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January 13, 2010

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PUBLIC SERVICE
COMMISSION

Mr. Jeffrey DeRouen
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602

RE: Case No. 2005-00455—Revised Testimony of dPi Teleconnect

Dear Mr. DeRouen:

Enclosed please find an original and ten copies of the revised direct and rebuttal testimony of dPi Teleconnect, L.L.C. This testimony is filed in response to the Commission's August 25, 2009 Order resetting dates for testimony and hearing. Please note a witness substitution for the Complainant. This testimony will replace testimony previously filed for Steve Watson and for Brian Bollinger, a former employee of dPi Teleconnect. Please indicate 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.

Very truly yours,

STOLL KEENON OGDEN PLLC

Douglas F. Brent

DFB:jms
Enclosures

c: Mary M. Keyer
Chris Malish

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BEFORE THE PUBLIC SERVICE COMMISSION

PUBLIC SERVICE COMMISSION

In the Matter of:

DPI TELECONNECT, LLC v.)
BELLSOUTH TELECOMMUNICATIONS,) Case No. 2005-00455
INC.

DIRECT TESTIMONY OF TOM O'ROARK

1 Q. Please tell us who you are and give a little background about yourself.

2 A. My name is Tom O'Roark. I serve as dPi's CFO and, for now, chief executive
3 officer. Since the departure of dPi's Brian Bolinger, dPi's former vice president of legal
4 and regulatory affairs, I am the one who has taken the lead in dealing with disputes over
5 promotion credits with AT&T. Prior to my involvement, Brian Bolinger along with
6 Steve Watson of Lost Key Telecom Inc. (which functions as dPi's billing and collections
7 agent for promotions) headed up this effort on behalf of dPi, and thus had most of the
8 detailed interaction with AT&T; I was kept apprised of events as they developed by
9 Brian and/or Steve. My direct and rebuttal testimony should be substituted for the earlier
10 filed testimonies of Brian and Steve.

11 Q. Please give a little background on dPi Teleconnect and describe the history of dPi
12 Teleconnect's dispute with AT&T.

13 A. dPi Teleconnect is a competitive telecommunications company authorized to
14 provide intrastate local exchange and interexchange telecommunications services in
15 Kentucky. dPi provides telecommunications services primarily to residential customers.
16 This case involves only dPi Teleconnect's resale operations and relationship with AT&T.

1 AT&T is required by law and by contract to make available for resale any
2 promotion that AT&T makes available to its customers for an extended period of time.

3 This case stems from AT&T's failure to do so.

4 **Q. What do you mean when you say "AT&T is required by law to make available for**
5 **resale any promotion that AT&T makes available to its customers"?**

6 A. I don't pretend to be an expert in Federal telecommunications law, but I do know
7 the more basic provisions that apply to our business. So I know that federal law requires
8 AT&T to make the same offers it extends to its retail customers available to its resellers
9 like dPi. For example, federal law provides, among other things, the following:

10 -- 47 U.S.C. § 251(c)(4)(A). ILECs have the duty to "offer for resale at wholesale
11 rates any telecommunications service that the carrier provides at retail to
12 subscribers who are not telecommunications carriers."

13 -- 47 U.S.C. § 251(c)(4)(B). ILECS have a duty not to "prohibit, and not to impose
14 unreasonable or discriminatory conditions or limitations on, the resale of such
15 telecommunications service."

16 I also know that the FCC has discussed promotion issues at length in various
17 dockets, notably including the FCC's 1996 *Local Competition Order*.¹ In the *Local*
18 *Competition Order*, the FCC explained

19 [t]he ability of [I]LECs to impose resale restrictions and
20 conditions is likely to be evidence of market power and may
21 reflect an attempt by [I]LECTs to preserve their market position.
22 In a competitive market, an individual seller (an [I]LEC) would
23 not be able to impose significant restrictions and conditions on
24 buyers because such buyers turn to other sellers. Recognizing
25 that [I]LECs possess market power, Congress prohibited

¹ *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*").

