STOLL · KEENON · OGDEN
PLLC

2000 PNC PLAZA
500 WEST JEFFERSON STREET
LOUISVILLE, KY 40202-2828
MAIN: (502) 333-6000
FAX: (502) 333-6099
www.skofirm.com

DOUGLAS F. BRENT
DIRECT DIAL: 502-568-5734
DIRECT FAX: 502-562-0934
douglas.brent@skofirm.com

August 27, 2010

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's Rebuttal Testimony of Tom O'Roark in the referenced case.

Please acknowledge receipt of this filing by placing your file-stamp on the extra copy and returning to me via our runner. Thank you.

Sincerely yours,

STOLL KEENON OGDEN, PLLC

Douglas F. Brent

DFB: jms
Enclosures

107513.122279/600495.1

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

dPi TELECONNECT, L.L.C.	)	
	)	
v.	)	**DOCKET NO. 2009-00127**
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	

REBUTTAL TESTIMONY OF TOM O'ROARK

Q. Mr. O'Roark, have you reviewed BellSouth's direct testimony?

A: I have.

Q: Overall, what is your response to BellSouth's testimony?

A: The main ideas that bear addressing are the following:

(1) BellSouth's contention that it is not required to provide the cash back offers to dPi because they are not telecommunications services; in fact, BellSouth must provide the cash back offer because it affects the ***rate*** at which the services are provided.

(2) its contention that allowing BellSouth to discriminate by making offers available to its retail customer but not to CLECs like dPi does not harm competition; in fact, allowing BellSouth to sell its services for less than the wholesale price stifles competition.

(3) its contention that dPi missed a deadline for seeking the correct pricing; in fact, dPi initiated proceedings well in advance of the applicable six year limitations period; and

(4) its contention that, in the event dPi is generally entitled to cashback promotions,

dPi's claims should be reduced by (a) the wholesale discount rate; and (b) an "error" rate. In fact, the entire amount of the cashback promotion must be extended to CLEC if they are to be allowed to resell services at the effective retail rate less the full amount of BellSouth's avoided cost; and no "error rate" should apply in this case, where the sole reason articulated by BellSouth for denying the credit requests was that it was not required to extend such credits to CLECs.

I. BELLSOUTH MUST OFFER CLECs THE CASH BACK PROMOTIONS BECAUSE THEY AFFECT THE RATE AT WHICH SERVICES ARE RENDERED

Q: What is your response to BellSouth's contention that it need not offer the cash back promotions to CLECs like dPi because they are not telecommunications services?

A. This is a classic case of misstating the problem. The question is not whether the promotions are telecommunications services – the question is whether the promotions affect ***the rate*** at which the services are provided.[1] These cash back promotion offers, whether in the form of rebates on a bill or actual checks sent to consumers, have the obvious effect of offering to reduce the net amount spent by the consumer on telephone service. The fact that the customer might initially be billed one amount and the next day credited or paid back with a check doesn't change the fact that the net amount of the overall retail offer is much less than the standard/tariffed rate. Allowing BellSouth to shift their customers to this kind of non-standard offering and thereby circumvent BellSouth's obligation to resell their services at wholesale is precisely the kind of activity that the FCC warned

---

[1] 47 U.S.C. § 251(c)(4)(A). ILECs have the duty to "offer for resale at wholesale ***rates*** any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."

eviscerates the resale provisions of the FTA.

The FCC has discussed promotion issues at length in various dockets, notably including the FCC's 1996 *Local Competition Order*.[2] In the *Local Competition Order*, the FCC explained

> [t]he ability of [I]LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by [I]LECTs to preserve their market position. In a competitive market, an individual seller (an [I]LEC) would not be able to impose significant restrictions and conditions on buyers because such buyers turn to other sellers. Recognizing that [I]LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale. *Local Competition Order*, 11 FCC Rcd at 15966, ¶939.

Later in the *Local Competition Order*, the Commission expressly recognizes that ILECs could use promotions like BellSouth's to manipulate their retail rates and effectively avoid their resale obligations. Consequently, the Commission found that the resale requirement of Section 251(c)(4) of the Act

> ***makes no exception for promotional or discounted offerings***, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act. *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted)(emphasis added).

