 16th day of December, 2009.

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Norman H. Horton, Jr.