1 unreasonable restrictions and conditions on resale. *Local*
2 *Competition Order*, 11 FCC Rcd at 15966, ¶939.

3 Indeed, in the *Local Competition Order* the Commission expressly recognizes
4 that ILECs could use promotions like AT&T's to manipulate their retail rates and
5 effectively avoid their resale obligations. Consequently, the Commission found that the
6 resale requirement of Section 251(c)(4) of the Act

7 ***makes no exception for promotional or discounted offerings***, including
8 contract and other customer-specific offerings. We therefore conclude
9 that no basis exists for creating a general exemption from the wholesale
10 requirement for all promotional or discount service offerings made by
11 incumbent LECs. A contrary result would permit incumbent LECs to
12 avoid the statutory resale obligation by shifting their customers to
13 nonstandard offerings, thereby eviscerating the resale provisions of the
14 1996 Act. *Local Competition Order*, 11 FCC Rcd at 15970, ¶948
15 (footnote omitted)(emphasis added).

16 The FCC concluded that resale restrictions are presumptively unreasonable and
17 that an ILEC can rebut that presumption but only if the restrictions are “narrowly
18 tailored.” *Local Competition Order*, 11 FCC Rcd at 15966, ¶939. Accordingly, in the
19 *Arkansas Preemption Order*, the FCC preempted an Arkansas statute that was contrary
20 to the Commission’s implementation of Section 251(c)(4)(B), stating:

21
22 In connection with offering to competing carriers a retail service that an
23 incumbent LEC markets to its end-user consumers at a promotional price
24 for longer than 90 days, the second sentence of 9(d) allows the incumbent
25 LEC to apply the wholesale discount to the ordinary retail rate, whereas
26 ***our rules require the incumbent LEC to apply the wholesale discount***
27 ***to the special reduced rate.***²

² *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).

1 Finally, the rules which the Commission adopted in the *Local Competition Order*
2 plainly state that all promotional offerings must be made available for resale, other than
3 those promotions expressly provided for in Section 51.613 (cross-class and short term
4 promotions), and that ILECs are prohibited from restricting, limiting or refusing in the
5 first instance to make telecommunications service available for resale. The FCC rules
6 on resale are found in the Code of Federal Regulations (“CFR”) at Title 47
7 (Telecommunication), Part 51 (Interconnection), Subpart G (Resale), sections 51.601 -
8 51.617. In relevant part, the FCC rules provide:

9 **47 CFR § 51.605 Additional obligations of incumbent local exchange carriers.**

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

13 ***

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

17 **47 C.F.R. § 51.613 Restrictions on resale.**

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

20 (1) Cross-class selling. [an ILEC may prohibit CLECs from reselling a promotion
21 to customers at large if the ILEC makes the only to a certain class of customers
22 eligible for the promotin – i.e., if the ILEC’s promotion is directed to residential
23 customers, the CLEC cannot cross sell it to business class customers.]

24 (2) Short term promotions. An incumbent LEC shall apply the wholesale discount
25 to the ordinary rate for a retail service rather than a special promotional rate only
26 if:

1 (i) Such promotions involve rates that will be in effect for no more than
2 90 days; and

3
4 (ii) The incumbent LEC does not use such promotional offerings to evade
5 the wholesale rate obligation, for example by making available a
6 sequential series of 90-day promotional rates.

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

10 ***

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

12 **Q. What does the contract between AT&T and dPi say? Something different from**
13 **federal law?**

14 A. No. Actually, the contract clearly states that it is subject to state and federal law,
15 and that AT&T will make available to resellers like dPi the same services AT&T offers
16 at retail. Among other things, the parties' contract provides in relevant part the
17 following:

18 -- That the parties wish to interconnect "pursuant to Sections 251 and 252 of the
19 Act" GTC p.1;

20 -- Parity: "When DPI purchases Telecommunications Services from BellSouth
21 pursuant to ... this Agreement for the purposes of resale to End Users, such
22 services shall be be ... subject to the same conditions... that BellSouth provides
23 to its ...End Users." GTC p. 3

24 -- Governing Law: "... ***this agreement shall be governed by and construed in***
25 ***accordance with federal and state substantive telecommunications law,***
26 ***including rules and regulations of the FCC....***" GTC p. 15.

