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January 26, 2010

VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: dPi Teleconnect LLC, Complainant v. BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky, Defendant
PSC 2005-00455

Dear Mr. Derouen:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of AT&T Kentucky's Notice of Filing.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Mary K. Keyer

Enclosures

cc: Parties of Record

774613

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

DPI TELECONNECT, L.L.C	)	
	)	CASE NO.
COMPLAINANT	)	2005-00455
	)	
v.	)	
	)	
BELLSOUTH TELECOMMUNICATION, INC. D/B/A AT&T KENTUCKY	)	
	)	
DEFENDANT	)	

AT&T KENTUCKY'S NOTICE OF FILING

BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky, by counsel, hereby files the attached orders entered in North Carolina and Florida regarding the same issues as are present in this docket. The Commission in its Order dated March 2, 2006, held the case in abeyance pending the outcome of the North Carolina case and required the Parties to provide periodic reports on the status on the North Carolina proceedings until this matter is resolved. On January 26, 2007, the Commission issued an order stating the case was no longer being held in abeyance following the North Carolina Utilities Commission's ("NCUC") ruling on June 7, 2006, in favor of AT&T Kentucky, and subsequent ruling on October 12, 2006, denying dPi Teleconnect, L.L.C."s ("dPi") motion for reconsideration. Since that time, several orders have been issued in both North Carolina and Florida regarding the same issues that are before this Commission in this docket.

The federal district court for the Eastern District of North Carolina on September 25, 2007, denied dPi's motion for summary judgment and granted the NCUC's and AT&T North Carolina's motions for summary judgment and upheld the NCUC's order of June 7, 2006, against dPi. *See dPi Teleconnect, L.L.C. v. Jo Anne Sanford, et al.*, United States District Court for the Eastern District of North Carolina, Western Division, Case No. 5:06-CV-463-D, Order (Issued September 25, 2007), attached hereto as **Exhibit A**. dPi appealed the court's September 25, 2007, order to the Fourth Circuit Court of Appeals. No decision has been rendered in that appeal.

The NCUC denied on July 18, 2008, dPi's second motion to reconsider the NCUC's order dated June 7, 2006, dismissing dPi's complaint against BellSouth (now d/b/a AT&T North Carolina). *See dPi Teleconnect v. BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina*, North Carolina Utilities Commission, Docket P-55, Sub 1577, Order Denying dPi's November 19, 2007 Motion to Reconsider (Issued July 18, 2008), attached hereto as **Exhibit B**. dPi's motion was based on alleged new evidence discovered in the Florida case.

The federal district court for the Eastern District of North Carolina denied on April 16, 2009, dPi's motion to set aside the court's September 25, 2007, order denying dPi's motion for summary judgment and granting the NCUC's and AT&T North Carolina's motions for summary judgment. *See dPi Teleconnect, L.L.C. v. Jo Anne Sanford, et al.*, United States District Court for the Eastern District of North Carolina, Western Division, Case No. 5:06-CV-463-D, Order

(Issued April 16, 2009), attached hereto as **Exhibit C**. dPi's motion was based on alleged new evidence discovered in the Florida case.

The Florida Public Service Commission found for BellSouth (now d/b/a AT&T Florida) and ordered on September 16, 2008, that dPi was not entitled to any credits in the instant docket or any other promotional credits from AT&T Florida. *See In re: Complaint by DPI-Teleconnect, L.L.C. against BellSouth Telecommunications, Inc. for dispute arising under interconnection agreement*, Florida Public Service Commission, Docket No. 050863-TP, Order No. PSC-08-0598-FOF-TP (Issued September 16, 2008), attached hereto as **Exhibit D**.

Lastly, on August 21, 2009, the federal district court for the Northern District of Florida, affirmed the Florida PSC's order dated September 16, 2008, in favor of AT&T Florida. *See dPi Teleconnect, L.L.C. v. The Florida Public Service Commission et al. and BellSouth Telecommunications, Inc. d/b/a AT&T Florida*, United States District Court for the Northern District Court of Florida, Panama City Division, Case No. 4:08-cv-00509-RS-WCS, Order (Issued August 21, 2009) attached hereto as **Exhibit E**.

Respectfully submitted,

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TELECOMMUNICATIONS, INC.
D/B/A AT&T KENTUCKY

770315

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:06-CV-463-D

dPi TELECONNECT, L.L.C.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
JO ANNE SANFORD, et al.,	)	
	)	
Defendants.	)	

Plaintiff dPi Teleconnect, L.L.C. ("dPi" or "plaintiff") filed a complaint seeking declaratory and injunctive relief from an order of the North Carolina Utilities Commission ("NCUC") denying dPi's claim for promotional credits from defendant BellSouth Telecommunications, Inc. ("BellSouth"). The defendant Commissioners of the NCUC ("Commissioners"), who are sued in their official capacities, filed a motion to dismiss for lack of subject matter jurisdiction. Thereafter, the parties filed cross motions for summary judgment. As explained below, the court denies the Commissioners' motion to dismiss, grants the Commissioners' and BellSouth's motions for summary judgment, and denies plaintiff's motion for summary judgment.

I.

The Telecommunications Act of 1996 ("1996 Act") regulates local telephone markets and imposes various obligations on incumbent local exchange carriers ("ILECs") to foster competition, including requirements for ILECs to share their networks with competitors. See 47 U.S.C. § 251 et seq.; Verizon Md., Inc. v. Public Serv. Comm'n, 535 U.S. 635, 638 (2002) ("Verizon Md."); MCImetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc., 352 F.3d 872, 874-76 (4th Cir. 2003). The duties under the 1996 Act require, inter alia, ILECs 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(c)(4); see BellSouth Telecomms., Inc. v.

Sanford, 494 F.3d 439, 441 (4th Cir. 2007). This resale obligation extends to promotional offerings that last longer than 90 days. See 47 C.F.R. § 51.613.

Plaintiff is a competitive local exchange carrier ("CLEC") certified by the NCUC to provide local telephone service in North Carolina. See Compl. ¶ 4. Pursuant to section 251(c)(4), plaintiff purchases retail services at wholesale rates from BellSouth, an ILEC, and resells the services to plaintiff's residential customers. See id. ¶¶ 5, 10. Pursuant to the 1996 Act, dPi and BellSouth voluntarily negotiated an interconnection agreement, and the NCUC approved the interconnection agreement. The interconnection agreement states, inter alia, that "[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 BellSouth directly." R. at 222.[1]

From January 2004 through November 2005, BellSouth offered a Line Connection Charge Waiver ("LCCW") promotion to attract subscribers. See id. at 594 ¶ 5 (NCUC Order). Under the LCCW promotion, BellSouth waived the line connection charge for new residential customers who purchased basic service and at least two custom calling features. See id. at 190.[2] These features

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[1]The parties manually filed the record from the proceedings before the NCUC. Cites to the agency record are "R. at __."

[2]The promotion reads in part:

> **Promotion Specifics:**
> Specific Features of this promotion are as follows:
> Waived 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® PreferredPack℠ service, or basic service and two (2) features will be waived.
>
> **Restrictions/Eligibility Requirements:**
> . . .
> The customer must switch their local service to BellSouth and purchase 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.

R. at 190.

included call return, repeat dialing, and call tracing. See id. at 191-93 ("Definitions of Feature Offerings" in BellSouth General Subscriber Service Tariff). BellSouth allowed its customers to block these features on a per use basis without charge. Id.

Under BellSouth's procedures, CLECs must pay the wholesale price for services and then apply for any promotional credits -- including the LCCW promotional credit -- to which they are entitled. See Compl. ¶ 12. dPi purchased basic service from BellSouth and instructed BellSouth to block all features that customers could use on a charge-per-use basis, including call return, repeat dialing, and call tracing. Id. dPi wanted these features blocked because dPi sells pre-paid phone services to "non-credit worthy" customers. Mem. in Supp. of Pl.'s Mot. for Summ. J. 16. If dPi did not block features that result in a per-use charge, dPi's customers could use the feature and thereby incur an expense. dPi would have difficulty recouping that expense because it sells pre-paid phone services and does not bill customers after-the-fact for such charges. Essentially, dPi blocks features that could result in a per-use charge in order to make more money. See Commissioners' Mem. in Resp. to Pl.'s Mot. for Summ. J. 2-3.

BellSouth added the feature blocks -- call return block ("BCR"), repeat dialing block ("BRD"), and call tracing block ("HBG") -- at no charge to dPi. dPi then resold the basic service with the feature blocks to its customers as a single pre-paid package. See Compl. ¶¶ 15, 17. dPi applied for the LCCW promotional credit on these resales, but BellSouth denied dPi's applications on resales in which dPi's customers did not purchase basic service and two or more features other than the feature blocks. See id. ¶ 17.

On August 25, 2005, plaintiff filed a complaint against BellSouth with the NCUC. R. at 1-5. Following an evidentiary hearing, the NCUC dismissed the complaint on June 7, 2006. Id. at 592-600. The NCUC concluded that:

> dPi urges the Commission to intervene in this dispute to divine the "proper" meaning of the promotion and require BellSouth to pay the appropriate credits. Were it to do so, the Commission would resort to various judicially acknowledged rules to assist it in interpreting the promotion. However, after careful consideration,

> the Commission concludes that we are not required to analyze and decide this case based on the language of the promotion. The fact is that BellSouth and dPi jointly agreed to methodology for determining the limits of any promotion in their voluntarily negotiated interconnection agreement. The following language governs this Commission's interpretation of this promotion:
>
> > "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 BellSouth directly." [citation omitted].
> >
> > Under the clear language of this provision, promotions are *only* available to the extent that end users would have qualified for the promotion if the promotion had been provided by BellSouth directly. In [BellSouth] Witness Tipton's testimony, she stated emphatically that BellSouth does not authorize promotional discounts to its End Users who only order basic services and the blocks provided by dPi. [citation omitted]. This fact was uncontested by dPi at the hearing and unrebutted in its post hearing brief. The Commission assumes that, if dPi had any contradictory evidence, it would have brought that evidence to our attention. This fact is dispositive. Under the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are *not* eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits. dPi's complaint should therefore be denied.

Id. at 598 (emphasis in original).

On July 6, 2006, plaintiff filed a motion for reconsideration. See id. at 601-10. After a full briefing, the NCUC denied the motion for reconsideration on October 12, 2006. See id. at 632-38. The NCUC found plaintiff's arguments on the motion for reconsideration to be "identical" to its earlier assertions before the NCUC and held that "nothing in the record suggests that BellSouth applies the promotional language in any manner other than that described by BellSouth's witness." Id. at 637.

On November 11, 2006, plaintiff filed a complaint in this court against BellSouth and the individual members of the NCUC in their official capacities. Plaintiff seeks a declaration that the NCUC order is contrary to the 1996 Act and that plaintiff is entitled to the LCCW promotional credits. See Compl., Prayer for Relief ¶ 1. On January 8, 2007, the Commissioners filed a motion to dismiss the complaint for lack of subject matter jurisdiction. BellSouth did not join in the motion to dismiss. On May 4, 2007, plaintiff, the Commissioners, and BellSouth filed motions for summary judgment. On September 12, 2007, the court heard oral argument on all motions.

II.

The Commissioners argue that the court lacks subject matter jurisdiction because plaintiff's complaint does not raise a federal question. Plaintiff responds that jurisdiction is proper under 47 U.S.C. § 252(e)(6) or 28 U.S.C. § 1331. See Verizon Md., 535 U.S. at 642 ("[E]ven if § 252(e)(6) does not confer jurisdiction, it at least does not divest district courts of their authority under 28 U.S.C. § 1331 to review the Commission's order for compliance with federal law.").

A.

In order to resolve the jurisdictional issue, the court first analyzes the recent decisions from the Fourth Circuit and United States Supreme Court concerning jurisdiction and the 1996 Act. As the Supreme Court has noted, "[i]t would be [a] gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397 (1999).

