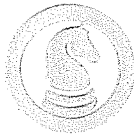

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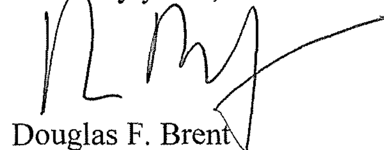
June 10, 2008



Ms. Stephanie L. Stumbo
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

RE: dPi Teleconnect v. BellSouth Telecommunications
Case No. 2005-00455

Dear Ms. Stumbo:

Enclosed please find an original and ten copies of dPi Teleconnect's Response to AT&T Kentucky's Motion to Compel in the above-captioned case.

Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via the enclosed self-addressed, postage-paid envelope.

Sincerely yours,

Douglas F. Brent

cc: J. Philip Carver, Sr.
Mary Keyer

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
JUN 1 2 2008
PUBLIC SERVICE
COMMISSION

In the Matter of:

DPI TELECONNECT, LLC	)	
	)	
v.	)	**CASE NO. 2005-00455**
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	

DPI TELECONNECT, LLC'S RESPONSE
TO AT&T KENTUCKY'S MOTION TO COMPEL

dPi Teleconnect, LLC (dPi") objected to certain BellSouth Telecommunications ("AT&T" or AT&T Kentucky") data requests, and AT&T Kentucky seeks an order requiring dPi to answer 15 of the 41 requests. AT&T's motion to compel should be denied because the information it seeks – information related to dPi's interactions with third parties – is utterly irrelevant and not likely to lead to the discovery of admissible evidence in this case. While dPi is aware that the Commission's Rules of Procedure are generally silent with respect to discovery and that the scope of discovery is usually broad, the AT&T data requests taken up in the motion to compel are improper. The only question before the agency is whether is AT&T is required to extend promotional pricing for which AT&T's retail customers qualify to dPi as a wholesaler. Thus, while it is appropriate to explore the meaning and construction of the LCCW promotion at issue, as well as AT&T's past practices in making the promotion pricing available to its retail and other wholesale customers, AT&T's inquiries into dPi's relations with third parties have no bearing on the questions the Commission must answer. As discussed below, the AT&T requests dPi objected to are nothing more than a sideshow and a diversion. AT&T's motion must be denied.

Analysis

Under Kentucky's Rules of Civil Procedure, discovery is allowed if the request is relevant or reasonably likely to lead to the discovery of relevant evidence.[1] The scope of permissible discovery is limited by the requirement of relevance. The Commission may disallow discovery if the burden exceeds the probative value of the evidence.[2] Clearly, discovery of matter not reasonably likely to lead to the discovery of relevant evidence is not within the scope of the rule.[3]

AT&T contends that it is entitled to discovery on dPi's relations with third parties (i.e., dPi's customers) based on its interpretations of a footnote to a schedule to an appendix to the contract between the parties. AT&T suggests that this footnote means that dPi qualifies for promotions only if dPi's customers order things from dPi the way that AT&T's customers order from AT&T, and thus that it is allowed to conduct discovery about dPi's interactions with dPi's customers. But AT&T's motion to compel makes clear the improper purpose behind the questions to which dPi objected: AT&T's theory is that dPi has some type of obligation to disclose to its own customers every feature dPi utilizes in *configuring* its retail service. *See* AT&T Motion to compel at 2 ("dPi places on the line". . . blocks, without the customer's request or consent). AT&T claims that unless dPi's customers have specifically requested that their service be configured in a certain way, dPi can not be eligible for the LCCW promotions. AT&T's discovery is aimed at propping up its innuendo that dPi has somehow deceived its customers. That motive would not justify discovery under the Civil Rules. As the Supreme

---

[1] *See* Ky. Civil Rule 26.02(1); 34.01.
[2] Here, because it is utterly irrelevant, the probative value of the information requested is zero, and thus the burden of producing the material necessarily exceeds the probative value of the information requested.
[3] *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351-52 (1978).

Court has stated, in deciding whether a request comes within the discovery rules, a decision maker does not have to "blind itself to the purpose for which a party seeks information."[4]

Moreover, AT&T's interpretation of this footnote is wrong, as it contradicts the rest of the contract. But even if this footnote language could be interpreted in the way AT&T claims, it is unenforceable because it violates federal law, which requires AT&T to extend to CLECs (such as dPi) the same promotions it extends to its retail customers. In short, regardless of what the footnote says, AT&T is required by federal law to make the promotions at issue available to dPi, and the footnote cannot trump federal law. Thus, AT&T's contentions are irrelevant, as are the interactions between dPi and dPi's end users. Because they are irrelevant, and cannot lead to the discovery of relevant evidence, these requests must be denied.

<u>What the law says on resale and the resale of promotions</u>

Under 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." ILECS may not "prohibit, [or] impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service." 47 U.S.C. § 251(c)(4)(B). This applies equally to short term promotions lasting 90 days or more. 47 C.F.R. § 51.613(a)(2).

<u>The contract is intended to conform and apply federal law</u>

Contrary to AT&T's assertions, the contract was intended to apply and conform to federal law. It states that the parties wish to interconnect "pursuant to Sections 251 and 252 of the Act" at GTC p.1. It provides point-blank that "... this agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC...." GTC p. 15. It provides for "Parity" and states that "When

[4] *See id.* at 353, n. 17.

DPI purchases Telecommunications Services from BellSouth pursuant to ... this Agreement for the purposes of resale to End Users, such services shall be ... subject to the same conditions... that BellSouth provides to its ...End Users." GTC p. 3. The agreement's Resale Attachment's General Provision sections 3.1: p. 4 provide 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."

Consequently, the one question in this case is: Did the orders dPi placed qualify for AT&T's Line Connection Charge Waiver? The qualifying language for the promotion is as follows:

> The line connection charge to reacquisition or winover residential customers who currently are not using BellSouth for local service and who purchase BellSouth Complete Choice service, BellSouth Preferred Pack service, or basic service and two (2) features will be waived.

Accordingly, the only relevant questions are whether the orders dPi places qualify for the promotion. To make this determination, one needs to know the qualifications of the promotion, and perhaps AT&T's practices in extending the promotion to its retail customers and other wholesalers. Logically, dPi's relations with third parties are completely irrelevant to this inquiry.

However, since AT&T's requests concern dPi's end users, including information on what features were offered them, how much they were billed, what efforts dPi went through to ensure that the customers were aware that they were given call blocks, etc., dPi properly objected to these questions insofar as they attempt to pry into dPi's relationship with its customers--as a matter of law these dealings cannot be relevant to the determination the agency must make. Because the law is concerned only with whether AT&T makes AT&T's promotions available to

resellers like dPi, and not dPi's interactions with third parties, AT&T's requests are irrelevant to the question of whether promotional credits should be granted.

Conclusion

The information sought to be compelled cannot be relevant, and no colorable argument can be made that information about relationships between dPi and third parties is in any logical way relevant to these proceedings. Because none of the information requested can help the Commission or any other party better answer the question of whether one qualifies for the LCCW promotion by ordering basic service plus the TouchStar Blocking Features, it is utterly irrelevant and inadmissible. AT&T's Motion to Compel should be denied.

Respectfully submitted,

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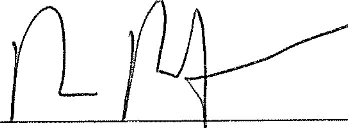
CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing document has been filed with the Kentucky Public Service Commission and served upon Defendant BellSouth through its below-listed attorneys on this 10th day of June 2008.



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