

FOSTER MALISH & BLAIR, L.L.P.

ATTORNEYS AT LAW

CHRISTOPHER MALISH

A REGISTERED LIMITED LIABILITY PARTNERSHIP

1403 WEST SIXTH STREET

AUSTIN, TEXAS 78703

(512) 476-8591

FAX (512) 477-8657

www.fostermalish.com

WRITERS EMAIL:
chrismalish@fostermalish.com

October 30, 2006

UPS Next Day Air
~~Via Certified Mail, Return Receipt Requested~~

RECEIVED

NOV 01 2006

PUBLIC SERVICE
COMMISSION

Ms. Beth O'Donnell, Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, Kentucky 40602

Re: Docket No. 2005-00455; *dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.*

Dear Ms. O'Donnell:

This is regarding the above-referenced case which is being held in abeyance until the outcome is determined of a similar case before the North Carolina Utilities Commission (NCUC Docket No. P-55, Sub. 1577). Please be advised that an order denying dPi's Motion for Reconsideration was issued in the North Carolina complaint on October 12, 2006. However, dPi has appealed the results of this order; attached is dPi's Complaint and Request for Declaratory and Injunctive Relief filed on October 20, 2006 in the U.S. District Court, Western District of North Carolina, Charlotte Division. No action should be taken on this case until a final decision is rendered in this appeal.

Thank you for your courtesy in this matter. If you should have any questions, please do not hesitate to call.

Very truly yours,



Christopher Malish

Enclosure

Ms. Beth O'Donnell

October 30, 2006

Page 2

cc: Creighton E. Mershon, Sr. *Via Certified Mail, Return Receipt Requested*
Attorney at Law for BellSouth Telecommunications, LLC
601 West Chestnut Street, Room 407
Louisville, Kentucky 40203

Andrew Shore, Senior Regulatory Counsel *Via Certified Mail, Return Receipt Requested*
BellSouth Telecommunications, Inc.
675 West Peachtree Street, Suite 4300
Atlanta, Georgia 30375

Douglas F. Brent *Via Certified Mail, Return Receipt Requested*
Stoll Keenon & Ogden, PLLC
2650 Aegon Center
400 West Market Street
Louisville, Kentucky 40202-3377

**U.S. District Court
Western District of North Carolina (Charlotte)
CIVIL DOCKET FOR CASE #: 3:06-cv-00438**

dPiTeleconnect, LLC v. North Carolina Utilities
Commission et al
Assigned to: Robert J. Conrad, Jr
Referred to: Carl Horn, III
Cause: Declaratory Judgment

Date Filed: 10/20/2006
Jury Demand: None
Nature of Suit: 890 Other Statutory
Actions
Jurisdiction: Federal Question

Plaintiff

dPiTeleconnect, LLC

represented by **David S. Wisz**
Bailey & Dixon, LLP
Post Office Box 1351
Raleigh, NC 27602-1351
919/ 828-0731
Fax: 919/ 828-6592
Email: dwisz@bdixon.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Ralph McDonald
Bailey & Dixon, LLP
P. O. Box 1351
Raleigh, NC 27602-1351
919-828-0731
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

North Carolina Utilities Commission

Defendant

Jo Anne Sanford

Defendant

Robert E Kroger

Defendant

Robert V. Owens, Jr.

Defendant

Sam J. Ervin, IV

Defendant

Lorinzo L. Joyner**Defendant****James Y. Kerr, II****Defendant****Howard N. Lee****Defendant****Bellsouth Telecommunications, Inc.**