In Bell Atlantic Md., Inc. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001) rev'd by, Verizon Md., 535 U.S. at 648, the Fourth Circuit considered whether federal jurisdiction existed over an order of the Maryland Public Service Commission ("MPSC") that determined that calls to Internet service providers ("ISPs") qualified as "Local Traffic" under the parties' interconnection agreement and thereby required payment of "reciprocal compensation" under section 251(b)(5) of the 1996 Act. The CLEC in the case filed a complaint with the MPSC, arguing that calls to ISPs were not "local traffic." The CLEC relied on a recent ruling by the Federal Communications Commission ("FCC") that classified ISP-bound calls as non-local calls that do not qualify for reciprocal compensation under 47 U.S.C. § 251(b)(5). Id. at 285-86. Despite the FCC ruling, the MPSC held that as a matter of state contract law, the parties in their interconnection agreement had agreed to treat ISP-bound calls as local traffic subject to reciprocal compensation. Id. The CLEC challenged the MPSC ruling in federal court, but the district court dismissed the action for lack of subject matter jurisdiction. Id. at 286-87.

On appeal, the Fourth Circuit held that section 252(e)(6) does not confer jurisdiction over state commission decisions interpreting or enforcing interconnection agreements. Id. at 301-07. Instead, the scope of jurisdiction created by section 252(e)(6) is limited to "determinations" made by state commissions under section 252, i.e., whether an interconnection agreement complies with the requirements of sections 251 and 252. Id. at 304. The Fourth Circuit held that "[w]hile this federal jurisdictional provision authorizes review of § 252 arbitration determinations ultimately leading to the formation of interconnection agreements, in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements." Id. at 302-03. According to the Fourth Circuit, federal review of negotiated interconnection agreements is even narrower because there the "only 'determination' that can be made by the State commission . . . is a determination to approve or reject it, and when the agreement is approved by the State commission, then there is a question whether there can be any 'party aggrieved' to seek review in federal court." Id. at 303. The Fourth Circuit stated that any determination by a state commission that was not a section 252 determination could only be reviewed pursuant to state law. Id. Further, the Fourth Circuit concluded that the general grant of jurisdiction in 28 U.S.C. § 1331 could not be used to override Congress' limited grant of federal jurisdiction in section 252(e)(6). Id. at 307-09.

The Supreme Court reversed the Fourth Circuit in Verizon Maryland, holding that section 252(e)(6) did not strip federal courts of jurisdiction they would otherwise have under section 1331. Verizon Md., 535 U.S. at 641-44. The Supreme Court found that the CLEC had brought a straightforward federal preemption claim:

> Verizon alleged in its complaint that the Commission violated the Act and the FCC ruling when it ordered payment of reciprocal compensation for ISP-bound calls. Verizon sought a declaratory judgment that the Commission's order was unlawful, and an injunction prohibiting its enforcement. We have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit. Verizon seeks relief from the Commission's order on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, and its claim thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Id. at 642 (quotation omitted). Thus, section 1331 provided a basis for jurisdiction over the CLEC's claim that the MPSC's order was preempted by the FCC ruling. Id. at 643. The Supreme Court expressly declined to decide whether section 252(c)(6) provided an independent basis for jurisdiction over a state commission decision interpreting or enforcing an interconnection agreement. Id. at 642 ("Whether the text of § 252(e)(6) can be so construed is a question we need not decide."). The Supreme Court remanded the case to the Fourth Circuit. Id. at 648.

On remand to the district court, the CLEC filed an amended complaint. See Verizon Md., Inc. v. Global NAPs, Inc., 377 F.3d 355, 361 (4th Cir. 2004) ("Global NAPs"). Count I alleged that the MPSC's order violated federal law and the interconnection agreement. Count II alleged that the MPSC lacked authority to require reciprocal compensation in arbitration proceedings. Id. The district court recognized its jurisdiction over the "garden-variety federal preemption claim" in Count II, found that the MPSC possessed authority to require reciprocal compensation in arbitration proceedings, and awarded summary judgment on Count II to the defendants. Id. at 362.

Regarding Count I, the district court found that the CLEC "was actually asserting two distinct claims: first, that the [M]PSC's interpretation of the interconnection agreement violated federal law; and second, that the [M]PSC's interpretation violated the parties' intent as reflected in the [interconnection] agreement." Id. The district court took jurisdiction over the first claim in Count I and awarded summary judgment to the defendants. As for the second claim in Count I, the district court found that neither section 252(e)(6) nor section 1331 conferred jurisdiction. The district court construed the second claim as a state-law contract claim arising under state law and declined to exercise supplemental jurisdiction over it. Id.

The CLEC appealed. In Global NAPs, the Fourth Circuit held that there was jurisdiction under section 1331 over the second claim in Count I alleging that the MPSC misinterpreted the interconnection agreement. Id. at 363. The Fourth Circuit found that the misinterpretation claim raised a requisite "substantial question of federal law" for four reasons:

> (1) [the] complaint alleges that the [M]PSC misinterpreted interconnection agreement provisions that incorporate federal law, (2) the agreement interpreted is federally mandated, (3) the contractual duty at issue is imposed by federal law, and (4) the purpose of the 1996 Act is best served by allowing review of the [M]PSC's order in the district court.

Id. at 366. The Fourth Circuit stated that a federal question exists "when there is a claim that a state utility commission has misinterpreted an interconnection agreement provision that implements a duty imposed by the Act." Id. The Fourth Circuit cautioned, however, that it was "not saying that every dispute about a term in an interconnection agreement belongs in federal court, but when the contractual dispute . . . involves one of the 1996 Act's essential duties, there is a federal question." Id.; accord Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd., 189 F.3d 1, 11-14 (1st Cir. 1999). Moreover, because federal question jurisdiction existed under 28 U.S.C. § 1331 to review the order of the MPSC, the Fourth Circuit "decline[d] to decide whether jurisdiction could be grounded independently on 47 U.S.C. § 252(e)(6)." Global NAPs, 377 F.3d at 366 n.2.

B.

In light of Verizon Maryland and Global NAPs, the court initially addresses jurisdiction under 28 U.S.C § 1331. As mentioned, in Global NAPs, the court concluded that plaintiff's complaint raised a substantial question of federal law under 28 U.S.C § 1331 for four reasons: (1) plaintiff's complaint alleged that the state commission "misinterpreted interconnection agreement provisions that incorporate federal law"; (2) "the agreement interpreted is federally mandated"; (3) "the contractual duty at issue is imposed by federal law"; and (4) "the purpose of the 1996 Act is best served by allowing review of the [state commission's] order in the district court." Global NAPs, 377 F.3d at 366.

1.

The first Global NAPs factor is whether the complaint alleges that the state commission misinterpreted an interconnection agreement provision that incorporates federal law. Id. Plaintiff's complaint alleges that the NCUC misinterpreted a provision in dPi's interconnection agreement with

BellSouth that incorporates federal law and thereby erroneously denied dPi promotional credits. See Compl. ¶¶ 2, 20-23; Prayer for Relief; cf. Global NAPs, 377 F.3d at 363. Specifically, the interconnection agreement states that "[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 BellSouth directly." R. at 222. This provision is derived from BellSouth's obligation to resell its services at wholesale rates to CLECs under section 251(c)(4)(A). See 47 U.S.C. § 251(c)(4)(A). This provision also corresponds to an FCC regulation that establishes permissible restrictions on reselling. See 47 C.F.R. § 51.613(a)(1).[3] The NCUC relied on this provision in the interconnection agreement and Tipton's testimony at the hearing concerning the LCCW promotion to deny dPi's claim for promotional credits. Thus, the first Global NAPs factor supports jurisdiction.

2.

The second Global NAPs factor is whether the state commission interpreted an

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[3]47 C.F.R § 51.613(a) states:

> a) Notwithstanding § 51.605(b), the following types of restrictions on resale may be imposed:
>
> (1) Cross-class selling. A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.
>
> (2) 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.

47 C.F.R. § 51.613(a).

interconnection agreement that is federally mandated. See Global NAPs, 377 F.3d at 366. At oral argument, the Commissioners conceded that the NCUC interpreted an interconnection agreement between plaintiff and BellSouth that is federally mandated. The court agrees. The interconnection agreement implements the 1996 Act's resale obligation in section 251(c)(4)(A) and 252(b)(3). This obligation, like the reciprocal compensation provision in section 251(b)(5), is an essential duty under the 1996 Act. See, e.g., Global NAPs, 377 F.3d at 364. Thus, the second Global NAPs factor supports jurisdiction.

3.

The third Global NAPs factor is whether "the contractual duty at issue is imposed by federal law...." Global NAPs, 377 F.3d at 366. At oral argument, plaintiff explained that under its theory of the case, the "contract" at issue in this case consists of three distinct documents: the promotion that BellSouth unilaterally promulgated, the tariffs that BellSouth submitted to the NCUC, and the interconnection agreement between dPi and BellSouth. According to plaintiff, the promotion and the tariff contractually establish "the contractual duty at issue" in the case (i.e., the duty to pay the LCCW promotional credits). Further, plaintiff contends that the NCUC erroneously concluded that the interconnection agreement negates this alleged "duty" to pay the LCCW promotional credits. The defendants disagree with dPi. According to the defendants, the interconnection agreement provides the methodology for determining the "contractual duty at issue" with respect to any promotional credits that dPi seeks from BellSouth, including the LCCW promotional credits. Moreover, according to defendants, the interconnection agreement coupled with Tipton's testimony doom dPi's request for the LCCW promotional credits.

The parties agree that the scope of the "contractual duty at issue" in this case involves (at its broadest level) BellSouth's duties under section 251(c)(4)(A) and section 252(b)(3) and involves the interpretation of a federally mandated interconnection agreement. The interconnection agreement is the vehicle that Congress chose "to implement the duties imposed in § 251." Id. at 364.

Resolving the parties' dispute about the LCCW promotional credits turns on whether the NCUC's implicit premise is correct: the parties must abide by the unambiguous terms of their interconnection agreement once a state commission approves the agreement under section 252(e)(1). Stated differently, the NCUC concluded that an unambiguous contractual duty in the interconnection agreement controlled the resolution of this dispute about the LCCW promotion. In light of this conclusion, the third Global NAPs factor supports jurisdiction. Cf. Nuvox Commc'ns, Inc. v. N.C. Utils. Comm'n, 409 F. Supp. 2d. 660, 664-65 (E.D.N.C. 2006) (holding dispute about audit requirements in an interconnection agreement did not present a substantial federal question), vacated on other grounds, 2007 WL 2038942 (4th Cir. July 12, 2007) (per curiam) (unpublished).

4.

Finally, the court must determine whether the purpose of the 1996 Act is best served by allowing federal review of the NCUC order. See Global NAPs, 377 F.3d at 365. The 1996 Act "took the regulation of local telephone service away from the States and established a new federal regime designed to promote competition." Id. (quotation omitted) (emphasis omitted). At the same time, the 1996 Act preserved the authority of state utility commissions and courts to interpret and enforce contracts that do not raise a substantial question of federal law. See id. In fact, the FCC carved out a state role in policing ILEC's resale obligations with respect to promotions:

> We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

In re Implementation of the Local Competition Provisions of the Telecomm. Act of 1996, 11 F.C.C.R. 15,499 ¶ 952 (1996) (First Report and Order). Nevertheless, in Global NAPs, the Fourth

Circuit stated that "when there is a claim that a state utility commission has misinterpreted an interconnection agreement provision that implements a duty imposed by the Act, review should be available under § 1331 in district court." Global NAPs, 377 F.3d at 366. Because plaintiff's complaint essentially contends that the NCUC misinterpreted an interconnection agreement provision that implements a duty imposed under 47 U.S.C. § 251(c)(4)(A), the court concludes that the fourth Global NAPs factor supports jurisdiction.

Accordingly, the court concludes that it has jurisdiction under 28 U.S.C. § 1331 to review the NCUC decision. In light of this conclusion, the court does not address whether jurisdiction exists under 47 U.S.C. § 252(e)(6). Cf. BellSouth Telecomms., 494 F.3d at 444-45 (finding jurisdiction under section 252(e)(6) to consider BellSouth's challenge to an NCUC decision holding that an ILEC's incentive offers to subscribers created a promotional retail rate that must be offered to CLECs under section 251(c)(4)).

III.

Next, the court considers the parties' motions for summary judgment. Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Fed. R. Civ. P. 56. The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. Anderson, 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn from the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369

U.S. 654, 655 (1962) (per curiam).

The court reviews de novo the NCUC's interpretations of the 1996 Act. GTE South, Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999). However, the court does not "sit as a super public utilities commission." Id. Thus, the court reviews the NCUC's fact findings for substantial evidence. Id. Under the substantial evidence standard, the "court is not free to substitute its judgment for the agency's . . . ; it must uphold a decision that has substantial support in the record as a whole even if it might have decided differently as an original matter." Id. at 746 (quotations omitted).

