



## Procedural Background

dPi filed its complaint against AT&T Kentucky on November 9, 2005. On January 30, 2006, AT&T Kentucky and dPi filed a joint motion to hold the case in abeyance. As grounds for their motion, the parties stated that a similar case was being litigated before the North Carolina Utilities Commission and that dPi and AT&T Kentucky had reached an agreement to abate similar proceedings in Kentucky and seven other states pending a final order from the North Carolina Commission.<sup>1</sup>

The North Carolina Utilities Commission ("NCUC") issued a dispositive Order on June 7, 2006, a copy of which AT&T Kentucky filed with the Commission on June 13, 2006.<sup>2</sup> The NCUC dismissed dPi's complaint finding that, because AT&T did not extend the promotion to customers that were similarly situated to dPi's customers, dPi was not entitled to the promotional discount. The United States District Court for the Eastern District of North Carolina subsequently upheld the NCUC's determination.<sup>3</sup>

A hearing was scheduled and delayed several times at the request of all parties because they were litigating similar issues in several other states. Most recently, the parties delayed any hearings because AT&T Kentucky's counsel, who had handled the similar litigation in the other states, retired and AT&T Kentucky requested additional

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<sup>1</sup> Joint Motion to Abate at 1-2.

<sup>2</sup> AT&T Kentucky Responses to dPi's Data Requests, Item No. 1-9.

<sup>3</sup> *dPi Teleconnect, L.L.C. v. Sanford et al.*, Case No. 5:06-CV-463-D 2007 WL 2818556 (W.D. N.C. 2007)

time so that a new attorney might prepare for the case. Ultimately, the parties jointly moved to cancel the scheduled hearing and submit the case on briefs.<sup>4</sup>

### Case Summary

dPi is a competitive local exchange carrier (“CLEC”) that purchases services from AT&T Kentucky and resells them to its own customers. dPi operates as a prepaid company that offers service to credit-challenged customers.<sup>5</sup> AT&T Kentucky is an incumbent local exchange carrier (“ILEC”) and, as such, has a duty to offer any services that it offers to its customers to dPi at wholesale rates so that dPi may resell those services to its own customers. 47 U.S.C. § 251(c)(4)(A). AT&T Kentucky’s resale obligations extend to promotional discounts offered on retail communication services that extend for periods in excess of 90 days. 47 C.F.R. § 51.613(a)(2).

The details of the resale are governed by the parties’ interconnection agreement,<sup>6</sup> in which dPi essentially functions as a customer of AT&T Kentucky by purchasing the telecommunications service and then reselling it to dPi’s customers. The dispute arises under the interconnection agreement and centers on alleged credits due dPi as a result of dPi’s reselling of services allegedly subject to AT&T Kentucky promotional discounts. AT&T Kentucky denies that dPi was eligible for the promotional

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<sup>4</sup> dPi also filed a motion for an extension of time in which to file its brief. The briefs were due to be filed on March 19, 2010. dPi filed its motion and brief on April 1, 2010.

<sup>5</sup> Direct Testimony of Tom O’Roark at 14.

<sup>6</sup> The parties operated under two agreements during the period of the dispute. Once one agreement expired, another agreement was executed. The terms in the agreements are similar and the fact that there are two agreements does not affect the outcome of this case.

credits. The dispute centers on a specific promotion offered from January 2001 until November 2005.

From January 2001 until November 2005, AT&T Kentucky offered a promotion called "Line Connection Charge Waiver" ("LCCW") whereby AT&T Kentucky would waive a new customer's line connection charge if the customer ordered basic service in addition to purchasing two or more "Touchstar" features.<sup>7</sup> Pursuant to the interconnection agreement, dPi customers who qualify for the LCCW, also receive the waiver.<sup>8</sup> The dPi customer, however, does not receive the benefit of the credit. dPi receives the benefit of the LCCW waiver by paying a lower price to AT&T Kentucky for the purchased service. dPi claims that it is entitled to approximately \$44,993.11 in credits.<sup>9</sup> AT&T Kentucky denies this claim.