Date Filed	#	Docket Text
10/20/2006	<u>1</u>	COMPLAINT <i>and Request for Declaratory and Injunctive Relief</i> against all defendants (Filing fee.\$ 350 receipt number 250009.); filed by dPiTeleconnect, LLC.(Wisz, David) (Entered: 10/20/2006)
10/20/2006	<u>2</u>	Corporate Disclosure Statement by dPiTeleconnect, LLC (Wisz, David) (Entered: 10/20/2006)
10/23/2006		Case Assigned to Judge Robert J. Conrad, Jr and Carl Horn, III. <i>This is your only notice - you will not receive a separate document.</i> (apb) (Entered: 10/23/2006)
10/23/2006		NOTICE of ECF Case Opening Error re: 1 Complaint Summons not issued. Filer shall conventionally or electronically submit civil summons for issuance to the Clerk of Court. No request for waiver of service. If summons not to be issued, filer shall file a request for waiver of service using the <i>Request for Waiver of Service</i> event. (apb) (Entered: 10/23/2006)
10/23/2006	<u>3</u>	Summons Issued Conventionally as to Howard N. Lee, Bellsouth Telecommunications, Inc., North Carolina Utilities Commission, Jo Anne Sanford, Robert E Kroger, Robert V. Owens, Jr, Sam J. Ervin, IV, Lorinzo L. Joyner, James Y. Kerr, II. (apb) (Entered: 10/23/2006)
10/27/2006	<u>4</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. North Carolina Utilities Commission served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Proof of Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>5</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>6</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. Lorinzo L. Joyner served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)

10/27/2006	<u>7</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. Robert E Kroger served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>8</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. Robert V. Owens, Jr served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>9</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. Jo Anne Sanford served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>10</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. Howard N. Lee served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>11</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. James Y. Kerr, II served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>12</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. Sam J. Ervin, IV served on 10/25/2006, answer due 11/14/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)
10/27/2006	<u>13</u>	AFFIDAVIT of Service of Complaint and Summons, filed by dPiTeleconnect, LLC. Bellsouth Telecommunications, Inc. served on 10/26/2006, answer due 11/15/2006. (Attachments: # <u>1</u> Affidavit Service)(Wisz, David) (Entered: 10/27/2006)

PACER Service Center			
Transaction Receipt			
10/31/2006 17:23:44			
PACER Login:	fm0541	Client Code:	712
Description:	Docket Report	Search Criteria:	3:06-cv-00438
Billable Pages:	2	Cost:	0.16

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

dPi Teleconnect, L.L.C.

(b) County of Residence of First Listed Plaintiff Dallas County, TX (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Ralph McDonald; Bailey & Dixon, LLP; P.O. Box 1351; Raleigh, NC 27602-1351; (919) 828-0731

DEFENDANTS

North Carolina Utilities Commission; JoAnne Sanford; Robert E. Kroger; Robert V. Owens, Jr.; Sam Ervin, IV; Lorinzo Joyner; James Y. Kerr, II; and Howard N. Lee (in their official capacities as Commissioners of the North Carolina Utilities Commission); and BellSouth Telecommunications, Inc. (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
Incorporated or Principal Place of Business in This State
Incorporated and Principal Place of Business in Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, SOCIAL SECURITY, FEDERAL TAX SUITS, BANKRUPTCY, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. 2201
Brief description of cause: Declaratory judgment for violation of Telecommunications Act of 1996

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE 1 DOCKET NUMBER

DATE 10/20/2006 SIGNATURE OF ATTORNEY OF RECORD

Handwritten signature of attorney

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Case No.:

dPi Teleconnect, L.L.C.)
)
Plaintiff,)
)
v.)
)
THE NORTH CAROLINA)
UTILITIES COMMISSION,)
Jo Anne Sanford, Robert E. Kroger,)
Robert V. Owens, Jr., Sam Ervin, IV,)
Lorinzo Joyner, James Y. Kerr, II,)
and Howard N. Lee (in their official)
capacities as Commissioners of the)
North Carolina Utilities)
Commission), and Bellsouth)
Telecommunications, Inc.)

PLAINTIFF'S COMPLAINT
AND REQUEST FOR
DECLARATORY AND INJUNCTIVE
RELIEF

1. The dispute in this matter arises from a disagreement regarding BellSouth Telecommunications, Inc. ("BellSouth")'s resale obligations under 47 U.S.C. 251(c)(4)(A) and 252(d)(3), and more specifically whether BellSouth must extend to dPi Teleconnect, L.L.C. ("dPi") promotional credits for services which would be eligible for the promotion pricing under the plain reading of certain promotions BellSouth offered in the State of North Carolina.