27 -- Resale Attachment's General Provision sections 3.1: p. 4: "***...Subject to effective***
28 ***and applicable FCC and Commission rules and orders, BellSouth shall make***
29 ***available to DPI for resale those telecommunications services BellSouth makes***
30 ***available...to customers who are not telecommunications carriers.***"

1 **Q. Has AT&T performed consistent with its legal and contractual requirements as you**
2 **understand them?**

3 A. No. This case arises because of AT&T's refusal to extend its promotional pricing
4 to dPi. The parties' dispute centers on credits which are due from AT&T to dPi
5 Teleconnect as a result of dPi Teleconnect's reselling of services subject to AT&T
6 promotional discounts. AT&T has over the past months and years sold its retail services
7 at a discount to its end users under various promotions that have lasted for more than 90
8 days. dPi Teleconnect is entitled to purchase and resell those same services at the
9 promotional rate, less the wholesale discount. As a practical matter, dPi Teleconnect has
10 bought these services at the regular retail rate less the resale discount, then been credited
11 the difference between that rate and the promotional rate pursuant to "promotion credit
12 requests."

13 **Q. How does the "promotion process" work?**

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

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

21 Also, AT&T/SBC's systems in the midwest and southwest *do* allow one to apply
22 for a promotional credit as a part of the provisioning order, and reject the order if it does

1 not qualify for the promotion. The credit is applied to the price immediately and the
2 discount reflected on the same bill; the CLEC pays no more than what it actually owes
3 for the service from the beginning. So there is no technical reason why CLECs cannot
4 be billed correctly for the service they acquire from AT&T.

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

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

1 resources in time and money. Some CLECs appear to have simply thrown their hands
2 in the air and given up.

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

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

16 **Q. What is Steve Watson's company, Lost Key,'s role in this case?**

17 A. Because of the above mentioned difficulties involved in extracting and presenting
18 the data used to calculate these promotion credit requests, dPi hired Lost Key to apply
19 for promotional credits from AT&T on dPi's behalf. At any given time, AT&T has a
20 number of promotions going at once. As dPi's agent in this process, Lost Key reviews
21 the data AT&T provides dPi regarding the services AT&T has sold dPi, and calculates
22 which promotions dPi is entitled to under the promotions then in effect. Lost Key then

1 submits requests for promotional credits on dPi's behalf, and AT&T evaluates or audits
2 those requests and issues or denies credit as it sees fit.

3 **Q. What promotions are involved in this case?**

4 A. Although dPi has a number of promotion related disputes, this case will focus on
5 the dispute about dPi's eligibility for a single particular promotion – the Line Connection
6 Charge Waiver (“LCCW”) promotion – as this argument encompassed the lion's share
7 of the total dollars in dispute in Kentucky apart from the cash back promotions.

8 **Q. What's the Line Connection Charge Waiver promotion?**

9 A. Generally, the Line Connection Charge Waiver promotion provides that
10 BellSouth will waive the line connection charge for customers who switch to Bellsouth
11 and take at least basic service with two Touchstar features – at least, two features are
12 required according to BellSouth's documents. *See* dPi's Exhibit 2, BellSouth's
13 documents establishing qualifying criteria for the promotion.

14 This promotion has been around for a couple of years; dPi's claims go back to
15 January of 2004.

16 **Q. What does it take to qualify for the LCCW promotion?**

17 All – *ALL* – a CLEC like dPi has to do to qualify for the line connection charge
18 waiver is purchase Basic Service with one or more TouchStar features.³ Using the words

3

See dPi Exhibit 3, a screenshot taken from Bellsouth's website during the summer of 2005. In relevant part, the promotion provides:

Connection Fee Waived

Customers who switch their local service to Bellsouth from another provider and purchase Bellsouth® Complete Choice®, Bellsouth® Preferred Pack, or Bellsouth Basic Service with at least one feature can qualify for a waiver of the local service connection fee. Customers must not have had local service with Bellsouth 10 days prior to new service connection date. Offer ends December 26, 2005.