When applying the discount, AT&T Kentucky customers receive the LCCW from inception. CLECs pay the wholesale price for resale, subsequently determine which of their customers qualify for the LCCW, and submit an application to AT&T Kentucky for the discounts, which AT&T Kentucky provides in the form of credits to the CLECs' accounts.<sup>10</sup>

The parties' interconnection agreement provides that:

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<sup>7</sup> Exhibit PLF-2 (Letter to the Commission dated December 7, 2005).

<sup>8</sup> Exhibit A to the Resale Attachment to the Interconnection Agreement.

<sup>9</sup> Complaint at 2, Direct Testimony of Tom O'Roark at 17.

<sup>10</sup> O'Roark Direct Testimony at 7.

[W]here available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by AT&T Kentucky directly.<sup>11</sup>

AT&T Kentucky claims it only applies the LCCW for customers who order two or more "TouchStar" features for which an additional charge is made.<sup>12</sup> AT&T Kentucky's tariff contains many vertical features described as "TouchStar" features. Some of the features deemed as "order blocking" (return block, repeat dialing block and call tracing block) are provided at no charge. These free features block a customer from accessing the call return, repeat dialing and call tracing TouchStar features for which the customer would have to pay an additional charge.<sup>13</sup>

dPi provides the "order blocking" features free of charge to its customers and, therefore, argues that those customers qualify for the LCCW. dPi's customers do not request the order blocking features; dPi automatically provides the blocking features.<sup>14</sup> AT&T Kentucky argues that, because those TouchStar features are provided at no charge, even to its own customers, the LCCW should not be credited for those dPi customers. AT&T Kentucky also argues that it does not provide its own customers the LCCW for those customers that order blocking features out of the TouchStar tariff.

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<sup>11</sup> Exhibit A to the Resale Attachment to the Interconnection Agreement.

<sup>12</sup> Direct Testimony of Ferguson at 50.

<sup>13</sup> AT&T Kentucky Tariff, Section A13.19.2A.

<sup>14</sup> Exhibit A to AT&T Kentucky's Brief, 2006 NCUC Transcript at 81-82.

## dPi's Position

dPi argues that it is entitled to the promotional credits because an order for basic service plus blocking features qualifies for the promotion pursuant to the promotion's plain language and AT&T Kentucky's original interpretation of that language.<sup>15</sup>

dPi argues the plain language of the promotion states a qualifying order includes the purchase of BellSouth basic service and two custom calling (or TouchStar service) local features. dPi further argues that call return block ("BCR"), repeat dialing block ("BRD"), and call tracing block ("HBG") are all TouchStar services.<sup>16</sup> Because dPi's basic service always includes at least two TouchStar blocking features, dPi argues that its customers are always qualified for the promotion and thus for the promotional credits.<sup>17</sup>

dPi also argues that blocks are features because:

1. AT&T Kentucky employees referred to blocks as features in communications with dPi; and,
2. Blocks are identified as "features" in AT&T Kentucky's tariff; specifically, BCR, BRD, and HBG are described and have their own Universal Service Ordering Code ("USOC") in the TouchStar section of AT&T Kentucky's tariff.<sup>18</sup>

dPi argues that AT&T Kentucky is imposing additional terms not in the promotion when it argues that blocking does not qualify for the promotion because it is not

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<sup>15</sup> dPi Final Brief at 3.

<sup>16</sup> dPi Final Brief at 4-6.

<sup>17</sup> Id. at 7-8.