In support of its motion for summary judgment, plaintiff argues that it qualifies for the LCCW promotion under the express terms of the promotion. The LCCW promotion states that customers are eligible for the promotion if they "purchase . . . BellSouth® basic service and two (2) custom calling (or Touchstar® service) local features." R. at 190. In the transactions at issue, dPi purchased basic service at wholesale pricing from BellSouth, instructed BellSouth to block charge-per-use features, and resold the service as a pre-paid package to customers. Plaintiff asserts that these blocks of Touchstar features – BCR, BRD, HBG – are themselves Touchstar features that, added to the purchase of basic service, entitle dPi to the LCCW promotion. In support of this argument, plaintiff notes that BCR, BRD, and HBG are described as features in the rates and charges section of the Touchstar tariff. See id. at 199.

BellSouth responds that the NCUC correctly interpreted the interconnection agreement. Additionally, BellSouth argues that regardless of whether the blocks are "features," plaintiff does not qualify under the terms of the LCCW promotion because plaintiff merely took, and did not purchase, the blocks with the basic service. Similarly, BellSouth notes that plaintiff's customers did not purchase or order the blocking features separately, but assumed them without cost or knowledge of as part of plaintiff's uniform package service. Plaintiff counters that the test is not whether plaintiff or its customers actually purchased the features, but whether a BellSouth customer would

have qualified for the promotion by purchasing basic service with two blocking features as a package. Plaintiff concedes that "it is doubtful that ANY of BellSouth's customers would have ordered service this way, as that would be extremely atypical for the kinds of customers BellSouth serves – which almost by definition are not the kinds of non-credit worthy customers dPi serves." Mem. in Support of Pl.'s Mot. for Summ. J. 16. Nevertheless, according to dPi, "all that matters is that dPi has qualified under the written terms of the promotion – by purchasing the combination of basic local service with two or more Touchstar blocks." Id. at 17.

The NCUC declined to analyze the tariff or "to analyze and decide this case based on the language of the promotion." R. at 598. In so doing, it refused to resolve whether – under the language of the promotion itself – a customer who took, as opposed to purchased, two or more features with basic service qualified for the LCCW promotion. The NCUC also left unanswered how the alleged ambiguity in the tariff's language impacted the dispute about the LCCW promotion between dPi and BellSouth. Instead, the NCUC concluded that it initially needed to examine the "voluntarily negotiated interpretative aid found in the interconnection agreement." See id. at 599. If an unambiguous provision in the interconnection agreement resolved the dispute about the LCCW promotion, that was the end of the matter. The NCUC then examined the interconnection agreement, which states "[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 BellSouth directly." Id. at 594 ¶ 8. The NCUC then reviewed the evidence in light of this provision in the interconnection agreement and found that "[u]nder the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are not eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits." Id. at 598 (emphasis added).

Implicitly, the NCUC concluded that if the parties enter into an interconnection agreement concerning the duties owed under section 251 and a state commission approves that agreement, then an unambiguous provision in the interconnection agreement is binding in resolving disputes about

the parties' duties under section 251. Hence, this court must determine whether the NCUC's conclusion concerning the legal effect of the parties' interconnection agreement is correct.

This court need not look far to conclude that the NCUC correctly viewed the legal effect of the parties' interconnection agreement. In Global NAPs, the Fourth Circuit stated:

> If the parties enter into an agreement by voluntary negotiation, they may agree "without regard to the standards set forth" in § 251(b) and § 251(c). [47 U.S.C.] § 252(a)(1). They must still, however, spell out how they will fulfill the duties imposed by § 251. See id. § 251(c)(1). When an agreement, like the one voluntarily negotiated by Verizon and MCI, is submitted to the state commission for approval, the commission may reject it only if it discriminates against a carrier not a party, or it is not consistent with "the public interest, convenience, and necessity." Id. § 252(e)(2)(A). Once the agreement is approved, the 1996 Act requires the parties to abide by its terms. See §§ 251(b)-(c).
>
> Interconnection agreements are thus the vehicles chosen by Congress to implement the duties imposed in § 251. They are, in short, federally mandated agreements, and "[t]o the extent [an agreement] imposes a duty consistent with the Act . . . that duty is a federal requirement."

Global NAPs, 377 F.3d at 364; see also Cavalier Tel., LLC v. Verizon Va. Inc., 208 F. Supp. 2d 608, 618 (E.D. Va. 2002), aff'd, 330 F.3d 176 (4th Cir. 2003); accord Connect Commc'ns Corp. v. Southwestern Bell Tel., L.P., 467 F.3d 703, 708-09 (8th Cir. 2006); Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc., 323 F.3d 348, 357 (6th Cir. 2003); Southwestern Bell Tel. Co. v. Pub. Util. Comm'n, 208 F.3d 475, 485-87 (5th Cir. 2000).

Because the NCUC properly looked first to the interconnection agreement to resolve dPi and BellSouth's dispute about the LCCW promotion, the court next analyzes whether substantial evidence supports the NCUC's interpretation of the interconnection agreement vis-à-vis the evidence. See, e.g., Morrison, 199 F.3d at 745-46. The NCUC found that in order to receive the LCCW promotional credit, the interconnection agreement required dPi to show that similarly situated BellSouth customers would have qualified for the LCCW promotional credit. See R. at 598. As evidence to support this finding, the NCUC cited the testimony of a BellSouth witness, Pam Tipton. Tipton testified that BellSouth "does not authorize promotional discounts to its End

Users who only order basic services and the blocks provided by dPi." Id. (emphasis added). The NCUC relied on this testimony and found that "similarly situated BellSouth End Users are not entitled to such credits." Id. (emphasis added). Accordingly, in light of the clear terms in the interconnection agreement, the NCUC concluded that dPi is not entitled to such credits. Id.

In opposition to this conclusion, plaintiff argues that "Tipton's testimony is the least reliable evidence in the record and would never have been admissible in a court of law." Mem. in Support of Pl.'s Mot. for Summ. J. 16. Tipton, a director in BellSouth's regulatory department, did not review, approve, or deny applications for LCCW credits for BellSouth before the complaint was filed. However, Tipton personally reviewed all of dPi's applications in preparation for testifying before the NCUC on behalf of BellSouth. At the hearing, the presiding Commissioner overruled dPi's objection to the admissibility of Tipton's testimony. The presiding Commissioner held that dPi's objection went to the weight of Tipton's testimony and was properly dealt with on cross examination. Tipton testified that BellSouth required customers to purchase basic service and two or more paying features to qualify for the LCCW promotion. The NCUC noted that "[t]his fact was uncontested by plaintiff at the hearing and unrebutted in its post hearing brief." R. at 598. The NCUC was entitled to credit Tipton's testimony regarding BellSouth's administration of the LCCW promotion and to interpret the interconnection agreement to bar dPi's receipt of the LCCW credits. Under the substantial evidence standard, the court cannot substitute its judgment for that of the NCUC. See Morrison, 199 F.3d at 745-46. In light of the language in the interconnection agreement and the evidence at the NCUC hearing, defendants are entitled to summary judgment.

IV.

For the reasons stated above, the Commissioners' motion to dismiss for lack of subject matter jurisdiction is DENIED. The Commissioners' and BellSouth's motions for summary judgment are GRANTED, and plaintiff's motion for summary judgment is DENIED. The Clerk is DIRECTED to close the case.

SO ORDERED. This 25 day of September 2007.

JAMES C. DEVER III
United States District Judge

Exhibit B

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1577

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Complaint of dPi Teleconnect, L.L.C. Against	)	
BellSouth Telecommunications, Inc. Regarding	)	ORDER DENYING dPi's
Credit for Resale of Services Subject to	)	NOVEMBER 19, 2007 MOTION
Promotional Discounts	)	*TO RECONSIDER*

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, and Chair Edward S. Finley, Jr.

APPEARANCES:

For dPi Teleconnect, L.L.C.:

Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh, North Carolina 27602-1351

Christopher Malish, Foster, Malish, Blair & Cowan, L.L.P., 1403 West Sixth Street, Austin, Texas 78703

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III, AT&T North Carolina, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

J. Phillip Carver, AT&T Southeast, 675 W. Peachtree Street NE, Suite 4300, Atlanta, Georgia 30375

BY THE COMMISSION: On August 25, 2005, dPi Teleconnect, L.L.C. (dPi) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking credit for resale of services subject allegedly to promotional discounts in accordance with their interconnection agreement. Among other things, dPi resells BellSouth's retail residential telephone services, some of which are subject to BellSouth promotional discounts. The discount dPi sought credit for in this proceeding is the Line Connection Charge Waiver (LCCW), which BellSouth gave to customers that purchased certain packages or features.

It was dPi's belief that some of its customers met the requirements of the LCCW by obtaining at least two of the following features: blocking per-use call return, blocking

repeat dialing, and blocking call tracing. BellSouth refers to these features by the codes BCR, BRD, and HBG, respectively. BellSouth charges customers for most custom calling features, but it furnishes BCR, BRD, and HBG to customers upon request, without charge. BellSouth believes that customers obtaining BCR, BRD, or HBG did not qualify for the discount because the promotion only provided the discount for purchased features.

On March 1, 2006, the Commission held an evidentiary hearing in Raleigh with witnesses from dPi and BellSouth presenting testimony and exhibits. On April 27, 2006, the Public Staff filed its Proposed Order and dPi and BellSouth filed briefs. On June 7, 2006, the Commission issued an Order Dismissing the Complaint. Specifically, the Commission held that dPi was not entitled to the credits that it sought because the interconnection agreement between BellSouth and dPi precluded a similarly situated BellSouth customer who only purchased basic service and received the two free blocking features provided by BellSouth from receiving the LCCW. In that Order the Commission stated:

> Under the clear language of this provision, promotions are *only* available to the extent that end users would have qualified for the promotion if the promotion had been provided by BellSouth directly. In Witness Tipton's testimony, she stated emphatically that BellSouth does not authorize promotional discounts to its End Users who only order basic services and the blocks provided by dPi. (Tr. pp. 245-247). This fact was uncontested by dPi at the hearing and unrebutted in its post hearing brief. The Commission assumes that, if dPi had any contradictory evidence, it would have brought that evidence to our attention. This fact is dispositive. Under the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are *not* eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits. dPi's complaint should therefore be denied.
>
> June 7, 2006 Order, p. 7.

On July 6, 2006, dPi filed a Motion for Reconsideration which can be summarized as follows:

a. dPi is entitled to recover $2,537.70 for credits wrongfully denied on the grounds that a transfer, rather than a winover or reacquisition, was involved

b. Applying the correct test, or basing the decision on the best evidence in the record, inexorably leads to the determination that dPi is entitled to LCCW promotion pricing when it purchases Basic Local Service plus two of the BCR, BRD, and HBG Touchstar features.

On October 12, 2006, the Commission denied dPi's motion to reconsider.

On October 26, 2006, dPi challenged the Commission's denial by filing a complaint in United States District Court for the Eastern District of North Carolina. dPi alleged that the Commission had erred by failing to award it the credits that it was due by failing to properly analyze the evidence presented and by inappropriately interpreting the interconnection agreement between dPi and BellSouth in violation of the Telecommunications Act of 1996. On September 25, 2007, United States District Court Judge James C. Dever affirmed the Commission's decision and denied dPi's request for relief. dPi appealed the decision to the United States Court of Appeals for the Fourth Circuit on October 18, 2007. Pursuant to Fourth Circuit rules, the parties were scheduled to mediate the dispute on December 7, 2007

On November 19, 2007, dPi filed a motion with the Commission Clerk pursuant to G.S. 62-80 requesting that the Commission reconsider its decision dismissing the complaint against BellSouth. dPi alleged that, as a result of discovery that BellSouth provided to dPi in a companion proceeding before the Florida Public Service Commission (Florida Commission) on September 28, 2007, dPi had discovered evidence that the primary BellSouth witness in the proceeding before this Commission, Pam Tipton, had provided false testimony to this Commission and the Commission had relied upon such testimony in making its decision.