1 from Bellsouth's own promotion, dPi is entitled to the promotion because it has
2 "purchase[d] ... Bellsouth Basic Service with at least one feature" and thus has
3 "qualif[ied] for a waiver of the local service connection fee." This is because in every
4 situation in which dPi applied for the promotional credit, it ordered at least Basic Service
5 plus two or more TouchStar features, including TouchStar Blocking Features, such as
6 Block Call Return (known by its USOC "BCR"), Block Repeat Dialing (known by its
7 USOC "BRD"), and Block Call Trace (known by its USOC "HBG").⁴ These three
8 TouchStar features – BCR, BRD, and HBG – will be collectively referred to as
9 TouchStar Blocking Features.

10 **Q. Does Bellsouth agree with this interpretation of the promotional language?**

11 A. Well, it did, at least initially. We know that BellSouth initially agreed with this
12 interpretation because when Lost Key was first getting set up and running test batches
13 together, it approved all orders configured this way. In the fall of 2003, Steve Watson
14 was working with BellSouth on ways to automate the crediting process, which entailed
15 agreeing on proposed processes, then sending small batches of orders at a time to see if
16 the processes worked. By December 2003 and January 2004, we were working on the
17 LCCW promotion, and had our batches containing credit requests for orders for basic
18 service plus the TouchStar Blocking Features approved. In fact, in January, February,
19 March, and April 2004, regular batches of such orders were approved for Teleconnex (on
20 whose behalf Steve Watson was working at the time), before Teleconnex was taken by

4

dPi's basic offering always includes the TouchStar blocks. There is no dispute that dPi has ordered TouchStar blocks – the dispute is solely whether the TouchStar block features that dPi orders "qualify" as TouchStar features under the promotion because they bear no additional charge.

1 other owners and ceased doing business. Then again, in the summer of 2004, BellSouth
2 was crediting other CLECs (such as Budget Phone) with millions for promotional rates
3 for orders essentially identical to dPi's.

4 **Q. So when did you begin submitting credit requests for the LCCW promotion for**
5 **dPi?**

6 A. In August 2004, Lost Key began submitting credit requests for dPi pursuant to
7 Bellsouth's procedures, as well as for other clients. Lost Key's computer program
8 automatically scours the orders electronically reported by BellSouth, and tallies those that
9 contained new service plus two or more TouchStar features. A request for credit was
10 made pursuant to those tallies.

11 **Q. Was dPi ever credited on its promotion requests?**

12 A. No. BellSouth credited dPi only a small fraction of the amounts applied for.

13 **Q. Did any of dPi's similarly situated competitors get paid the LCCW credits?**

14 A. Yes. For some of our competitors who were also Lost Key clients, BellSouth
15 paid essentially 100% of credit applied for. For example, Budget Phone, who has a
16 claim roughly double the size of dPi's, was paid in full. Previously, BellSouth had
17 similarly paid Teleconnex in full for these promotions. These entities' product mix to
18 their end users was also essentially very similar to dPi's. However, BellSouth credited
19 dPi only about a small fraction of the amounts applied for.

20 **Q. Did BellSouth extend the LCCW promotion to its own customers taking basic**
21 **service plus the TouchStar Blocking Features?**

22 A. Yes, they did. Although BellSouth testified in both North Carolina and Florida
23 that it was its policy to never extend the LCCW promotion to its own end users taking

1 just Basic Service plus the TouchStar Blocking Features, an examination of their
2 provisioning data revealed that in fact BellSouth HAD extended the LCCW to such
3 customers.

