COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DPI TELECONNECT, L.L.C.	)	
	)	
COMPLAINANT	)	
	)	
V.	)	CASE NO.
	)	2009-00127
BELLSOUTH TELECOMMUNICATONS, INC.	)	
D/B/A AT&T KENTUCKY	)	
	)	
DEFENDANT	)	
	)	
	)	
DISPUTE OVER INTERPRETATION OF THE	)	
PARTIES' INTERCONNECTION AGREEMENT	)	
REGARDING BELLSOUTH'S FAILURE TO	)	
EXTEND CASH BACK PROMOTIONS TO DPI	)	

ORDER TO SATISFY OR ANSWER

BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") is hereby notified that it has been named as defendant in a formal complaint filed on March 27, 2009, a copy of which is attached hereto.

Pursuant to 807 KAR 5:001, Section 12, AT&T Kentucky is HEREBY ORDERED to satisfy the matters complained of or file a written answer to the complaint within 10 days of the date of service of this Order.

Should documents of any kind be filed with the Commission in the course of this proceeding, the documents shall also be served on all parties of record.

By the Commission

ENTERED

JUN - 2 2009

KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director

STOLL · KEENON · OGDEN
PLLC

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March 25, 2009

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

Re: ***dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky Dispute Over Interpretation of the Parties' Interconnection Agreement Regarding BellSouth's Failure to Extend Cash Bank Promotions to dPi***
Case No. 2009- 00127

Dear Mr. DeRouen:

Enclosed please find and accept for filing the original and ten copies of dPi Teleconnect, L.L.C.'s Original Complaint in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions please contact me at your convenience.

Sincerely yours,

Douglas F. Brent

DFB:ec
Enclosures
cc: Christopher Malish

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky Dispute Over Interpretation of the Parties' Interconnection Agreement Regarding BellSouth's Failure to Extend Cash Back Promotions to dPi	))))))	**CASE NO. 2009-_____**

dPi TELECONNECT'S ORIGINAL COMPLAINT

dPi Teleconnect, L.L.C. ("dPi Teleconnect,"or "dPi") brings this complaint seeking to recover cash back promotional credits from BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("BellSouth") and in support thereof, shows as follows:

I. IDENTIFICATION OF PARTIES

Complainant, dPi Teleconnect, L.L.C., is a Texas corporation headquartered at 2997 LBJ Freeway, Suite 225, Dallas, Texas 75234. Designated representatives for complainant are:

Christopher Malish
(out of state admission form to be filed)
Malish & Cowan, PLLC
1403 West Sixth Street
Austin, Texas 78703
Telephone: (512) 476-8591

and

Douglas F. Brent
Stoll Keenon Ogden PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Telephone: (502) 568-5374

BellSouth is an "incumbent local exchange carrier" ("ILEC") as defined by the Act. 47 U.S.C. §251(h). It is a Georgia corporation with its principal place of business in Atlanta.

II. FACTS AND NATURE OF THE DISPUTE

The parties' dispute arises under their interconnection agreement[1] 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. Among other things, the parties' contract provides in relevant part the following:

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

2. Nondiscriminatory Access: "When DPI purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to customers, such services shall be ... subject to the same conditions... that BellSouth provides to others, including its customers." GTC, Section 3, p. 4. Furthermore, the contract provides that "...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, General Provision sections 3.1: p. 3: (emphasis added).

3. 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 and appropriate [state] Commission...." GTC, Section 17, p. 16.

4. Dispute Resolution: "... if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party, if it elects to pursue resolution of the dispute, shall petition the Commission for a resolution of the dispute. GTC, Section 8, p. 10.

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[1] The current interconnection agreement is on file with the Commission and is available on the Commission's public website at: http://162.114.3.165/PSCICA/1998/1998-599/00109-AM_041607.pdf. The claims in this complaint relate back to an earlier interconnection agreement that was in effect at the time dPi's claims began to accrue. That agreement, at Section 30, provides for the survival of obligations that by their nature are intended to continue beyond the termination or expiration of the agreement. The agreement is available at: http://162.114.3.165/PSCICA/1998/1998-599/00109-AM_041703.pdf

Federal law provides, among other things, the following:

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."

2. 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."

3. 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."

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."

Of concern in this particular case, BellSouth has provided a number of "cash back" promotions going back to late 2003.[2] 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.

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[2] 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.

The timing appears to coincide with the Fourth Circuit's decision in *BellSouth Telecommunications Inc. v. Sanford et al.*, 494 F.3d 439 (2007), in which the Court upheld the North Carolina Commission's decision that promotions that tend to reduce the retail price paid by retail customers must be made available to CLECs.

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 dispute necessary.

This action is timely filed. The interconnection agreement between the parties provides at Section 17 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 this contract is six years. O.C.G.A. § 9-3-24. Furthermore, the contract clearly provides at General Terms and Conditions section 16 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...."

In Kentucky, dPi qualified and applied for, but was not credited, approximately $37,050 in cash back promotions. Across the 9 state BellSouth region, the total figure that dPi qualified and applied for, but was not credited, is $465,950.

III. DPI TELECONNECT'S FIRST CAUSE OF ACTION

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.

IV. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, dPi Teleconnect, L.L.C. respectfully requests that the Commission issue an order:

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,

By: _____

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