On December 17, 2007, dPi filed the Affidavit of Steven Tepera, an attorney in the firm representing dPi in these proceedings, in support of its motion to reconsider. On that same date, BellSouth filed its response in opposition to dPi's motion to reconsider. In its response, BellSouth asserted that the materials upon which dPi relied upon do not in any way invalidate the testimony given by Ms. Tipton in these proceedings for the following reasons: (1) dPi submitted no new evidence but instead "submitted cursory, vague, largely unexplained and completely unverified documents that would not [as a matter of law] be accepted by the Commission as evidence in a hearing"; (2) one cannot discern any insight as to how the LCCW promotion applied to BellSouth's retail customers from the evidence submitted by BellSouth at dPi's request; (3) dPi has attempted to utilize the information in a way that is untenable and misleading; and (4) even if one were to accept this information as reliable, it does not tell the whole story. BellSouth attached an Affidavit from Ms. Tipton in support of its response. BellSouth's response was accompanied by a cover letter which explained that dPi served BellSouth with the Tepera Affidavit on the day that it was filing the response and that BellSouth reserved the right to respond to the affidavit after it had a chance to review and digest the information contained therein.

On January 2, 2008, dPi responded to the response filed by BellSouth. dPi alleged that the bottom line was that, contrary to the original testimony of the BellSouth witness, BellSouth repeatedly and regularly waived the LCCW charge for those customers taking just basic service and two free Touchstar blocking features.

On January 22, 2008, BellSouth again responded to dPi's assertion by denying the merit of the allegations.

On March 7, 2008, the Commission issued an Order Scheduling Hearing for April 15, 2008 to receive evidence concerning dPi's factual allegation that BellSouth presented false evidence at the March 1, 2006 evidentiary hearing and BellSouth's response that dPi's allegations cannot be supported.

On March 14, 2008, the Commission issued a further Order Clarifying Procedure related to the evidentiary hearing scheduled for April 15, 2008. In that Order, the Commission notified the parties that Mr. Tepera and Ms. Tipton were necessary witnesses to the hearing and required their presence during the proceeding. Further, the Commission notified the parties that, "in lieu of prefiled testimony, the affidavits of Mr. Tepera and Ms. Tipton respectively may be identified by the witness, offered in evidence, and made a part of the record without further formality or explanation and the witness immediately tendered for cross examination."

On March 26, 2008, dPi filed the Direct Testimony of Mr. Tepera, Exhibits 10 and 13 and a Consolidated Exhibit List. On March 28, 2008, BellSouth Telecommunications, Inc., which is now known as AT&T North Carolina (AT&T or BellSouth), filed a Motion to Strike the Direct Testimony of Steven Tepera and the associated exhibits. In the Motion, AT&T asserted that the Commission's prior orders did not authorize the filing of prefiled testimony, that dPi had filed prefiled testimony without requesting prior leave of the Commission, that the procedures contemplated by the Commission were more streamlined than those ordinarily utilized by the Commission because the hearing was intended to focus on a specific factual allegation made by dPi, that allowing the testimony would be unduly prejudicial to AT&T; and, that permitting the testimony would result in a delay in the hearing to allow AT&T to respond to dPi's prefiled testimony and to allow dPi to respond to AT&T's response.

On April 1, 2008, dPi responded to BellSouth's motion to strike the testimony of Mr. Tepera. In its response, dPi asserted that the Order Clarifying Procedure did not preclude the introduction of prefiled testimony and that the introduction of such evidence would not unfairly prejudice BellSouth. On April 1, 2008, the Commission entered an Order Granting BellSouth's Motion to Strike the Direct Testimony of Steven Tepera and the associated exhibits.

Based on the foregoing, the evidence presented at the hearing, and the entire record in this matter, the Commission now makes the following

FINDINGS OF FACT

dPi's evidence is insufficient to justify a conclusion that Ms. Tipton provided false testimony during the March 1, 2006 hearing.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT

Pursuant to G.S. 62-80, the Commission has the authority, upon its own motion or upon motion by any party, "to reconsider its previously issued order, upon proper

notice and hearing" and "upon the record already compiled, without requiring the institution of a new and independent proceeding by complaint or otherwise." *State ex rel. Utilities Commission v. Edmisten, 291 N.C. 575, 582, 232 S.E.2d 177, 181 (1977).* At this rehearing, the Commission may rescind, alter, amend, or refuse to make any change to its earlier order. Id. An application for rehearing pursuant to G.S 62-80 is addressed to and rests in the discretion of the Commission. *State ex rel. Utilities Commission v. Services Unlimited, Inc., 9 N.C.App. 590, 591, 176 S.E.2d 870, 871 (1970).* Although the Commission can choose to rescind, alter or amend a final decision of its own accord pursuant to G S. 62-80, the Commission may not, in the exercise of that discretion, arbitrarily or capriciously amend, modify or rescind a final order in the absence of some change in circumstance or misapprehension or disregard of fact which requires such amendment, modification or rescission in the public interest. *State ex rel. Utilities Commission v. N.C. Gas Service, 128 N.C. App. 288, 494 S.E.2d 621, 625 (1998); State ex rel. Utilities Commission v. Edmisten, 291 N C. 575, 584, 232 S.E.2d 177, 182 (1977).*

Pursuant to the discretion granted in G.S. 62-80, the Commission permitted this proceeding to be reopened for the limited purpose of receiving evidence concerning dPi's factual allegation that BellSouth witness Tipton presented false testimony at the March 1, 2006 evidentiary hearing. Specifically, this hearing was convened to determine if witness Tipton testified falsely when she testified that BellSouth authorized promotional discounts to its End Users who only order basic services and the free blocks provided in BellSouth's plan. In its Post-hearing Brief, dPi attempted to widen the scope of our reconsideration to argue additional issues that were previously considered, such as the wisdom of allowing and relying upon the testimony of Ms. Tipton and the meaning of the terms included within the promotion. With regard to the former, dPi persists in arguing that Ms. Tipton's March 1, 2006 testimony was admitted in error. dPi goes so far as to assert that no court in the country would have admitted the testimony. Contrary to these assertions, the Commission was well within its right in admitting the testimony. The Commission is required to follow the rules of evidence applicable in civil actions "insofar as practicable." G.S. 62-65. "The procedure in the Commission is not, however, as formal as that in litigation conducted in the superior court. *State ex rel. Utilities Commission v. Carolina Telephone & Telegraph Co., 267 N.C. 257, 269, 148 S.E. 100, 109 (1966).* Under Commission procedures, admission of hearsay testimony is a permissible practice. *State ex rel. Utilities Commission v. Edgecombe-Martin EMC, 5 N.C. App. 680, 684, 169 S.E.2d 225, 228(1969).* With regard to the latter, the Commission decided in our June 7, 2006, Order that it need not determine the precise meaning of the terms of the promotion because it could rely upon the provisions in the parties' interconnection agreement to fully and finally dispose of the dispute before us.

BellSouth has asked the Commission to strike those provisions in dPi's Post-hearing Brief which went beyond the original limitations contained in our order permitting this hearing. Although we agree with BellSouth that the arguments contained in dPi's Post-hearing Brief stray far beyond the original limits that we established, i.e., whether Ms. Tipton provided false testimony when she testified that BellSouth did not grant the LCCW to its customers who only order basic service plus the free blocks, we,

in our discretion, decline to strike those portions of dPi's Post-hearing Brief as we are able to separate those portions of the argument contained therein which are relevant to the limited issue that this hearing was designed to address from those that have no relevance to this proceeding. Accordingly, BellSouth's motion to strike portions of dPi's Post-hearing Brief is denied.

On April 15, 2008, the matter was called for hearing by Presiding Commissioner James Kerr. As required by the March 14, 2008 Order, Mr. Tepera was duly sworn and his Affidavit of December 17, 2007 was identified, offered into evidence, and made a part of the record without further formality or explanation. In his testimony, Mr. Tepera stated that, as a result of discovery that BellSouth provided to dPi in a companion proceeding before the Florida Commission, dPi discovered that Ms. Tipton had provided false testimony to this Commission in the March 1, 2006, hearing and that the Commission had relied upon such testimony in making its June 7, 2006, decision. According to Mr. Tepera, the Florida discovery[1] demonstrated that, contrary to Ms. Tipton's testimony in the March 1, 2006, proceeding, BellSouth consistently awarded the LCCW promotion waiver to its end users who ordered basic service and two of the three free call blocks. According to Mr. Tepera, the exhibits that he introduced into evidence in this reconsideration hearing showed that.

1. From May 2003 to January 2005, new BellSouth retail accounts created with basic service and two TouchStar Blocking Features received a Line Connection Charge waiver between 40% and 22% of the time;

2. From January 2005 through August 2007, at least 2,562 new accounts with just basic residential service and at least two out of three of the TouchStar Blocking Features had had the Line Connection Charge waived; and,

3. From January 2005 to the time of the filing of Ms. Tipton's rebuttal testimony in February 2006, at least 493 new accounts were created in which basic service was purchased and two TouchStar Blocking Features were obtained, and the Line Connection Charge waived in Florida alone.

In Mr. Tepera's opinion, this was clear evidence supporting an inference that BellSouth awarded the LCCW promotion waiver to its end users because they ordered basic service and two of the three free call blocks despite its prior testimony to the contrary.

On cross examination, Mr. Tepera, a lawyer and aerospace engineer by training, admitted that he had never worked for a telecommunications company, had no specialized training or experience in the telecommunications industry and had no specialized training or knowledge regarding computerized billing systems in general and AT&T's systems in particular. Further, Mr. Tepera admitted during cross examination that one could not discern the specific reason that an individual customer was granted the line connection waiver from this compilation of the data. T pp. 54-56. Further, in

[1] At the hearing, both dPi and BellSouth individually acknowledged that the data that was provided in Florida was applicable to the dispute in North Carolina because BellSouth has a regional system and the data is consistent from state to state. T pp. 13 and 18.

response to the questioning by Commissioner Kerr, Mr. Tepera conceded that, due to the limitations inherent in the data: (1) there was no way to tell from the data provided if the customers that received the waivers were otherwise eligible for the LCCW promotion waiver primarily because the data did not indicate if the customers receiving the waivers were reacquisition or winback customers, a necessary precondition for receiving the LCCW waiver, and (2) there was no direct evidence that that BellSouth granted the LCCW waiver to its customers because they only ordered basic service and received the two free blocking features.

Despite these admissions, Mr. Tepera asserted that a strong inference should be drawn from the evidence that BellSouth did indeed give the LCCW promotion waivers to customers because they only ordered basic plus two of the free block from the fact that BellSouth gave out such a high number of waivers. Mr. Tepera reasoned that a significant percentage of those waivers given during the periods examined must represent the application of the promotion to BellSouth's own customers because the alternative explanations given by BellSouth for the number of waivers granted, such as disconnects in error, hurricane reconnects, etc., simply did not suffice to explain the large number of waivers granted. T p. 58. According to Mr. Tepera, the only reasonable explanation for this high number of granted waivers is that BellSouth granted the LCCW waiver promotion to customers because they ordered basic plus two of the three free blocks.

Ms. Tipton was duly sworn and her Affidavit of December 17, 2007 was identified, offered into evidence, and made a part of the record. Ms. Tipton stated in her affidavit and testimony that she stood by the accuracy of her testimony in the March 2006 hearing; that BellSouth did not give the LCCW promotion waiver to customers because they ordered basic service plus two free blocks; that BellSouth customers who order basic service plus two free blocks were not eligible for the LCCW promotion; that it is impossible to tell from the data provided to dPi whether the line connection waivers that were granted in the orders examined resulted from the LCCW promotion or for some other reason; that the data provided to dPi, when examined closely, does not prove dPi's contention; and that she examined a random representative sample of the actual orders provided to dPi pursuant to the discovery request and that none of that information provided any indication that the waiver had been granted as a result of the LCCW promotion. During cross examination, Ms. Tipton admitted that she does not have evidence that will demonstrate with one hundred percent certainty that BellSouth did not grant LCCW promotion waivers to BellSouth customers that ordered only basic service plus the free call blocks.

In assessing the relative merits of the arguments presented by the parties at this stage of the proceeding, the Commission notes that this hearing was convened for the limited purpose of determining whether Ms. Tipton testified falsely that BellSouth did not authorize promotional discounts to its End Users because they ordered basic services and the free blocks provided in BellSouth's plan in the March 2006 hearing. Accordingly, we have carefully examined the "statistical" evidence that dPi presented in support of its contention that Ms. Tipton's testimony was false.