4 Through discovery in Florida, dPi tried to determine what non-recurring charges
5 BellSouth charged its own end users who (1) ordered new basic service and (2) any two
6 of the BCR, BRD, and HBG TouchStar Blocking Features (without any other TouchStar
7 features). This data provided by BellSouth showed that from 2003 to the present, in any
8 given month, for BellSouth end users ordering basic service plus the TouchStar Blocking
9 Features, BellSouth would award the end user the LCCW promotion between 8.8% and
10 40.1% of the time. More particularly, for the time period from May 2003 to January
11 2005, new Bellsouth retail accounts created with basic service and 2 TouchStar Blocking
12 Features received the LCCW promotion between 40% and 22% of the time. Those new
13 orders not receiving the promotional pricing included orders that did not qualify because
14 they were not a “winover” or “reacquisition” (a requirement to qualify for LCCW);
15 because they were split-offs of existing accounts; or the orders were for accounts that
16 were reestablished after being disconnected – in other words, those orders not granted
17 LCC waivers were for reasons *other* than because BellSouth was not counting BCR and
18 BRD as TouchStar features. A detailed explanation of the data reviewed and the analysis
19 of that data by Steven Tepera is found in dPi’s Exhibit 8. The frequency BellSouth
20 awarded its end users LCCW is shown on three graphs in dPi’s Exhibit 6.

21 Admittedly, the above information was taken from BellSouth’s operations in
22 Florida; an identical discovery request was made in Kentucky was objected to and no

1 response was made. But because BellSouth is generally consistent with its practices
2 across the states it serves, the results in Kentucky should be expected to match those
3 from Florida. Indeed, AT&T admitted that the results should be equally applicable
4 everywhere in a pleading filed in Alabama.

5 **Q: So if BellSouth waived the Line Connection Charge for its own end users taking**
6 **basic service plus the TouchStar blocking features, why did BellSouth not extend**
7 **the promotion pricing to dPi?**

8 A. Frankly, because the amounts dPi was entitled to under the promotion were so
9 large. There has followed a parade of excuses, some more initially plausible than others,
10 but ultimately, all false.

11 **Q: How do you know BellSouth refused to extend the promotion pricing to dPi because**
12 **the amounts dPi was entitled to under the promotion were so large?**

13 A. Because BellSouth said so in just so many words. In 2006, dPi deposed
14 BellSouth's Kristy Seagle, who was the person at BellSouth who headed up the
15 promotion crediting process. A copy of her deposition is attached as dPi Exhibit 7. She
16 had been in the position for two years (Seagle depo 8) and no one at BellSouth knew
17 more about the process than her (Seagle depo 27-28). She was in charge of processing
18 dPi's credit requests. Ms. Seagle testified that the credit requests were received in
19 September 2004 but no payments or denials made until April 2005. (Seagle depo 37-39).
20 The credit requests were initially not paid simply because the amounts seemed so large:

21 The red flag went off for me initially because the dollar amount was so
22 high. I just -- I guess I don't deal in those large of dollars. It just shocked
23 me, shocked me and made me start looking at what we were doing.
24 (Seagle depo 46-47).

25 ***

1 ... and that's when I stopped everything that we were doing at that point
2 from October 2004 until April 8, 2005, nobody was credited for those
3 promotions..... (Seagle depo 39-40).

4 At this point, (September/October 2004) BellSouth put together a team of lawyers
5 and retail and marketing managers to find see if there was a way to avoid paying the
6 promotions. *See* Seagle depo 40-56.

7 From September 2004 to April 2005, BellSouth was unable to satisfactorily
8 explain why it was refusing to pay these credits. On numerous occasions over this
9 period, BellSouth's Kristy Seagle and/or other employees promised that these payments
10 would be forthcoming. *See* dPi's Exhibit 5, copies of email communications between the
11 parties on this subject.

12 It appears that over the period of September 2004 to April 2005, BellSouth
13 seemed to be floating "test balloons" about possible reasons for not paying the credits.
14 For example, during the fall of 2004, it was suggesting that it might deny dPi the credits
15 requested because the orders submitted would not qualify because they were not for
16 "winover" or "reacquisition" customers. However, because (unlike BellSouth) dPi sells
17 primarily to the credit challenged customer, essentially every single one of dPi's new
18 customers is someone who was formerly a customer of BellSouth or another provider and
19 who left after getting into trouble over their phone bill.