<sup>18</sup> dPi Final Brief at 6.

purchased for a separate amount. The promotion's plain language does not require the features to be purchased separately. dPi also claims that if AT&T Kentucky actually meant to exclude blocks from the promotion, it would have drafted limiting language listing features expressly excluded or included in the promotion.<sup>19</sup>

dPi refutes AT&T Kentucky's claim that payments to other CLEC's with orders for basic service plus blocking features were mistakes or the result of "stealing" by CLECs with the allegation that AT&T Kentucky never attempted to backbill or collect the promotion credits paid in error.<sup>20</sup>

Additionally, dPi argues that the evidence in the record (from discovery in the Florida proceeding) document that AT&T provided waivers to retail customers with orders for basic service plus blocking features. dPi further argues that AT&T has not produced evidence that the waivers were due to reasons other than the promotion.<sup>21</sup>

Lastly, dPi argues that it is entitled to the same offers made to AT&T Kentucky customers regardless of how dPi repackages or markets those services. Conditioning dPi's eligibility for the promotion upon whether dPi customers specifically request the features violates the law, because AT&T Kentucky must make available to CLECs whatever offers it makes to its customers, dPi argues that this condition also violates the terms of the parties' interconnection agreement.<sup>22</sup>

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<sup>19</sup> Id. at 8, 9.

<sup>20</sup> Id. at 10-11.

<sup>21</sup> Id. at 12-13.

<sup>22</sup> Id. at 13-15.

### AT&T Kentucky's Position

AT&T Kentucky argues that blocks are not the same thing as features. Thus, dPi's end users did not qualify for the promotion and dPi is not entitled to credits for the promotion. AT&T Kentucky has four main arguments as to why dPi is not entitled to the promotional credits.

First, AT&T Kentucky argues that dPi end users must meet the same promotion criteria as AT&T Kentucky end users. dPi is not entitled to promotional credits because its end users did not qualify under the terms of the promotion.<sup>23</sup>

Second, AT&T Kentucky asserts that the parties' interconnection agreement provides that resale promotions are available only to end users who would have qualified had the promotion been offered by AT&T Kentucky and AT&T Kentucky does not consider blocks to be features. Therefore, the purchase of basic service and two blocks is not the equivalent of the purchase of basic service and two features.<sup>24</sup>

Third, AT&T Kentucky argues that its end user who ordered only basic service and two blocks would not qualify for the promotion. Likewise, dPi's end users who ordered basic service and two blocks did not qualify for the promotion. (Under this argument, it does not matter whether dPi or its end users ordered the blocks). Thus, dPi end users did not qualify for the promotion. Because dPi end users did not qualify for the promotion, dPi is not entitled to the promotional credits.<sup>25</sup>

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<sup>23</sup> AT&T Kentucky Brief at 8.

<sup>24</sup> Id. at 12-14.

<sup>25</sup> Id. at 12.



Lastly, AT&T Kentucky argues that, because blocks are not features themselves, dPi does not qualify for promotional credits.<sup>26</sup>

AT&T Kentucky points to the price structure in its Tariff and Price List to highlight the difference between a block and a feature. Features are services offered in addition to basic service. Features are priced accordingly with a charge above and beyond basic telephone service. In contrast, blocks, although listed under TouchStar features, are offered to end users free of charge.<sup>27</sup> The price difference reflects the different purpose of a block. A block prevents the end user from accessing additional services and thus accruing charges beyond the price for basic service.<sup>28</sup>

AT&T Kentucky argues that the promotion required the purchase of features. Neither dPi nor its end users purchased the blocks.<sup>29</sup> AT&T Kentucky asserts that the promotion required end users to purchase additional services at an additional price. The blocks are provided free of charge and because the blocks dPi ordered for its end users were provided free of charge by AT&T Kentucky, the blocks are not purchased features. Because no services were purchased, AT&T Kentucky argues the terms of the promotion were not met and dPi is not entitled to promotional credits.<sup>30</sup>

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<sup>26</sup> Id. at 9-11.

<sup>27</sup> Exhibit PLF-4, AT&T Kentucky Tariff, Section A13.19.2.A to P.

<sup>28</sup> AT&T Kentucky notes that its position that a block is not a feature itself has been upheld in federal district court in Florida in *dPi Teleconnect, L.L.C. v. Florida Public Service Commission*, Case No. 4:08-cv-00509, 2009 WL 2603144 (N.D. Fla. 2009).