The FCC concluded that resale restrictions are presumptively unreasonable and that an ILEC can rebut that presumption but only if the restrictions are "narrowly tailored." *Local Competition Order*, 11 FCC Rcd at 15966, ¶939.

---

[2] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15954, ¶907 (rel. Aug. 8, 1996) ("*Local Competition Order*").

Accordingly, in the *Arkansas Preemption Order*, the FCC preempted an Arkansas statute that was contrary to the Commission's implementation of Section 251(c)(4)(B), stating:

> In connection with offering to competing carriers a retail service that an incumbent LEC markets to its end-user consumers at a promotional price for longer than 90 days, the second sentence of 9(d) allows the incumbent LEC to apply the wholesale discount to the ordinary retail rate, whereas ***our rules require the incumbent LEC to apply the wholesale [avoided cost] discount to the special reduced rate.***[3]

Finally, the rules which the Commission adopted in the *Local Competition Order* plainly state that all promotional offerings must be made available for resale, other than those promotions expressly provided for in Section 51.613 (cross-class and short term promotions), and that ILECs are prohibited from restricting, limiting or refusing in the first instance to make telecommunications service available for resale. The FCC rules on resale are found in the Code of Federal Regulations ("CFR") at Title 47 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 - 51.617. In relevant part, the FCC rules provide:

47 CFR § 51.605 Additional obligations of incumbent local exchange carriers.

(a) An incumbent LEC shall ***OFFER*** **to any requesting telecommunications carrier any telecommunications service that the incumbent LE*C OFFERS* on a retail basis** to subscribers that are not telecommunications carriers for resale **at wholesale rates** ....

***

---

[3] *In the Matter of Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended,* Memorandum Opinion and Order, 14 FCC Rcd 21579, ¶47 (rel. Dec. 23, 1999) ("*Arkansas Preemption Order*")(footnotes omitted)(emphasis added).

(e) Except as provided in §51.613, ***an incumbent LEC shall not impose restrictions on*** the ***resale*** by a requesting carrier of telecommunications services offered by the incumbent LEC.

47 C.F.R. § 51.613 Restrictions on resale.

(a) Notwithstanding §51.605(b), the following types of restrictions on resale may be imposed:

> (1) Cross-class selling. [an ILEC may prohibit CLECs from reselling a promotion to customers at large if the ILEC makes the promotion available only to a certain class of customers – i.e., if the ILEC's promotion is directed to residential customers, the CLEC cannot cross sell it to business class customers.]
>
> (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.

(b) **With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction *only if it proves to the state commission that the restriction is reasonable and nondiscriminatory*.**

***

I have added the emphasis placed on the relevant language cited above.

II. COMPETITION IS STIFLED WHEN BELLSOUTH IS ALLOWED TO SELL ITS SERVICES AT RETAIL FOR LESS THAN THE PRICE CLECs MUST PAY FOR THE SAME SERVICE.

Q: What is your response to BellSouth's contention competition is not harmed when BellSouth does not make the cash back promotions available to CLECs like dPi?

A. I find it absolutely astonishing that BellSouth makes such claims. Among other things, BellSouth appears to be claiming that its discriminatory actions are

good for competition, and that its actions have had no effect adverse effect competition, citing as evidence:

(1) the fact that the amounts in Kentucky are so small;

(2) the fact that dPi is still in business; and

(3)the fact that other CLECs have not complained as dPi has done.

First, the point behind the FTA was to help dismantle the monopoly in local phone service enjoyed by BellSouth and the other ILECs by promoting competition with the ILECs by new entrants – not to promote *BellSouth*'s ability to compete against new entrants.

Wireline competition in Kentucky is as not robust, vibrant, or as healthy as BellSouth suggests. The line count that CLECs have is minuscule compared to BellSouth's and is not growing. AT&T, once an independent competitor, has been consumed by BellSouth/AT&T.