JURISDICTION

2. This action arises under Sections 252(e)(6) and 251(c)(4)(A) of the Federal

Telecommunications Act of 1996 (the "FTA" or "Act"), which is the source of the Court's jurisdiction in this matter. It is essentially an appeal of a State Commission's decision of a dispute arising under the FTA.

3. Venue in the United States District Court for the Western District of North Carolina is proper under 28 U.S.C. § 1391(b), because the Commission is based in said district.

THE PARTIES

4. Complainant dPi Teleconnect, L.L.C. is a Delaware corporation headquartered at 2997 LBJ Freeway, Suite 225, Dallas, Texas 75234. dPi is a "competitive local exchange carrier" ("CLEC") as defined by the Act in 47 U.S.C. §251.

5. BellSouth is an "incumbent local exchange carrier" ("ILEC") as defined by the Act. 47 U.S.C. §251(h). It is a Georgia corporation with its principal place of business in Atlanta, and could be considered the real party in interest in this proceeding.

6. The North Carolina Utilities Commission is an agency of the State of North Carolina. Jo Anne Sanford; Robert E. Kroger; Robert V. Owens, Jr.; Sam Ervin, IV; Lorinzo Joyner; James Y. Kerr, II; and Howard N. Lee are all Commissioners of the North Carolina Utilities Commission and are served in their official capacities only.

CONDITIONS PRECEDENT

7. All conditions precedent to jurisdiction have occurred or been complied with: Plaintiff originally filed this action with the North Carolina Utilities Commission and after issuance of the Commission's initial order in said proceeding, moved for rehearing, and now files this Complaint.

FACTS

Regulatory Background

8. The FTA opens up the local telephone service market by, among other things, requiring the incumbent local exchange carriers ("ILECs"), such as BellSouth, to offer their retail services at wholesale rates to competitive local exchange carriers ("CLECs"), such as dPi.

9. Among other things, ILECs are required to extend any promotional pricing offered to their end users for periods of 90 days or more to CLECs, like dPi.

Facts of the Case

10. dPi Teleconnect resells BellSouth's retail residential telephone services. dPi's dispute centers on credits which are due from BellSouth to dPi Teleconnect as a result of dPi Teleconnect's reselling of services subject to BellSouth promotional discounts.

11. BellSouth has over the past months and years sold its retail services at a discount to its end users under various promotions that have lasted for more than 90 days. dPi is entitled to purchase and resell those same services at the promotional rate, less the wholesale discount.

12. As a practical matter, dPi Teleconnect has bought these services at the regular retail rate less the resale discount, then been credited the difference between that rate and the promotional rate pursuant to "promotion credit requests."

13. After completing an audit in 2004, dPi found that BellSouth had failed to issue dPi with hundreds of thousands of dollars worth of promotional credits to which dPi was entitled (system wide, not just in North Carolina). The bulk of the promotions for which

credits were due but not paid in North Carolina were related to BellSouth's Line Connection Charge Waiver ("LCCW") promotion.

14. Pursuant to this promotion, BellSouth waives the line connection charge for those customers who switch to BellSouth and take at least basic service with two Touchstar features.¹ Thus all – *ALL* – dPi had to do to qualify for the line connection charge waiver is purchase Basic Service with one or more Touchstar features.

15. In every situation in which dPi applied for the promotional credit, dPi had purchased through a single order a package consisting of at least Basic Service plus two or more Touchstar features. This is because dPi's basic offering always includes at least two Touchstar blocks, including the call return block (known by its Universal Service Ordering Code ["USOC"] of "BCR"); the repeat dialing block ("BRD"); and the call tracing block, or "HBG" block.² There is no dispute that dPi ordered these Touchstar blocks.