<sup>29</sup> AT&T Kentucky Brief at 12, Exhibit PLF-2 (Letter to Commission dated December 7, 2005.)

<sup>30</sup> Id. at 13.

AT&T Kentucky also argues that the promotional order must be the result of an actual order from an end user. As noted above, the parties' interconnection agreement provides that promotions available for resale are available only to end users who would have qualified had the promotion been offered by AT&T Kentucky. AT&T Kentucky argues that this term implicitly requires that dPi treat its end users just as AT&T Kentucky does. AT&T Kentucky requires that the order result from an actual order placed by an end user. AT&T Kentucky argues that dPi's end users placed none of dPi's orders; they were placed by dPi itself without the knowledge of its end users. Because dPi, and not its end users, placed the orders, dPi end users do not qualify for the promotion and dPi is not entitled to the promotional credits.<sup>31</sup>

AT&T Kentucky also raises four other issues. First, AT&T Kentucky asserts that it did not provide promotional credits to its end users who purchased basic service and requested free blocks. Discovery in a separate action in Florida documents that AT&T (in various states) waived charges, including line connection charges, when customers ordered basic service and call blocks. However, AT&T Kentucky argues this was not part of the promotion at issue but was due to other reasons, such as natural disasters, bill splitting provisions, and errors.<sup>32</sup>

Second, AT&T Kentucky asserts that its mistaken payments of promotional credits to other CLECs does not entitle dPi to receive promotional credits. AT&T Kentucky states it relied on an honor system in processing promotional credits until it discovered that some CLECs received credits to which they were not entitled. AT&T

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<sup>31</sup> Id. at 13-14.

<sup>32</sup> Id. at 15-17.

Kentucky revamped its procedures to ensure all credit requests actually qualified for the promotional credit. AT&T Kentucky argues that its mistake is not a valid basis to award credits to dPi for which it is not entitled.<sup>33</sup>

Third, AT&T Kentucky asserts that it never agreed with dPi's interpretation of the language of the promotion that blocking was a feature. It argues that dPi erroneously equated AT&T Kentucky's confirmation of receipt of electronic submission of credit request with approval of dPi's credit request, and thus an agreement with dPi's interpretation of the promotion terms.<sup>34</sup>

Fourth, AT&T Kentucky asserts that it did not deny dPi's credit requests because the amounts were large. Credit request payments were delayed while AT&T Kentucky verified the same qualifying criteria being applied to CLEC's promotional credit requests as to retail customers. AT&T Kentucky denies any intent to avoid paying the promotions.<sup>35</sup>

#### Discussion

Under AT&T Kentucky's procedures, dPi pays the wholesale price for services and then applies for promotional credits. In this instance, dPi purchased basic service from AT&T Kentucky and instructed AT&T Kentucky to block all features that customers could use on a charge-per-use basis; features such as call return, repeat dialing and call tracing. dPi "ordered" these free blocks under the Touchstar services tariff. dPi ordered the blocks because dPi sells prepaid phone services to non-credit-worthy

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<sup>33</sup> Id. at 19-20.

<sup>34</sup> Id. at 20.

<sup>35</sup> Id. 21-22.

customers. dPi ordered the blocks, not as additional services or features for its customers, but to prevent its customers from incurring additional charges, charges that dPi would be hard pressed to recover. As the District Court noted in the North Carolina action, “[e]ssentially, dPi blocks features that could result in a per-use charge in order to make more money.”<sup>36</sup>

The primary language of the interconnection that governs this complaint states:

Where available for resale, promotions will be made available only to End Users who would have qualified for the promotion had it been provided by [AT&T Kentucky] directly.<sup>37</sup>

Pursuant to the clear language of the above provision, promotions are only available to the extent that end users would have qualified for the promotion if the promotion had been provided by AT&T Kentucky directly. Thus, if AT&T Kentucky did not provide a promotional discount to its customers, then dPi is not entitled to the credit. AT&T Kentucky, via its written testimony, asserts that it does not extend the LCCW promotion to its end users that order only blocks in addition to basic service.