In its June 7, 2006, Order the Commission accepted and relied upon BellSouth witness Tipton's testimony at the March 1, 2006 hearing that BellSouth did not grant its customers the LCCW promotion because they ordered basic service, plus the blocking features. The Commission granted dPi's motion to reconsider because dPi made the rather serious allegations that Ms. Tipton's testimony was false and that dPi was prepared to prove this allegation with evidence unavailable to it at the March 1, 2006 hearing. In a motion to reconsider, the burden to prove the allegation that evidence admitted and relied upon in the hearing in chief was faulty rests squarely on the movant. This is especially the case where the movant alleges that the witness whose testimony the Commission relied upon testified falsely. dPi's has not presented any direct evidence in its testimony or post hearing filings to support its allegations that Ms. Tipton testified falsely at the March 1, 2006, hearing. Instead, dPi witness Tepera concedes that the only support that it has offered for its contention that Ms. Tipton provided false testimony is an inference that dPi contends that the Commission should draw from the data compiled in dPi's exhibits. T p. 70. At this stage of the proceeding, an inference will not do. The burden is on dPi to identify dispositive evidence to prove that BellSouth offered the LCCW promotion to its subscribers because they subscribed to basic service plus the blocking features and that witness Tipton testified falsely when she testified that the promotion was not given for these reasons. dPi has failed to meet its burden and its motion to reconsider should be denied.

The fact of the matter is that dPi, by its own admission, has done nothing more than review the data and compile a set of numbers. From this compilation, dPi discerned that BellSouth granted a high number of waivers. It took no steps, however, to employ an economist/statistician or any other person with expertise in the field to analyze the data to draw statistically relevant conclusions from the data. Nor did it examine any of the orders individually in an attempt to find even one order in which the LCCW waiver was granted to a customer that it contends is eligible to receive the promotion and BellSouth contends is not.

Based upon this record and the testimony here presented, nothing more than mere conjecture supports dPi's contention that the high number of waivers granted during the period in question provides a "strong inference" that BellSouth granted a "significant percentage" of the line connection charge waivers to customers who only ordered basic service and two blocks. Certainly, the evidence in this record is insufficient to prove by the greater weight of the evidence that BellSouth granted any, let alone a significant amount of, LCCW promotional waivers to the customers in question or to prove that Ms. Tipton provided evidence "now known to be false."

Because dPi bears the burden of proving the preceding by the greater weight of the evidence and it has not done so, dPi's November 19, 2007 Motion to Reconsider the Order of June 7, 2006 must be and is, hereby, Denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 18th day of July, 2008.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

Lh071808 02

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:06-CV-463-D

dPi TELECONNECT, L.L.C.,
Plaintiff,
v.
JO ANNE SANFORD, et al.,
Defendants.

ORDER

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, plaintiff dPi Teleconnect, L.L.C. ("dPi" or "plaintiff") filed a motion to set aside this court's judgment of September 25, 2007 [D.E. 53]. dPi wants to offer newly discovered evidence from a companion case in Florida and have the court reconsider its judgment in light of this evidence. According to dPi, this new evidence undercuts the central testimony that the North Carolina Utilities Commission ("NCUC") relied on when denying dPi's claim. In turn, dPi contends that this court erroneously relied on this tainted testimony in refusing to grant dPi a declaratory judgment concerning the NCUC's decision. Before filing its Rule 60(b) motion, dPi filed a motion for reconsideration with the NCUC. The NCUC held a hearing on the motion and received additional evidence, including the alleged, newly discovered evidence. After the hearing, the NCUC denied dPi's motion for reconsideration. dPi now seeks to have the court consider this same newly discovered evidence and set aside this court's judgment. As explained below, the court denies plaintiff's motion to set aside this court's judgment.

I.

dPi is a competitive local exchange carrier ("CLEC") that purchases retail services at wholesale rates from BellSouth and resells the services to dPi's residential customers. See dPi Teleconnect, L.L.C. v. Sanford, No. 5:06-CV-463-D, 2007 WL 2818556, at *1 (E.D.N.C. Sept. 25, 2007) (unpublished). dPi and BellSouth's interconnection agreement states that "[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 BellSouth directly." Id. at *1 (quotation omitted).

The underlying dispute concerns a Line Connection Charge Waiver ("LCCW") promotion BellSouth offered to attract subscribers. See id. Under the LCCW promotion, BellSouth waived the line connection charge for new residential customers who purchased basic service and at least two custom calling features, including call return, repeat dialing, and call tracing. See id. BellSouth allowed its customers to block these features on a per-use basis without charge. Id.

dPi purchased basic service from BellSouth and instructed BellSouth to block all features that customers could use on a charge-per-use basis, including call return, repeat dialing, and call tracing. Id. at *2. BellSouth complied with dPi's request and added the feature blocks at no charge to dPi. dPi then resold the basic service with the feature blocks to its customers as a single pre-paid package. See id. dPi applied for the LCCW promotional credit on these resales, but BellSouth denied dPi's applications on resales in which dPi's customers did not purchase basic service and two or more features other than the feature blocks. See id.

On August 25, 2005, plaintiff filed a complaint against BellSouth with the NCUC. Id. Following an evidentiary hearing, the NCUC dismissed the complaint on June 7, 2006. Id. On July 6, 2006, plaintiff filed a motion for reconsideration, which the NCUC denied on October 12, 2006. See id. at *3.

On November 11, 2006, plaintiff filed a complaint in this court against BellSouth and the individual members of the NCUC in their official capacities (the "Commissioners"), seeking a declaration that the NCUC order is contrary to the Telecommunications Act of 1996, 47 U.S.C. §§ 251 et seq., and that plaintiff is entitled to the LCCW promotional credits [D.E. 1]. On September 25, 2007, the court denied the Commissioners' motion to dismiss for lack of subject matter jurisdiction, denied plaintiff's motion for summary judgment, and granted the Commissioners' and BellSouth's motions for summary judgment [D.E. 52]. On October 18, 2007, plaintiff timely

appealed to the Fourth Circuit [D.E. 54, 55].

According to dPi's motion to set aside, in late September 2007, dPi discovered evidence in a companion case before the Florida Public Service Commission that dPi contends undercuts the testimony of Pam Tipton ("Tipton" or the "Tipton testimony"). dPi contends that Tipton's testimony was the primary evidence the NCUC and this court relied upon in reaching their determinations. See Pl.'s Mem. in Supp. of Mot. for Relief from J. 4 [hereinafter "Pl.'s Mem."]; Commissioners' Mem. of L. in Resp. to dPi's Mot. for Relief from J. 4 [hereinafter "Comm'rs' Resp."]. As such, on November 19, 2007, plaintiff asked the NCUC to reconsider its judgment and either rescind its prior order or reopen the case to allow new evidence related to Tipton's testimony. See Pl.'s Mem., Ex. A (plaintiff's "Motion for Reconsideration of Decision Based on Testimony Now Known to Be Incorrect" to NCUC). The Fourth Circuit held the appeal of this court's order in abeyance pending the NCUC's disposition of dPi's motion for reconsideration [D.E. 58].

The NCUC held a hearing for the limited purpose of determining whether Tipton provided false testimony at the original evidentiary hearing. See Pl.'s Mem. 5, Ex. E, at 2; Comm'rs' Resp. 4, Ex. 1, at 5. During the hearing, the NCUC heard testimony from witnesses that dPi and BellSouth presented. See Pl.'s Mem., Exs. E–F. The hearing yielded over 1,000 pages of new evidence and testimony. See Pl.'s Mem. 5. Ultimately, the NCUC maintained its original disposition of the case and denied plaintiff's motion for reconsideration. See dPi Teleconnect, L.L.C., NCUC Docket No. P-55, Sub 1577 (July 2008), available at http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=CAAAAA00280B&parm3=000124043 (last visited Apr. 15, 2009) [hereinafter "NCUC Order Denying Mot. to Reconsider"]. The NCUC wrote:

> dPi[] has not presented any direct evidence in its testimony or post hearing filings to support its allegations that Ms. Tipton testified falsely at the March 1, 2006, hearing. Instead, dPi witness [Steven] Tepera concedes that the only support that it has offered for its contention that Ms. Tipton provided false testimony is an inference that dPi contends that the Commission should draw from the data compiled in dPi's exhibits. At this stage of the proceeding, an inference will not do. The burden is on dPi to

> identify dispositive evidence to prove that BellSouth offered the LCCW promotion to its subscribers because they subscribed to basic service plus the blocking features and that witness Tipton testified falsely when she testified that the promotion was not given for these reasons. dPi has failed to meet its burden and its motion to reconsider should be denied.

Id. at 8 (citation omitted).

On August 29, 2008, dPi filed a motion for relief from judgment pursuant to Rule 60(b)(2), (3), and (6) of the Federal Rules of Civil Procedure [D.E. 59]. In support, dPi attached the motion for reconsideration that it filed with the NCUC (Exhibit A), an affidavit explaining the methodology of the calculations used in the appendices to the motion for reconsideration (Exhibit B), several graphical depictions of the newly discovered data (Exhibit C), these data in table format (Exhibit D), and excerpts of the transcript of the NCUC evidentiary hearing related to the motion for reconsideration (Exhibits E and F).

The Commissioners and BellSouth separately responded in opposition [D.E. 61, 63]. dPi replied and did not include the entire record from the NCUC reconsideration proceedings [D.E. 64]. On September 18, 2008, the Fourth Circuit again held the appeal in abeyance pending this court's disposition of dPi's Rule 60(b) motion [D.E. 62].

II.

Rule 60(b) of the Federal Rules of Civil Procedure allows a court to set aside judgment in certain circumstances, including (1) newly discovered evidence that could not have been discovered in time to move for a new trial, (2) fraud, misrepresentation, or other misconduct by a nonmoving party, (3) and "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(2), (3), (6). To obtain relief under Rule 60(b), the moving party must satisfy two requirements. See, e.g., Nat'l Credit Union Admin. Bd. v. Gray, 1 F.3d 262, 264 (4th Cir. 1993). First, the moving party must show (1) timeliness of the motion, (2) a meritorious claim or defense, and (3) lack of unfair prejudice to the opposing party. See, e.g., Heyman v. M.L. Mktg. Co., 116 F.3d 91, 94 n.3 (4th Cir. 1997); Gray, 1 F.3d at 264; Dowell v. State Farm Fire & Cas. Auto. Ins. Co., 993 F.2d 46, 48 (4th Cir. 1993); see

also Ackermann v. United States, 340 U.S. 193, 199 (1950).[1]

Second, if these threshold conditions are met, the court then determines whether the movant has satisfied "one of the six enumerated grounds for relief under Rule 60(b)." Gray, 1 F.3d at 266; see Dowell, 993 F.2d at 48. At this second stage, the moving party "must clearly establish the grounds . . . to the satisfaction of the . . . court and such grounds must be clearly substantiated by adequate proof." In re Burnley, 988 F.2d 1, 3 (4th Cir. 1992) (per curiam) (quotations and citations omitted).

III.

As for the timeliness requirement, a Rule 60(b) motion must be made within a "reasonable time" and, under subsections (b)(1), (b)(2), and (b)(3), must be filed no more than a year after the entry of judgment. Fed. R. Civ. P. 60(c)(1). The Commissioners acknowledge the timeliness of plaintiff's Rule 60(b) motion. See Comm'rs' Resp. 12. BellSouth takes issue with whether dPi's motion was timely. See Bellsouth Telecomm., Inc.'s Resp. in Opp'n to Pl.'s Mot. for Relief from J. 5–6 [hereinafter "BellSouth's Resp."]. Nonetheless, the court will assume (without deciding) that dPi's motion is timely.

As for whether dPi has shown a meritorious claim, this threshold requirement ensures that granting relief from the judgment under Rule 60(b) "will not in the end have been a futile gesture." See Boyd v. Bulala, 905 F.2d 764, 769 (4th Cir. 1990) (per curiam). A meritorious claim requires "a proffer of evidence which would permit a finding for the [moving] party . . . . The underlying

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[1]When a party moves under Rule 60(b)(6), a fourth initial requirement is sometimes mentioned: exceptional or extraordinary circumstances. See, e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863–64 (1988); Reid v. Angelone, 369 F.3d 363, 370, 374 (4th Cir. 2004); Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 118 n.2 (4th Cir. 2000); Gray, 1 F.3d at 264. To establish "exceptional circumstances," the moving party must show that it is without fault. See Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 393 (1993); Gray, 1 F.3d at 266. The Fourth Circuit recently reaffirmed the "exceptional circumstances" requirement, thus reinforcing the limited scope of Rule 60(b)(6) relief. See Wadley v. Equifax Info. Servs., LLC, 296 F. App'x 366, 369 (4th Cir. 2008) (per curiam) (unpublished) (determining that change in law that served as basis for district court's ruling did not constitute "extraordinary circumstances").

concern is whether there is some possibility that the outcome after a full trial will be contrary to the result achieved by the [original judgment]." Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808, 812 (4th Cir. 1988) (per curiam) (quotation omitted) (alterations removed). A bare allegation of a meritorious claim does not suffice. See, e.g., Gomes v. Williams, 420 F.2d 1364, 1366 (10th Cir. 1970); Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp., 383 F.2d 249, 251–52 (4th Cir. 1967). "Even an allegation that a meritorious claim exists, if the allegation is purely conclusory, will not suffice to satisfy the precondition to Rule 60(b) relief." Teamsters Union, Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992).