Second, all the things BellSouth is citing as evidence that its discriminatory treatment with regards to these promotions did not harm competition are in fact evidence to the contrary:

(1) the fact that the amount in controversy is so low is because dPi had trouble attracting enough customers that might otherwise qualify for the promotions – there is simply no way for dPi to compete with BellSouth when BellSouth's effective retail rate is so much lower than the wholesale price dPi is charged for the same service;

(2) the fact that dPi is still alive does not mean that dPi is successful or that competition is flourishing: dPi has in fact had difficulty growing its line count and

is lucky to be alive at all; the fact that dPi limps along despite its wounds does not mean that it is "successful." dPi's line count is infinitesimal as compared to BellSouth's in Kentucky and can hardly be called an example of "success."

(3) absence of regulatory complaints from other CLECs means nothing. The old independent AT&T is gone and many others are out of business or bankrupt; surviving CLECs no longer have the resources to engage in unlimited litigation with BellSouth over resale issues. Lack of litigation *today* is not a measure of the CLECs' successful competition, but an indication that in more than 10 years of nearly non-stop litigation by the ILECs since the Act was passed has managed to bleed much of the competition dry.

Finally, with regards to BellSouth's contention that it is reasonable for it to discriminate against dPi in particular because dPi's core customer base of credit-challenged customers differs from BellSouth customers of choice, note first that BellSouth does not discriminate against just dPi, but against ***ALL*** resellers, and one can infer that dPi or some other CLEC might very much like to attract the same customers that BellSouth sees as its core customers of choice. However, BellSouth's policy discourages entry into the market by conferring an unfair advantage upon BellSouth over any CLEC that cannot offer a similar cash back bonus, or its equivalent. As a result, competition is stifled and customers are left with fewer choices for telephone services.

Allowing BellSouth to get away with offering its services at retail at an effective rate lower than the wholesale rate is a sure recipe for the eventual elimination of resale competition entirely.

III. dPi's CLAIMS WERE MADE WELL WITHIN THE APPLICABLE SIX YEAR LIMITATIONS PERIOD.

Q. What is your response to BellSouth's claim that dPi's claims were made late under the contract?

A. Mr. Ferguson suggests that claims that were filed more than 12 months after they arose are barred by the contract. This is incorrect; the contract in effect at the time these orders were processed had a ***six year*** limitations period.

More particularly, as I mentioned in direct testimony, from 2003 to the present, dPi and BellSouth operated under two nearly identical interconnection agreements. The first was in effect from 2003 to May 2007, and is found in the record as Exhibit PLF-1 and 2 to BellSouth witness' Ferguson's testimony. The second was in effect from May 2007 to the present, and is found in the record at as Exhibit PLF 1 and 3 to BellSouth witness' Ferguson's testimony.

The orders in dispute, for which dPi was overcharged, were provided from 2003 to June 2007 (after June 2007, BellSouth began extending the cash back promotions to dPi.) Thus, the key contract for the purposes of this dispute is the first contract, in effect from 2003 to May 2007, found in the record as Exhibit EMM-1. This contract in effect from 2003 to May 2007 provides at Section 18 of its Terms and Conditions that the Agreement will be governed federal and state substantive telecommunications law, but in all other respects the "Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles." In Georgia, the limitations period for a breach of contract is six years. O.C.G.A. section 9-3-24. Since the earliest bill date at issue in this case is from November 2003, this case was

filed well within the limitations period.

The second contract, which went into effect May 2007, does have a 12 month limitations period in it. However, this second contract specifically provides that ***"the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date."*** General Terms and Conditions sec. 2.1.[4]

The second agreement also has a "merger clause" at section 30.1 that provides that orders placed under the prior agreement but not filled until the effective date of the new agreement, and services commenced under prior agreements but provided under the new agreement would be governed by the new agreement going forward. The purpose of that language is to explain how orders and services will be handled on a going forward basis, after the new contract goes into effect. Obviously, the fact that there is a new contract replacing the old one doesn't mean the parties will stop all operations and then re-start them under the new contract (e.g., there was no disconnection of customers when the old contract expired, and re-connection after the new effective date); the transition was meant to be seamless as far as daily operations go: orders that had been submitted but not filled prior to the effective date of the new contract did not have to be cancelled and ***re-submitted*** to be filled under the new contract. Instead, this provision is intended to confirm that services commenced or ordered under the earlier contract, but filled or provided after the new contract goes into effect, are governed by the new

---

[4] The "Effective Date is defined as the date that the Agreement is effective for purposes of rates, terms, and conditions and shall be 30 days after the [April 2007] date of the last signature executing the Agreement." General Terms and Conditions, Definitions (p. 2).

contract.