dPi presented evidence from the parallel proceedings in Florida and North Carolina. In the Florida proceeding, dPi presented evidence that some AT&T Florida customers that ordered basic service and blocking features received the LCCW. AT&T Florida explained that those occasions were anomalies caused by billing errors caused by natural disasters in Florida during a particularly active time of tropical weather. The Florida Commission dismissed dPi’s complaint, finding that, in order for a customer to

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<sup>36</sup> *dPi Teleconnect, L.L.C. v. Sanford et al.*, Case No. 5:06-CV-463-D, 2007 WL 2818556 (W.D. N.C. 2007) \*2.

<sup>37</sup> Exhibit A to the Resale Attachment to the Interconnection Agreement.

qualify for the LCCW, the customer had to purchase TouchStar features for an additional price. The Florida Commission concluded that, because the blocking features were not purchased at an additional price, they did not qualify a customer solely ordering those features for the LCCW. The United States District Court for the Northern District of Florida upheld the Florida Commission's determination.

In the North Carolina proceeding, AT&T North Carolina argued that, in the cases where it extended LCCW credits to CLECs that did not qualify, it was due to the CLECs' dishonesty in applying for credits to which they were not entitled (up and until that point AT&T<sup>38</sup> had relied on an "honor" system for the request of credits). When AT&T changed the verification procedures for receiving promotional credits, the anomalies were eliminated.

Despite the two exceptions listed above (which did not occur in Kentucky), dPi has presented no evidence that AT&T Kentucky extends the LCCW to its customers that order only basic service and blocking features. Specifically, dPi presents no evidence that AT&T Kentucky incorrectly extended such credits to its customers in Kentucky. The lack of contradictory evidence is dispositive; dPi cannot sustain its case

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<sup>38</sup> The changes in the verification procedure occurred in all of the AT&T entities that formerly composed BellSouth.

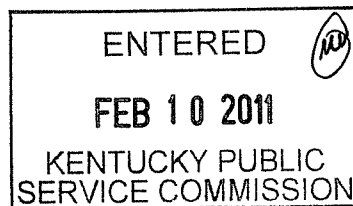
against AT&T Kentucky.<sup>39</sup>

Based on the above and on dPi's lack of evidence refuting AT&T Kentucky's assertions, the Commission finds that dPi's complaint against AT&T Kentucky should be dismissed.

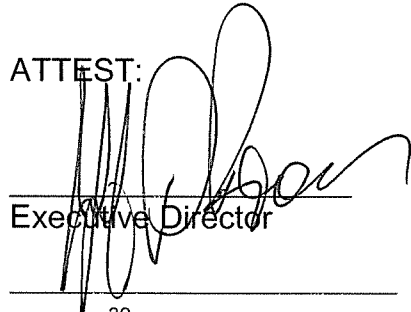
IT IS THEREFORE ORDERED that:

1. This case is dismissed and removed from the Commission's Docket.
2. dPi's motion for an extension of time in which to file its brief is granted, and the brief is accepted for filing as of April 1, 2010.
3. This is a final and appealable order.

By the Commission



ATTEST:

  
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Executive Director

<sup>39</sup> Even if dPi could prove that AT&T Kentucky had extended some of those credits, its arguments would still fail. The Commission finds that the blocks are not features as contemplated by the promotion. In doing so, the Commission agrees with the Florida District Court which concluded that the:

[B]locks of features placed on phone lines by dPi, without their customers request or consent, were not the same as features purchased by customers. To the contrary, the blocks actually prevent features from being accessed by the customers.

*dPi Teleconnect L.L.C. v. The Florida Public Service Commission et al. and Bellsouth Telecommunications d/b/a AT&T Florida, United States District Court for the Northern District Court of Florida, Case no. 4:08-cv-00509-RS-WCS, Order at 2 (Issued August 21, 2009.)*

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