The Commissioners contend that dPi lacks a meritorious claim because of the limited scope of the court's review of the NCUC's factual findings. The Commissioners properly note that because the court applies the substantial evidence test when reviewing a commission's findings under the Telecommunications Act of 1996, a reviewing court is "not free to substitute its judgment for the agency's . . . ; it must uphold a decision that has substantial support in the record as a whole even if it might have decided differently as an original matter." GTE S., Inc. v. Morrison, 199 F.3d 733, 746 (4th Cir. 1999) (alteration in original) (quotation omitted).

In this case, dPi presented its claim to the NCUC and presented the newly discovered evidence. Further, the NCUC held a hearing to consider the newly discovered evidence. As mentioned, after the hearing, the NCUC found:

> At this stage of the proceeding, an inference will not do. The burden is on dPi to identify dispositive evidence to prove that BellSouth offered the LCCW promotion to its subscribers because they subscribed to basic service plus the blocking features and that witness Tipton testified falsely when she testified that the promotion was not given for these reasons. dPi has failed to meet its burden . . . .
>
> . . . .
>
> . . . [N]othing more than mere conjecture supports dPi's contention that the high number of waivers granted during the period in question provides a 'strong inference' that BellSouth granted a 'significant percentage' of the line connection charge waivers to customers who only ordered basic service and two blocks. Certainly, the evidence in this record is insufficient to prove by the greater weight of the evidence that BellSouth granted any, let alone a significant amount of, LCCW

> promotion waivers to the customers in question or to prove that . . . Tipton provided evidence 'now known to be false.'

NCUC Order Denying Mot. to Reconsider 8. In light of the NCUC's findings and the requirements of Rule 60(b), dPi has failed to meet the threshold requirement of asserting a meritorious claim. See, e.g., GTE S., Inc., 199 F.3d at 746.[2] Accordingly, dPi's Rule 60(b) motion fails. In light of that conclusion, the court need not address prejudice or exceptional circumstances.

Alternatively, even if dPi met the threshold requirements for relief under Rule 60(b), dPi fails to prove any of the enumerated grounds under Rule 60(b)'s second-stage inquiry. As for Rule 60(b)(2), a court may relieve a party when there is "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). The standards governing relief on the basis of newly discovered evidence under Rule 59 and Rule 60 are coterminous. See, e.g., Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989). A party must show:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Id. (quotation omitted).

As to the first two elements under Boryan, the Commissioners and BellSouth do not challenge that the evidence is newly discovered post-judgment and nothing indicates that lack of due diligence by dPi contributed to its late discovery. Further, the court will assume (without deciding) that the evidence is not merely cumulative or impeaching and that the evidence is material.

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[2]Notably, dPi failed to include the entire record from the NCUC reconsideration proceedings. As the party with the burden of meeting the requirements of Rule 60(b), dPi presumably would have included the entire record if the record supported its position. The evidence dPi did submit with its Rule 60(b) motion fails to demonstrate a meritorious claim, particularly in light of the NCUC's assessment of the entire record.

As to the fifth element under Boryan, dPi contends that the court should grant the motion pursuant to Rule 60(b)(2) because the evidence is such that it is likely to produce a new outcome if the case were retried. See Pl.'s Mem. 6. The Commissioners disagree and argue that plaintiff's contention that the newly discovered evidence proves the Tipton testimony to be false "is argumentative and not a statement of fact." See Comm'rs' Resp. 14. Further, and more importantly, both the Commissioners and BellSouth emphasize that dPi presented its argument concerning the newly discovered evidence to the NCUC, and the NCUC found:

> [N]othing more than mere conjecture supports dPi's contention that the high number of waivers granted during the period in question provides a 'strong inference' that BellSouth granted a 'significant percentage' of the line connection charge waivers to customers who only ordered basic service and two blocks. Certainly, the evidence in this record is insufficient to prove by the greater weight of the evidence that BellSouth granted any, let alone a significant amount of, LCCW promotion waivers to the customers in question or to prove that . . . Tipton provided evidence 'now known to be false.'

NCUC Order Denying Mot. to Reconsider 8. Thus, by definition the newly discovered evidence is not likely to produce a new outcome if the case were retried.

The court agrees with the Commissioners and BellSouth. Here, the newly discovered evidence would not likely produce a new outcome because of this court's limited scope of review of factual findings under the substantial evidence standard. Indeed, if the court were to grant dPi's Rule 60(b) motion, the appropriate next step would be for the court to remand the case to the NCUC to consider the newly discovered evidence. The NCUC, however, already has considered this newly discovered evidence, conducted a hearing, made findings of fact, and affirmed its original order dismissing dPi's claim. Thus, the NCUC order denying dPi's motion for reconsideration proves the futility of granting the Rule 60(b) motion. Accordingly, dPi's motion fails under Rule 60(b)(2).

As for Rule 60(b)(3), a court, in its discretion, may relieve a party from an adverse judgment because of "fraud . . . misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). To prevail on a Rule 60(b)(3) motion, "the moving party must prove misconduct by clear and convincing evidence[,] and . . . the misconduct [must have] prevented the moving party from

fully presenting its case." Schultz v. Butcher, 24 F.3d 626, 630 (4th Cir. 1994) (quotation omitted); see, e.g., Green v. Foley, 856 F.2d 660, 665 (4th Cir. 1988); Square Constr. Co. v. Wash. Metro. Area Transit Auth., 657 F.2d 68, 71 (4th Cir. 1981).

dPi argues that relief from judgment is appropriate under Rule 60(b)(3) because the discrepancy between the Tipton testimony and BellSouth's system data demonstrates fraud, misrepresentation, or other misconduct. See Pl.'s Mem. 7. Under Rule 60(b)(3), dPi's challenge to the credibility of the Tipton testimony falls far short of "fraud . . . misrepresentation, or misconduct." Fed. R. Civ. P. 60(b)(3). dPi has no evidence that BellSouth engaged in any misconduct. Indeed, the NCUC, after considering the newly discovered evidence and hearing arguments from dPi and BellSouth, continued to credit the Tipton testimony and specifically found that dPi had failed to meets its burden that the Tipton testimony was false. dPi has failed to show that there was any fraud, misrepresentation, or other misconduct. Accordingly, dPi's motion under Rule 60(b)(3) fails.

Finally, the court rejects dPi's reliance on Rule 60(b)(6). Nothing in the record provides "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6); see Reid, 369 F.3d at 374.

IV.

Accordingly, dPi's motion to set aside this court's judgment of September 25, 2007 [D.E. 59] is DENIED.

SO ORDERED. This 16 day of April 2009.

JAMES C. DEVER III
United States District Judge

Exhibit D

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by DPI-Telecconnect, L.L.C. against BellSouth Telecommunications, Inc. for dispute arising under interconnection agreement.	DOCKET NO. 050863-TP ORDER NO. PSC-08-0598-FOF-TP ISSUED: September 16, 2008

The following Commissioners participated in the disposition of this matter:

KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

FINAL ORDER

BY THE COMMISSION:

I. Case Background

On November 10, 2005, dPi-Teleconnect, L.L.C. (dPi) filed a complaint against BellSouth Telecommunications, Inc. n/k/a AT&T Florida (AT&T) seeking resolution for a dispute arising under its interconnection agreement. On December 6, 2005, AT&T filed a response to dPi's complaint stating that dPi is not entitled to additional credits from AT&T as a result of dPi reselling AT&T services subject to promotional credits.

An administrative hearing was held on April 3, 2008. Post-hearing briefs were filed on April 30, 2008. On May 2, 2008 AT&T filed a Motion to Strike Appendices to dPi's post-hearing brief, which contained documents whose admission into the record had previously been denied by this Commission. On July 16, 2008, Order No. PSC-08-0457-PCO-TP was issued granting AT&T's Motion to Strike. We are vested with jurisdiction over this matter pursuant to Section 364.012, Florida Statutes, and Section 252 of the 1996 Federal Telecommunications Act.

II. Analysis

AT&T Florida line connection charge waiver promotion credits

The crux of this issue centers around the question of whether dPi is entitled to credits for the Line Connection Charge Waiver (LCCW) when dPi submits orders with free blocks. The language in AT&T's General Subscriber Service Tariff (GSST) states that the line connection charge will be waived for reacquisition and win-over residential customers who currently are not using AT&T for local service and who purchase AT&T Complete Choice, AT&T PreferredPack service, or basic service and two (2) features. dPi contends that the qualifications are met when dPi submits orders for reacquisition or win-over customers that include basic service and a combination of two free TouchStar service blocks, i.e., BCR (Denial of Per Activation of Call

Return), BRD (Denial of Per Activation of Repeat Dialing), and HBG (Denial of Per Activation of Call Tracing). AT&T asserts that the qualifications are met when dPi submits orders for the purchase of basic service and two TouchStar Service features that have a monthly or per usage fee.

dPi

dPi witness Watson devotes the majority of his testimony to explaining his role as the billing agent for dPi's promotional credits in 2004. The witness explains the methodology that AT&T had in place for processing credit requests from dPi and other CLECs, and argues why AT&T should be required to pay dPi the credits sought for the Line Connection Charge Waiver. dPi witness Bolinger's testimony primarily reiterates arguments made by witness Watson.

Witness Watson asserts that his company, Lost Key Telecom, was hired by dPi to apply for credits that dPi was entitled to receive from AT&T for promotions being offered by AT&T. The witness states that as dPi's billing and collections agent in the promotional credit process, his company reviewed data provided by dPi for resold AT&T services and determined for which promotions dPi was entitled to receive promotional credits. He asserts that once the promotions had been identified, Lost Key Telecom would submit promotional credit requests to AT&T on dPi's behalf.

dPi witness Watson testifies that when he first started applying for credits for CLECs in 2003, the process was long and the staff at AT&T consisted of one person, who was subsequently replaced by another person in the second half of 2005. The witness asserts that the staff at AT&T who were responsible for processing the promotional credits were helpful, but it was clear that when he first started talking to them about the credit process that AT&T was not receiving many requests from CLECs. He states that AT&T's staff was unable to answer many of his questions regarding promotions, and when they did answer questions the response was often later reversed. The witness opines that at times it seemed that policies were made on the spot, on an ad hoc basis.

Witness Watson asserts that AT&T Florida has offered a promotion called the Line Connection Charge Waiver that essentially waives the line connection charge for customers who switch to AT&T and purchase basic service and two TouchStar features. He states that in August 2004 Lost Key Telecom starting submitting credit requests for dPi and other clients that consisted of new basic service and two or more TouchStar features. Witness Watson states that AT&T paid all the claims that he submitted for Budget Phone, another CLEC that had a claim twice the size of dPi's. He also notes that AT&T paid Teleconnect in full for promotional credits for claims that were very similar to dPi's.

Witness Watson testifies that from September 2004 to April 2005 AT&T stopped paying dPi's promotional credit requests, but did not give a reason for not paying the credits; dPi was often promised that the payments were forthcoming. The witness states that in April 2005 AT&T informed dPi that credits would not be paid because dPi's orders did not include the purchase of basic service and two features. He states that dPi was told that the BCR, BRD, and

HBG blocks that were included in dPi's orders did not meet the qualifications because they were provided by AT&T at no additional charge. The dPi witness notes that in basically every instance where AT&T denied credit for the line connection charge waiver, dPi orders included basic service and at least two TouchStar features, such as the BCR and BRD blocks.[1] Witness Watson contends that there is no dispute that the BCR and BRD blocks are TouchStar features, and that AT&T Florida previously paid credits to other carriers with service orders consisting of basic service and TouchStar blocks.