However, this provision from the merger clause in the second agreement does not apply to orders and service that were ***completed under the old contract***: orders and services that were completed under the old contract do not get re-billed to conform to pricing changes and other changes in the new contract. This is made clear by General Terms and Conditions sec. 2.1 which specifically provides that ***"the rates, terms, and conditions of this Agreement shall not be applied retroactively prior to the Effective Date."*** Therefore this provision has no impact on the deadline for dPi to bring this claim, as the vast majority of services had been fully completed as of the effective date of the 2007 ICA. The claims arising out of the services which were not fully completed and which are subject to the provisions of the 2007 ICA were brought within 12 months as required by the 2007 ICA.

Furthermore, neither version of the contracts themselves provide for specific forms to be used in disputing bills or escalating disputes; BellSouth cannot arbitrarily impose its own conditions on what form is "acceptable" for billing after the contract has been signed. The requests for credits were submitted on BellSouth's "BAR" (Billing Adjustment Request) forms, and when not paid, the matter was escalated by dPi's Brian Bolinger discussing the matter with BellSouth's Pam Tipton.

Q. Has dPi nonetheless waived its right to recover the overpayments that BellSouth extracted?

A. No. This could ever be plausibly argued. The contract clearly provides at General Terms and Conditions section 17 (16 in the later contract) that "A 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...."

Even if BellSouth were to make some sort of equitable argument, i.e., that dPi has "taken too long" to bring these claims, BellSouth cannot rely on principles of equity to protect it in this case because BellSouth has unclean hands. The conduct which BellSouth seeks to protect is its own inequitable conduct of overcharging dPi for the services at issue. To allow BellSouth to retain these funds would result in its unjust enrichment at the expense of dPi.

Q. Could you please elaborate on what you mean by BellSouth's "inequitable conduct of overcharging dPi"?

A. To understand the dispute, one must understand its origins – namely, BellSouth's "promotion process" which, at the time relevant to this case, operated in practice if not by design to enrich BellSouth as the expense of its small competitors.

At the times relevant to this complaint, BellSouth was supposedly "unable" to bill resellers the correct amount (including promotional discounts) for the services they ordered when the order was submitted. However, it was able to bill its ***retail*** customers correctly.

Also, AT&T/SBC's systems in the midwest and southwest ***do*** allow one to apply for a promotional credit as a part of the provisioning order, and reject the order if it does not qualify for the promotion. The credit is applied to the price immediately and the discount reflected on the same bill; the CLEC pays no more than what it actually owes for the service from the beginning. So there is no technical reason why CLECs cannot be billed correctly for the service they acquire

from BellSouth.

Nevertheless, in the former BellSouth regions BellSouth ***automatically overcharges*** every reseller for every service the reseller orders that is subject to a promotional discount. Then BellSouth shifts the burden on to the reseller to (1) figure out how much BellSouth has overcharged the reseller, and (2) dispute BellSouth's bills accordingly. If a CLEC is not aware that this is how the system is supposed to work and does not know to apply for these promotions, BellSouth retains their money.

For those CLECs who generally understand that they must apply for these credits, BellSouth's system makes it as difficult as possible for the reseller to dispute the bills to BellSouth's satisfaction. First, the credit request must be meticulously documented, listing details of every order for which credit is requested. But getting the data to populate these forms is a Herculean task in itself: it must come from BellSouth's billing and ordering data, which BellSouth has traditionally provided to resellers only on either a paper bill, or electronically in a "DAB" file, which has data locks built into it, making downloading of the raw data exceptionally difficult. To make matters worse, in dPi's experience next to no one at BellSouth can explain how to get the data out of the "DAB" files, because BellSouth does not maintain its own data in such files, and its employees simply are not equipped with the knowledge to answer questions about how to unlock its secrets. Figuring out how, as a practical matter, to apply for these credits takes a large amount of resources in time and money. Some CLECs appear to have simply thrown their hands in the air and given up.