16. BellSouth initially admitted its obligation to pay the credits to dPi Teleconnect and repeatedly promised to issue the credits to dPi Teleconnect. BellSouth has paid similar

¹In relevant part, the promotion reads as follows:

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.

²*Id.*

credits to other CLECs. However, despite its promises, and its treatment of other CLECs with essentially identical claims, BellSouth ultimately refused to issue the credits to dPi

17. Ultimately, in North Carolina, BellSouth wrongfully denied dPi \$185,719.49 for credits applied for in situations where dPi qualified for the LCCW promotion credit by purchasing Basic Local Service plus two or more of the BCR, BRD, and HBG Touchstar block Features. BellSouth argued that dPi does not qualify for the promotion for a number of reasons: because the features that dPi is ordering are not Touchstar features; because dPi did not pay additional sums to secure those features; and because BellSouth does not sell to its customers in this way. Each of these arguments is without merit: the blocks are identified as Touchstar Features under the tariff, the UNE regime, and the conduct of the parties prior to the dispute; the text of the promotion does not require that the features be purchased at additional cost; and (if true) the fact that BellSouth's typical end users do not attempt to qualify for the promotion does not mean dPi, which has much different needs from the BellSouth' end users, does not qualify for the promotion.

18. dPi initiated a case against BellSouth on this issue before the North Carolina Commission in August, 2005. The case was styled *In the Matter of the Complaint of dPi Teleconnect, L.L.C. Against BellSouth Telecommunications, Inc. Regarding Credit for Resale Services Subject to Promotional Discounts*, Docket No. P-55, SUB 1577, before the State of North Carolina Utilities Commission.

19. The Commission heard the case and entered an initial decision not favorable to dPi on June 7. On July 6, dPi filed a motion for reconsideration, pointing out that had the Commission applied the correct test – i.e., interpreting the “contract” documents as written, as opposed to BellSouth’s “interpretation” of how the promotion was to be applied, or basing

the decision on the best evidence in the record, rather than the testimony of BellSouth's corporate spokesperson, who admittedly had no personal knowledge of the facts of the case, that dPi was entitled to prevail. The Commission rejected dPi's arguments and entered an order disposing of the motion for reconsideration on October 12, 2006.

APPEAL

20. Plaintiff hereby appeals the Commission's order in Docket No. P-55, SUB 1577. In particular, Plaintiff appeals the Commission's order with respect to dPi's eligibility to receive promotional pricing under BellSouth's Line Connection Charge Waiver promotion in situations where dPi is entitled as a matter of law to promotional pricing because dPi qualifies for the promotion under the express written terms of the promotion.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully request that Defendants be cited to appear and answer herein and that upon a final hearing of the cause, judgment be entered for Plaintiff granting the following relief:

a declaration that the PUC's order is contrary to the FTA of 1996 and/or arbitrary and capricious and that that dPi is entitled to the promotion credits it seeks to collect, with a reversal or remand of this case to the PUC with the instruction that the PUC issue a new order not inconsistent with the Court's ruling in this case; and

such other and further relief to which the Plaintiff may be entitled at law or in equity.

Respectfully submitted this 20th day of October, 2006.

David S. Wisz
Ralph McDonald
N.C. State Bar No. 5037
P.O. Box 1351
Raleigh, N.C. 27602-1351
(919) 828-0731

OF COUNSEL:

Christopher Malish
Foster Malish Blair & Cowan, L.L.P.
1403 West Sixth Street
Austin, Texas 78703
(512) 476-8591

By: /s/ David S. Wisz
N.C. State Bar No. 22789
/s/ Ralph McDonald
N.C. State Bar No. 5037
Bailey & Dixon, L.L.P.
Counsel for Plaintiff
Post Office Box 1351
Raleigh, North Carolina 27602
Telephone No.: (919) 828-0731
Facsimile No.: (919) 828-6592
dwisz@bdixon.com
rmcdonald@bdixon.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Defendants in this action by depositing a copy thereof in the United States mail, postage prepaid.

This 20th day of October, 2006.

/s/ David S. Wisz