According to witness Watson, AT&T initially agreed that orders consisting of basic service and the TouchStar blocks, BRD and BCR and HBG, were valid because for a while it paid credits to other CLECs for orders identical to those of dPi. The witness opines that once AT&T realized that the majority of dPi's orders would qualify for the promotion because the typical order for a dPi customer with poor credit includes at least two blocks, AT&T changed its interpretation of the promotion to keep from having to pay credits to dPi and other CLECs for the line connection charge waiver for a promotion for which most of AT&T customers with good credit would not qualify. dPi witness Bolinger asserts that Lost Key developed an automated system for processing promotional credits that was evaluated and approved by AT&T, prior to large batches of orders being submitted for credits. The witness asserts that AT&T approved the test orders for the LCCW credits that included basic service and blocking features.

AT&T

The majority of AT&T witness Tipton's testimony addresses the issues raised about the Line Connection Charge Waiver and explains why dPi is not entitled to the credits for the promotion when it submits orders consisting of basic service and two or more of the free TouchStar Service blocks, such as BCR, BRD, or HBG.

Witness Tipton asserts that AT&T offers its retail promotions, such as the Line Connection Charge Waiver, to dPi by granting credits for the value of the promotion when dPi meets the same criteria that an AT&T customer must meet to qualify for the promotion. According to witness Tipton, dPi is requesting credits for the promotion, in some instances, for end users who do not meet the eligibility criteria for the promotion. She states that the LCCW promotion requires an end user to purchase basic service and two features. The witness also disputes dPi's contention that the free blocks that dPi includes on most of its end user orders qualify as "purchased features" even though neither dPi nor its end users pay anything for these features.

Witness Tipton testifies that AT&T does not seek to avoid payment of promotional credits to dPi for claims that meet the qualifying criteria, but AT&T does seek to deny payment of claims to dPi and other CLECs that do not meet the conditions stated in the interconnection

[1] AT&T contends that the TouchStar BCR, BRD, and HBG blocking features are not features at all. However, they are described in the TouchStar feature portion of AT&T's tariff, where they are listed with other features, and are specifically referred to as features. See EXH 17, an excerpt from the tariff. Furthermore, AT&T employees repeatedly referred to these features as features during communications between the parties; see EXH 21.

agreement for promotions. The witness asserts that by the April 2007 billing cycle AT&T had issued credits totaling $83,000 to dPi's Florida end users. The witness states that the line connection charge waiver credit is paid when a request meets the eligibility criteria, and it is denied when a request does not. She cites the parties' interconnection agreement (Agreement) as the document that governs the issuance of promotional credits. The Agreement reads:

> 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 BellSouth directly.[2]

Witness Tipton asserts that the language in the agreement is clear, and dPi is only entitled to promotional credits when dPi's end users meet the same promotional criteria that AT&T retail end users must meet in order to qualify for the credit.

According to witness Tipton each month CLEC resellers submit credit request forms with accompanying spreadsheets for end user accounts which the CLECs claim qualify for promotional credits. Witness Tipton asserts that when requests are submitted by a CLEC, the CLEC has represented to AT&T that the CLEC's end users meet the criteria to qualify for the credit. She states that when AT&T first started processing promotional credits from CLECs, it assumed that the requests met the promotion's requirements listed in the tariff and the interconnection agreement between AT&T and the respective CLEC, and did not attempt to verify their eligibility. The witness asserts that in 2004 it appeared that some of the requests submitted by CLECs were not valid and ineligible for a promotional credit. As a result, AT&T started sampling the requests from CLECs in early 2005 to verify that the credit requests were valid and eligible for the promotion.

In witness Tipton's direct testimony she explains that the majority of dPi's claims are for the Line Connection Charge Waiver promotion, but there are actually three promotions at issue in the original complaint. Regarding the LCCW promotion, the witness asserts that the LCCW provides a credit of the applicable nonrecurring line connection charge (installation charge) when a customer purchases a basic local flat-rate residential line and two features. Witness Tipton explains that an AT&T retail end user qualifies for the LCCW if the end user is a customer whose service is currently with another carrier and the customer orders service as an AT&T "win-over," or reacquired customer. She asserts that the customer must also have purchased a minimum of basic service and a specified number of Custom Calling or TouchStar features. Witness Tipton testifies further that per the terms of the parties' Agreement, for dPi to qualify for a credit under the LCCW promotion, a dPi end user must likewise be a customer that is not a current dPi customer, has become a win-over or reacquired customer for dPi, and the customer must have purchased the specified number of Custom Calling or TouchStar features in accordance with the terms of the promotion.

Witness Tipton contends that the majority of the customer orders for which dPi requested credits under the LCCW promotion were denied by AT&T because the orders did not contain the

[2] This language was included in the original ICA between dPi and AT&T Florida.

required number of purchased features. The AT&T witness states that many of dPi's end users did not purchase any features, and thus were not eligible for the credit because AT&T retail end users with similar orders are not eligible for the LCCW promotion. She asserts that some of dPi's requests were also denied because the request was a duplicate request. Witness Tipton testifies that prior to implementing its automated verification process in April 2006, AT&T performed a sample audit of the credit requests submitted by dPi. The witness states that a subsequent review of 100% of the promotional credit requests was conducted for requests that were submitted in Florida for the period January 2005 through December 2005 that were not included in the original sample. The witness asserts that the review that was performed on the remainder of the requests (1) confirms the outcome of the initial sample, (2) indicates that AT&T most likely overpaid credits to dPi, and (3) reflects that dPi's process for submitting requests lacked a method to ensure that only valid requests were submitted. Witness Tipton states that when AT&T verified 100% of the requests for credits that dPi submitted for the LCCW promotion for January 2005 to December 2005, it was determined that 84% of the requests did not meet the qualifications for the LCCW promotion. She notes that initially 82% of dPi's LCCW requests for this period were denied, which indicates that dPi was overpaid for the LCCW promotion during the period January 2005 to December 2005.

Based upon the results of the verification conducted by AT&T for requests that dPi submitted between January 2005 and December 2005, the AT&T witness believes that dPi systematically inflated claims by submitting duplicate claims for credit without applying the most basic verification. Witness Tipton testifies that dPi submitted requests for some promotions that did not meet the qualifications because existing customer accounts were submitted for promotions that were only available to new customers, and those same new customers were also submitted for promotions that only applied to existing customers. According to witness Tipton, a review conducted by AT&T of claims submitted by dPi indicates that requests for credit were made in the same month, for the same end user telephone number, for both the LCCW and the Secondary Service Charge Waiver (SCCW) promotion. The witness asserts that claims were submitted in this manner even though the LCCW promotion requires that the customer be a newly reacquired or win-over customer, while the SCCW promotion requires that the customer be an existing customer. Witness Tipton asserts that a random review performed by AT&T of the credit requests submitted for January 2005 reveals that dPi submitted requests for credit and attempted to "double-dip" by applying for the LCCW and the SCCW promotion using the same customer information. The witness states that AT&T has informed dPi on numerous occasions of the number of accounts that dPi has submitted that did not meet the eligibility criteria.

In her rebuttal testimony witness Tipton asserts that dPi witness Watson discusses at length the process that AT&T used to review CLEC requests for promotional credits, which is not at issue in this proceeding. Witness Tipton states that our Order[3] only identified two issues:

(1) Is dPi entitled to credits for the AT&T Florida Line Connection Charge Waiver promotion when dPi orders free blocks on resale lines? and

[3] Order No. PSC-07-0322-PCO-TP, issued April 13, 2007.

(2) Is dPi entitled to any other promotional resale credits from AT&T Florida?

Witness Tipton argues that even though dPi claims that AT&T has not granted dPi credits for valid requests for the LCCW promotion, in most cases dPi no longer submits such requests for credits. The witness also states that the majority of dPi's requests that were denied, were denied because it appears that most of dPi's orders were based on the assumption that nonchargeable calling blocks are features. Witness Tipton testifies that calling blocks enable end users to prevent the activation of certain features that have a per-usage charge. The witness believes that a review of AT&T's tariff illustrates the distinction between a feature and a call block by referring to the applicable Rates and Charges for TouchStar Services. She asserts that the blocking capability described as "Denial of Per Activation" in the GSST Tariff is available to a customer at no charge if the customer wants to ensure that certain chargeable features are not utilized.

Witness Tipton states that dPi does not purchase call blocks from AT&T, and dPi does not charge its end users for the call blocks because the blocks are not purchased features. The witness asserts that in the North Carolina proceeding on the same issue, dPi witness Bolinger stated that dPi places blocks on all of its end user lines to ensure that its customers do not incur per activation charges on their accounts because that is standard industry practice for prepaid customers.

In response to dPi witnesses Watson and Bolinger's testimony that accuses AT&T of crediting CLECs in an unfair manner in 2004, AT&T witness Tipton counters that these allegations are not true. She states that in August and September 2004, dPi witness Watson from Lost Key Telecom began submitting thousands of requests for promotional credits for several CLECs' clients, and while AT&T was trying to determine how best to process the voluminous number of requests, witness Watson contacted AT&T and requested that AT&T process the requests from Budget Phone as soon as possible. Witness Tipton asserts that witness Watson told her that his business had been severely damaged as a result of Hurricane Ivan and that he needed the credits processed quickly in order to continue his business operations. She states AT&T assumed that witness Watson's requests were valid, and AT&T processed almost 100% of the credits for Budget Phone. Witness Tipton asserts that after the requests were processed for Budget Phone, AT&T realized that Budget Phone and many of the other CLECs for whom Lost Key Telecom had submitted claims had received credit for promotions that did not meet the terms of the promotion, and AT&T immediately suspended granting credits to all CLECs for a time.

In AT&T witness Tipton's direct testimony she states that after AT&T verified 100% of the promotional credit requests that dPi submitted between January 2005 and December 2005 it was determined that dPi was overpaid by 2% for the 2005 LCCW promotional credit requests. In her rebuttal testimony witness Tipton testifies that after additional reviews were conducted by AT&T for 100% of the promotional credit requests submitted by dPi for the LCCW promotion for the period January through March 2006 and August through December 2004, it was also determined that dPi had been overpaid for the LCCW promotion. dPi was overpaid by 3% for the period January through March 2006, and by 19% for the period August 2004 through

December 2004. In her supplemental rebuttal testimony, the witness notes that neither Lost Key Telecom nor dPi assisted in the development of AT&T's process for approving promotional credits, and no small test batches of claims were ever submitted to AT&T for approval before AT&T was inundated with the requests from Lost Key Telecom.

At hearing, witness Tipton testified that it was not AT&T's practice to grant the LCCW promotion to its retail customers that requested basic service and free blocks, as dPi contends that the data in EXH 13 proves. The witness asserts that there are several reasons why AT&T might have waived the line connection charge for some of its retail customers but it was never waived because of the LCCW promotion when its customers only ordered basic service and free blocks. She states that the data in EXH 13 reflects that in some instances the line connection charge was waived for some of AT&T's retail customers, but it cannot be determined in many instances why the charge was waived. Witness Tipton asserts that based on the data in EXH 13 and the analysis of that data, it is impossible for dPi or AT&T to determine whether a particular retail customer received a waiver of the line connection charge pursuant to the LCCW promotion.

Decision

The treatment of promotions is addressed in the parties' Agreement entered into on February 28, 2003. The language states that promotions lasting more than 90 days will be provided to dPi end users who would have qualified for the promotion had it been provided by AT&T directly. AT&T acknowledges its obligation to offer the LCCW promotion to dPi and asserts that the promotion is offered to dPi when dPi's orders meet the conditions and qualifications of the promotion. AT&T testifies that all requests for credits by dPi have been granted for claims that met the qualifications. To the contrary, dPi contends that AT&T has not extended its promotional pricing for all orders that met the qualifications. dPi asserts that AT&T originally interpreted its tariff language the way dPi states that it should be interpreted, but changed its interpretation after it paid a substantial amount of credits to two CLECs with identical claims as dPi. dPi contends that AT&T changed its interpretation so that it would not have to pay the requested credits to dPi and other CLECs. In its brief, dPi claims that AT&T interpreted the qualifying language and awarded promotional credits for the LCCW promotion in a manner consistent with dPi's interpretation. AT&T witness Tipton counters that dPi's claims were not valid. Witness Tipton also asserts that the claims that were submitted by Lost Key Telecom on behalf of other CLECs, such as Budget Phone, that were paid in 2003 and 2004 were also invalid. These claims were inadvertently paid because AT&T did not independently verify them, instead assuming that they satisfied the promotion's requirements.

dPi argues that dPi is AT&T's customer and if dPi's customers order dPi's basic service and dPi places a combination of the BRD, BCR, or HBG blocks on the orders, the orders qualify for the line connection charge waiver. However, AT&T contends that dPi's customers or end users must purchase basic service and two TouchStar features to qualify for the promotion, just as AT&T's end users must do to qualify for the promotion. AT&T asserts that it does not provide the LCCW to its end users on orders consisting of basic service and a combination of the

free blocks, and thus dPi is not entitled to the waiver when it submits orders for its end users with basic service and a combination of the free blocks.