Next, if a CLEC spends the time and resources to figure out a way to get at their data, and create systems for electronically scouring it to identify those orders that ought to qualify for promotional credits, and write and re-write programs that will populate BellSouth's forms (which it changes from time to time as it sees fit), BellSouth will examine the requests for credit to see if it will honor them. There is no deadline for BellSouth to act on these credit requests. When it finally approves or denies credits – which can take months – it makes no explanation for what credit requests it accepts, and what credits it rejects, and why. Thus, if the credit request is rejected, the CLEC has no way of auditing the rejection to see if it is merited or not. But note that even if the credit is accepted, BellSouth has kept the CLEC's money for months, without interest, before returning it.

The system is backwards, failure prone, and grossly inefficient. And at every step of the way, whether consciously designed to that end or not, the system works to enrich BellSouth at the CLEC's expense.

IV. BELLSOUTH MUST OFFER CLECs THE FULL AMOUNT OF THE CASH BACK PROMOTIONS IN ORDER TO COMPLY WITH THE FTA'S REQUIREMENT THAT THE SERVICES BE WHOLESALED AT THE RETAIL RATE LESS *AVOIDED COST*

Q. Should the amounts dPi seeks be reduced by the wholesale discount?

A. No. To comply with federal law, BellSouth must extend dPi the full cash back amount of the promotion. Remember, the FTA states the wholesale price should be the retail price less costs avoided by the local exchange carrier, such as marketing, billing, and collections. *See* 47 USC 252(d)(3).[5] So, the "wholesale

---

5 47 USC 252(d)(3): Wholesale prices for telecommunications services

discount" must by law be calculated as the avoided cost. When originally created by this agency, the avoided cost was based on, and calculated from, the standard/tariffed retail rate. Thus, the appropriate method for determining the wholesale price is to first calculate the amount of the avoided cost, then subtract the avoided cost from the actual sales price. Obviously, there will always be ***costs*** to providing service, regardless of what the ***sales price*** is, and although initially formulated as a percentage to avoid recalculating the costs as tariffed rates rose, the avoided cost was designed based on the ***standard, or tariffed***, rate.

Accordingly, to properly determine the avoided cost, one multiplies the resale discount factor times the standard/tariffed price. This gives one the base amount of the avoided cost, and thus the amount by which the wholesale amount should be lower than the retail price.

However, the *price* to which the avoided cost discount is applied is the lower of the tariffed standard price, or, if any, the promotional price in effect for the services in question. Stated another way, the three steps to finding the wholesale price are:

STEP 1: Find the standard/tariffed retail price.

STEP 2: Find the avoided cost: multiply the standard/tariffed retail price by the wholesale discount factor.

STEP 3: Subtract the avoided cost from the retail sales price, which is standard tariffed price, or, if a promotion applies, the price after applying the promotion.

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Note that by using this method, the wholesale price is always the same amount less than the retail price, which is a better reflection of the fact that the cost to provide the services is constant regardless of temporary fluctuations in the sales price caused by non-standard special sales. Figure 1, below, shows how this works.

Figure 1.

Comparison of results applying avoided cost discount based on hypothetical 20% discount to tariff price.

Tariff (standard price) ("T")	**Avoided Cost** (20% wholesale discount) ("C_a")	**Cash Back Promotion** (rebate) ("P")	**Net Retail Price** (T -P)	**Net Wholesale Price** ((T - P) - C_a)
$50	$10	$0	$50	$40 **(wholesale $10 LESS than retail)**
$50	$10	$50	$0	$-10 **(wholesale $10 LESS than retail)**
$50	$10	$100	$-50	$-60 **(wholesale $10 LESS than retail)**

By contrast, using BellSouth's proposed methodology, dPi will receive a discount from the sales price that is ***less*** than the avoided cost each time it purchases services subject to these kinds of special sales. This essentially allows BellSouth to evade its wholesale rate obligation. This can actually be demonstrated algebraically:

First consider the normal or standard situation, where no promotions are in play. In such a situation, the relationship between the retail rate ("R"), and the wholesale rate ("W"), can be shown by the equation :

