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October 26, 2009

Jeffrey DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40601

***RE: dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc. dba AT&T Kentucky
Dispute over Interpretation of the Parties' Interconnection Agreement
Regarding BellSouth's failure to extend Cash Back promotions to dPi
Case No. 2009-00127***

Dear Mr. DeRouen:

Enclosed please find an original and ten copies of dPi Teleconnect's Reply to BellSouth's Answer in the above mentioned case.

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

Sincerely yours,

STOLL KEENON OGDEN, PLLC

Douglas F. Brent

DFB: jms
Enclosures

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COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the matter of:)
)
dPi Teleconnect, L.L.C. v.)
BellSouth Telecommunications, Inc.)
dba AT&T Kentucky)
)
Dispute over Interpretation of the Parties')
Interconnection Agreement)
regarding BellSouth's failure to extend)
Cash Back promotions to dPi)

CASE NO. 2009-00127

dPi TELECONNECT'S REPLY TO BELLSOUTH'S ANSWER

dPi Telecommunications, L.L.C. ("dPi") hereby submits its Reply to the Answer filed by BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T"). dPi and AT&T are collectively referred to herein as "Parties."

RESPONSE TO AT&T'S AFFIRMATIVE DEFENSES

A. dPi has stated a claim upon which relief can be granted.

dPi has laid out a claim for breach of contract. It is undisputed that the Parties have a valid, enforceable contract in the form of an interconnection agreement ("ICA") between the Parties. Nowhere is it alleged that dPi has failed to perform on any part of its obligations under the contract. The complaint notifies AT&T that it is required under the ICA and federal law to repay dPi for the cash back promotions. Finally, the complaint asserts a claim in the form of approximately \$37,050 in unpaid cash back promotional credits.

B. AT&T cannot claim equitable defenses as it has unclean hands.

AT&T is trying to assert the equitable defenses of laches, estoppel and waiver despite the fact that this dispute arises out of its inequitable conduct: AT&T seeks to avoid refunding dPi money AT&T has purposely overcharged. AT&T cannot invoke the rules of equity to shield its own inequitable conduct. *Webster County v. Nance*, 362 S.W.2d 723, 725 (Ky. 1962); *Time Finance Co. v. Varney*, 253 S.W.2d 233, 234 (Ky. 1952). dPi alleges the billing system is designed to operate in such a way as to enrich AT&T at the expense of its small competitors. At the time of this dispute AT&T claimed that it was unable to bill the correct rate to resellers despite the fact that it could bill its retail customers correctly. In addition, dPi contends AT&T systems in other parts of the country were able to bill resellers correctly; there is no technical reason that AT&T needs to subject resellers to its rebate process. The effect of the incorrect billing at the outset of the process means that AT&T automatically overcharges resellers like dPi and then puts the onus on the reseller to catch and dispute the overcharge. *If the reseller discovers that it has been overcharged it must meticulously document each credit request using billing and ordering information which is available only from AT&T. AT&T has historically provided this data only in paper bills or electronic "DAB" files which contain data locks that make the information extremely hard to extract. Apparently AT&T does not use "DAB" files internally and cannot provide support on how to work with them. If a reseller is ever able to interpret the data and send a request for credit, AT&T can delay examination of the request as there is no strict deadline to act. AT&T will then either accept or reject the request, without providing any explanation. If the credit is rejected the reseller has no way of auditing to see if the rejection is warranted or not because there is no explanation as to why it was rejected. Even if AT&T finally accepts the request for credit and reimburses the reseller, AT&T has kept what is*

rightfully the reseller's money for several months with no interest. The entire process works to unjustly enrich AT&T and AT&T should not be permitted to pose an equitable defense arising out of the inefficiencies and unfairness of its own system.

C. Dpi's claims are well within the statute of limitations.

The ICA governing the relationship between dPi and AT&T expressly stated that apart from federal and state substantive telecommunications law the agreement would be governed by the laws of the State of Georgia without regard to conflict of laws principles. In Georgia the limitations period for breach of contract is six years. O.C.G.A. § 9-3-24. The first bills being disputed are from late 2003; the March 2009 filing of this action is within the limitations period.

D. dPi has (or had) no obligation to pursue its claims contractually, but did in fact pursue the claims with AT&T.

AT&T has claimed that dPi waived its contractual rights by not pursuing them, but according to the ICA governing dPi and AT&T "failure or delay of either Party to enforce any of the provisions... or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions..." (ICA section 17). Even if dPi had *not* been in contact with AT&T over the disputed bills such lack of contact could not constitute a waiver due to the express language of the contract reproduced above.

However, dPi *was* in contact with AT&T regarding the disputed bills over the period of time between the request for credit and the filing of this complaint. Numerous contacts were made between then dPi employee Brian Bolinger and AT&T's Pam Tipton trying to resolve this issue. In addition other employees and agents of dPi were in contact with AT&T regarding promotional credit issues.

E. dPi Asks for relief only for Kentucky accounts within the Commission's jurisdiction

While dPi's complaint does allege that AT&T owes dPi \$465,950 across a nine state region, in this action dPi seeks only the \$37,050 relating to Kentucky accounts which are within the jurisdiction of this Commission.

WHEREFORE, dPi respectfully requests the Commission to issue an Order granting the relief sought in the Complaint and granting such further relief as the Commission deems appropriate.

Dated: October 26, 2009

Respectfully submitted,

By: /s/ Christopher Malish
Christopher Malish (admitted *pro hac vice*)
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Counsel for dPi Teleconnect, L.L.C

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice was served upon the following persons by first class United States mail, postage prepaid, on the 26th day of October 2009:

Mary K. Keyer
General Counsel/Kentucky
BellSouth Telecommunications, Inc.
d/b/a AT&T Kentucky and
AT&T Kentucky Southeast
601 West Chestnut Street, Room 408
Louisville, KY 40203



Counsel for dPi Teleconnect, L.L.C.