In its brief, dPi contends that its analysis of the data produced by AT&T in Exhibit 13 shows that AT&T retail customers with orders consisting of basic service and two of the blocks (BCR, BRD, or HBG) received waivers of the line connection charge. AT&T's witness Tipton acknowledges that some of AT&T's retail customers received waivers for the line connection charge for several reasons. She states that the data in EXH 13 reflect that in some instances the line connection charge was waived for some of AT&T's retail customers, but it cannot be determined in many instances why the charge was waived. Witness Tipton asserts that based on the data in EXH 13 and the analysis of that data, it is impossible for dPi or AT&T to determine whether a particular retail customer received a waiver of the line connection charge pursuant to the LCCW promotion. We agree that it cannot be confirmed that when the line connection charge was waived for some of AT&T's retail customers, it was waived pursuant to the LCCW promotion.

Although there is only one primary issue and the parties agree that certain terms and conditions must be met in order to qualify the promotional credit for the LCCW, they tend to disagree on the application and interpretation of the language regarding (1) purchased features, (2) end users, (3) the process for requesting credits, and (4) parity. As a result, most of the parties' arguments address secondary issues that they assert are relevant to the LCCW promotion. AT&T's GSST[4] describes the terms and conditions that must be met to qualify for the promotion. The language in the GSST states:

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

In their Agreement AT&T and dPi have defined certain terms and conditions that must be met regarding parity in order to qualify for promotional offerings. The Online Merriam-Webster Dictionary defines parity as the quality or state of being equal or equivalent.[5] Accordingly, we find that parity is achieved in this case when AT&T's retail customers (end users) and dPi's retail customers (end users) are treated equally when it comes to requirements that must be met to qualify for the LCCW promotion. First, the Agreement defines "end user" in both the general terms and conditions section, and the section on Resale. The definition reads:

> End User means the ultimate user of the Telecommunications Service.[6]

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[4] Section A2.10.2(A) of AT&T Florida's General Subscriber Services Tariff that was in effect at the time the promotion credits were requested by dPi.

[5] The URL for this definition is http://www.merriam-webster.com/dictionary

[6] Negotiated Interconnection Agreement between dPi Teleconnect and BellSouth Telecommunications, Inc., dated March 11, 2003 and March 20, 2003, respectively.

We find the definition of end user is crucial in determining parity. We further find that "end user" refers to dPi's end users, not to dPi as dPi asserts. Second, the Agreement addresses parity on Page 4 of the General Terms and Conditions section. The language states:

> When dPi purchases Telecommunication Services from BellSouth for the purpose of resale to End Users, such services shall be equal in quality, subject to the same conditions, and provided within the same provisioning time interval that BellSouth provides to its Affiliates, subsidiaries and End Users.[7]

We find that the above language supports AT&T's argument that while dPi is AT&T's customer, it is dPi's end users who are the recipient of the services, and therefore they must meet the same criteria that AT&T's end users must meet to qualify for the LCCW promotion. Third, the Agreement addresses the conditions under which services will be available for resale by dPi. That language is addressed in the Agreement in Attachment 1, which includes a page that states exclusions and limitations on services available for resale. Under the Exclusion and Limitations Section of the Resale portion of the ICA, on Page 16 of Attachment 1, Applicable Note 2 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 BellSouth directly.[8]

In its brief, dPi argues that the BCR, BRD, and HBG are identified in the tariff as features and AT&T staff members have referred to them previously as features in communications with dPi. dPi further notes these blocks are features that have USOC codes listed in the rates and charges section of the tariff. Witness Tipton asserts that BCR, BRD, and HBG are listed under TouchStar Service but they are not TouchStar features and, more importantly, they are not purchased TouchStar features. In its brief, AT&T points out that dPi end users do not order the BCR, BRD, and HBG blocks that dPi places on their lines. We find it appropriate to agree with witness Tipton that the references made to the BCR, BRD, and HBG in footnotes in the GSST are ambiguous and somewhat confusing, but even if they are features, they are not purchased by dPi or dPi's end users. Pursuant to the language in the Agreement, we find that in order for dPi to qualify for the LCCW promotion, features must be purchased. Based upon the record evidence in this proceeding, we find that dPi's interpretation of the language in the tariff lacks merit and dPi also has not shown that its customers purchased the denial of activation blocks. We find that dPi is not entitled to any credits.

Promotional Resale Credits

dPi

dPi witnesses Bolinger and Watson did not present arguments for credits initially sought from AT&T for the SSCW and the TFFF promotions. Witness Bolinger did, however, state that

[7] Id.

[8] Id. The wording of this footnote was included in the parties' original ICA, and this provision was applicable to all claims submitted on dPi's behalf in 2004 and 2005. During cross-examination AT&T's witness testified that dPi is not considered the end user in this footnote.

dPi has a number of promotion-related disputes but will only focus on the dispute about the LCCW promotion. Witness Watson also states that dPi has been denied credits for the SSCW and TFFF promotions.

During cross-examination, witness Watson testified that in January, February, March and April 2004, while employed by Teleconnect, he submitted credit requests similar to dPi's requests for the SSCW and the TFFF promotions that were paid by AT&T within 30 days. Witness Watson testifies that in the summer of 2004 he left Teleconnect and started his own business. He asserts that after starting his business, Lost Key Telecom, he met with AT&T staff regarding promotions that his company was going to submit for two of his clients, Budget Phone and dPi. He states that Budget Phone's claims were paid and dPi's claims were denied, without any explanation.

AT&T

Witness Tipton asserts that in some instances dPi requested credits that did not meet the eligibility criteria. Witness Tipton states that AT&T extends its promotional pricing to dPi when dPi submits claims that meet the qualifications for a promotion as stated in the GSST. The witness testifies that a dPi end user qualifies for the SSCW promotion when the end user requests to add or change features or service on his accounts. Witness Tipton asserts that the TFFF promotion only applies to reacquisition or win-over customers and AT&T and dPi end users must purchase basic local service plus two Custom Calling or TouchStar features to receive the credit during the 12-month period following the installation of the qualifying service.

Witness Tipton asserts that before AT&T implemented its automated verification process in April 2006, a sampling method was used to verify claims submitted for the period January 2005 through December 2005 for the SSCW promotion and TFFF promotion. The witness states that combined data from AT&T's reviews indicated that 87% of the credit requests that dPi submitted for the period January 2005 through December 2005 did not qualify for the SSCW promotion, and that AT&T had only denied 68% of these credits. Witness Tipton also testifies that the results from the combined review indicate that 19% of the credit requests that dPi submitted for the TFFF promotion did not meet the qualifications, but AT&T only denied 5% of the requests for that period. The witness states that in both instances dPi had been overpaid for these promotions. Witness Tipton asserts that a random review of credit requests submitted in January 2005 indicated that dPi submitted the same requests for both the SSCW and LCCW promotions, even though the qualifications are different for each promotion. The witness asserts that AT&T communicated its concerns to dPi regarding the number of accounts submitted that were invalid.

Witness Tipton asserts in her rebuttal testimony that dPi's witnesses did not provide any testimony to support dPi's contention that AT&T owes dPi credits for the SSCW and the TFFF promotions. The witness states that credit requests submitted by dPi and subsequently denied by AT&T, were denied because they did not meet the qualifications for the promotion. Witness Tipton testifies that before going to hearing in the North Carolina case dPi agreed to drop the SSCW promotion and the TFFF promotion because dPi felt the issue had been addressed

satisfactorily. The AT&T witness states that additional reviews have been completed that validates AT&T's claim that dPi is not entitled to any credit requests for the SSCW promotion and the TFFF promotion.

Decision

dPi did not address or provide a position whether it was entitled to any other promotional resale credits from AT&T Florida in its post-hearing brief. We further note that the Order Establishing Procedure, Order No. PSC-07-0322-PCO-TP, and the Order Modifying Procedure, Order No. PSC-07-0959-PCO-TP, provide that failure to submit a position on an established issue in a post-hearing brief, results in that party having waived the specific issue. Therefore, we find that dPi has waived the issue in its entirety. Accordingly, absent any evidence or arguments to the contrary, we find that dPi is not entitled to any other promotional credits from AT&T.

III. Conclusion

We find that the TouchStar Service blocks that dPi orders for its resale lines that are provided by AT&T free of charge are not "purchased" features that qualify for promotional credits. We find it appropriate that dPi is entitled to credits for the Line Connection Charge Waiver promotion only when a dPi reacquisition or win-over customer purchases basic service and two features. We further find that dPi is not entitled to any credits in the instant docket, nor is dPi entitled to any other promotional credits from AT&T.

This docket shall be closed after the time for filing an appeal has run.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that dPi is entitled to credits for the Line Connection Charge Waiver promotion only when a dPi reacquisition or win-over customer purchases basic service and two features. It is further

ORDERED that dPi is not entitled to any credits in the instant docket. It is further

ORDERED that dPi is not entitled to any other promotional credits from AT&T. It is further

ORDERED that this docket shall be closed after the time for filing an appeal has run.

By ORDER of the Florida Public Service Commission this 16th day of September, 2008.

ANN COLE
Commission Clerk

(SEAL)

TLT

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Exhibit E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

dPi TELECONNECT, LLC,

Plaintiff,

vs. CASE NO. 4:08-cv-509/RS-WCS

THE FLORIDA PUBLIC SERVICE COMMISSION, KATRINA J. MCMURRIAN, NANCY ARGENZIANO, AND NATHAN A. SKOP IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION, and

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a AT&T FLORIDA,

Defendants.
_____/

ORDER

Before me are Plaintiff dPi Teleconnect's Initial Brief (Doc. 27) and Reply Brief (Doc. 34), Defendant Bellsouth Telecommunications' Answer Brief (Doc. 32), and Defendant Florida Public Service Commission and Commissioners' Answer Brief (Doc. 31). This is an appeal of the Final Order of the Florida Public Service Commission, PSC-08-0598-FOF-TP, issued on September 16, 2008.

The Public Service Commission's findings and interpretations of federal law are reviewed *de novo*. *MCI Worldcom Communications, Inc. v. Bellsouth*

Telecommunications, Inc., 446 F.3d 1164, 1170 (11th Cir. 2006). The factual findings of the Commission are given deference and reviewed only under an "arbitrary and capricious" standard. *Id. See also MCI Telecommunications Corporation, et. al. v. Bellsouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286, 1290 (N.D. Fla. 2000).

The issue in dispute between the parties was whether "blocks" of features placed by dPi on its customers' phone lines were "features" that entitled dPi to the Line Connection Charge Waiver promotion pricing from BellSouth. The Commission concluded that the blocks of features were not features themselves, and thus dPi was not entitled to the promotional pricing from BellSouth. This was a factual determination, not an interpretation of federal law and the Federal Telecommunications Act, therefore the Commission's decision will be reviewed under the "arbitrary and capricious" standard. *MCI Worldcom Communications, Inc. v. Bellsouth Telecommunications, Inc.*, 446 F.3d 1164, 1170 (11th Cir. 2006).

I find the Commission had a reasonable basis for making this determination. The Commission was not arbitrary or capricious in its determination that blocks 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 prevented features from being accessed by the customer. Because the blocks were not features, nor were they requested by dPi's customers, it was

reasonable for the Commission to determine that dPi was not entitled to receive the promotion pricing for a BellSouth promotion requiring the purchase, by a customer, of a telephone line and two features. The Commission's finding was supported by substantial evidence and it was not unreasonable. Therefore, its decision will not be disturbed.

The determination made by the Florida Public Service Commission in this case was entirely factual and did not involve any interpretation of federal law. However, I find that that the position taken by BellSouth does not violate any federal law provisions. Thus, even if a higher standard of review was required, the Commission's decision would still stand.

The relief requested by Plaintiff is **denied.** The Final Order of the Florida Public Service Commission is **affirmed.**

ORDERED on August 21, 2009.

/s/ Richard Smoak
RICHARD SMOAK
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE – 2005-00455

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof via U.S. Mail, this 26th day of January 2010.

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