$W = R - A,$

where A stands for the avoided cost. Thus, the difference between the retail rate and the wholesale rate is the avoided cost, expressed as

$R - W = A$

Now consider what happens when a cash back offer, ("C"), is involved. In such circumstances, the *effective* retail rate ("E_R") and the *effective* wholesale rate ("E_W") change. The effective retail rate is now the retail rate less the cash back offer, or

$E_R = R-C.$

If the cash back offer is made available in full to the CLEC, then the effective retail wholesale rate would be the retail rate less the avoided cost discount, or

$E_W = R - A - C.$

Now consider what happens when the cash back offer is discounted by some fraction, "d", where $0 < d < 1$. The effective retail rate, E_R, remains the same:

$E_R = (R - C)$

But the effective wholesale rate, E_W, increases:

$E_W = (R - A - dC)$

In this situation, subtracting the effective wholesale rate from the effective retail rate gives

$E_R - E_W = (R - C) - (R - A - dC)$, which simplifies to

$A + dC - C$.

Note that (A + dC – C) is by definition less than the avoided cost, A. Thus, discounting the cash back offer results in a wholesale margin that is less than avoided cost, resulting in a price squeeze.

Q. Should the amounts dPi seeks be reduced by an "error rate"?

No. At the time these requests were first submitted, BellSouth had all the data needed to verify the eligibility of the requests. However, BellSouth never denied any request for credit at issue in this case on the theory that the underlying orders were flawed at the time they were submitted; the requests for credit were all denied for the sole reason that BellSouth insisted it did not have to provide the promotions at all. In the time since the credit requests at issue in this docket were first submitted and denied as just described, BellSouth, in the ordinary course of its business, destroyed the order records needed to verify whether dPi met the promotion qualifications with regard to many of the credits it seeks in this docket. dPi does not have copies of these records either because they were never in dPi's possession.[6] However, dPi used the detailed billing records created by BellSouth to verify eligibility and create the requests for credit adjustment when they were first submitted.

Now, however, BellSouth claims it should not have to pay all of the credits sought by dPi because there were errors in dPi's credit submissions. But BellSouth

---

6 The ordering arrangement is analogous to conducting a transaction at an Automated Teller Machine – an ATM. The ATM's user has limited access to the bank's systems for limited purposes, and the receipt provided at the end of the transaction is a limited record does not contain all of the information transferred between the ATM unit and the bank's central system. In a similar way, dPi creates orders directly on BellSouth systems (using the equivalent of a password to access the systems) but is unable to make electronic copies of the actual orders submitted on BellSouth's systems. (dPi used to print a screen shot of the order just before submittal, but discontinued the practice in about 1999 because of the volume of paper that was generated.)

cannot point to ***any*** of the orders in this case as evidence; instead, it claims that a portion of *other* credit requests later submitted by dPi and ***not*** a part of this case have not (in BellSouth's opinion) met the eligibility requirements – and thus, by inference, the earlier requests must also have had errors.

This is unsustainable for a number of reasons. First, dPi denies that the there were errors in the requests at the issue in this docket. Note that BellSouth had at that time the data needed to further check the requests, but ***BellSouth never made the argument that the specific requests did not meet eligibility requirements*** until after it destroyed the records that it claims it needs to verify the requests for credit. BellSouth should not be allowed to invoke this defense considering that BellSouth has destroyed the evidence which it claims it needs to validate the claims which it originally rejected for other reasons altogether.

Second, dPi also denies BellSouth's contentions that dPi's more recent credit requests are ineligible; in fact, apart from statistically irrelevant errors, dPi asserts that its credit requests were appropriate, and the parties are still going through the dispute process with regards to the credit requests that BellSouth claims are ineligible.

BellSouth should not be allowed to raise new defenses to paying these claims years after they were initially filed and dismissed by BellSouth on completely different grounds. And it would be patently unjust to deny dPi credits to which they are entitled because BellSouth has destroyed, during the time the credits were in dispute, the records which would allow BellSouth to verify the claims.

Q. Does this conclude your rebuttal testimony?

A. Yes, it does for now. But I reserve the right to make changes as necessary.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Testimony was served upon the following persons by first class United States mail, postage prepaid, on the 27th day of August, 2010:

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.