20 Another reason initially advanced for not issuing the credits was for the supposed
21 reason that the TouchStar Blocking Features dPi used to qualify for the LCCW were
22 really not "features." This reason was withdrawn (though it has now reappeared in sister
23 states) after dPi pointed out that the TouchStar Blocking Features appear in the various

1 state tariffs where they are listed with other features, and are specifically referred to as
2 features. Furthermore, BellSouth employees repeatedly referred to these features as
3 features during communications between the parties; and BellSouth characteristically
4 referred to and charged for these things as features under the UNE regime.

5 Finally, in about April of 2005, BellSouth stated that it would not be paying these
6 credits applied for almost entirely on the grounds that dPi had not qualified for the credits
7 because, notwithstanding the fact that dPi had purchased BellSouth's basic service with
8 two or more Touchstar features, the Touchstar features that dPi had included in its orders
9 (e.g., BCR and BRD blocks)⁵ "did not count" because BellSouth did not have a separate
10 charge for these particular Touchstar features.

11 In North Carolina, Florida, and Alabama, (97%, 98%, and 92% respectively) the
12 overwhelming majority of the time credit requests were denied, they were denied because
13 Bellsouth decided the order did not have the requisite number of TouchStar features apart
14 from the TouchStar Blocking Features. Here in Kentucky, dPi requested the reasons for
15 each rejection, but has not received responsive documents yet. However, there is no
16 reason to believe that the answers would be substantially different from the other states.

17 **Q. Is there any merit to BellSouth's contention that the TouchStar Blocking Features**
18 **are not features?**

5

dPi's customers are largely pre-paid. dPi's most basic offering generally includes basic service, plus a number Touchstar Blocking Features, including (among others) the BCR and BRD Touchstar blocks, which are used to guarantee the customer's wishes to have his or her phone expenditure capped and not permit access to "per use" charges. Other features can be added at the customer's request.

1 A. No. The TouchStar BCR, BRD, and HBG blocking features are described in the
2 TouchStar feature portion of Bellsouth’s tariffs filed in various states, where they are
3 listed with other features, and are specifically referred to as features. *See* dPi’s Exhibit
4 1, an excerpt from a tariff. Furthermore, BellSouth employees repeatedly referred to
5 these features as features during communications between the parties; *see* dPi Exhibit 5.
6 Their website’s USOC decoder also decodes these USOCs as being TouchStar features.
7 Finally, in the UNE arena, these USOCs are listed and charged as “features.”

8 **Q. Is there any merit to Bellsouth’s contention that the LCCW can be awarded only**
9 **when additional features are purchased for additional cost?**

10 A. Again, essentially none. The fact of the matter is that all that is required to
11 qualify for these promotion is the purchase of basic service with two (or sometimes one,
12 if you use the promotion description from Bellsouth’s website) TouchStar features. In
13 every case where BellSouth denied credit on the grounds that dPi did not qualify because
14 it had not purchased BellSouth’s basic service with two features, dPi *had* in fact taken
15 BellSouth’s basic service with at least two additional TouchStar features, such as the
16 BCR and BRD blocks, among others. BellSouth simply chooses not to “count” these
17 features. There is no dispute that the blocks ordered are listed by BellSouth as TouchStar
18 features in their tariff. Moreover, BellSouth has paid credits to other carriers, such as
19 Budget and Teleconnex, with the same service orders (i.e., basic service plus TouchStar
20 Blocking Features) in the past. Finally, Bellsouth issues credits to its own retail
21 customers taking basic service plus TouchStar Blocking Features, and decreased the rate
22 at which it did so only after it decided to “re-interpret” the language of the promotion in

1 2005 so as to avoid paying these credits to CLECs. BellSouth has simply been
2 fabricating an excuse to avoid having to pay these credits to dPi.

3 **Q. Does BellSouth owe dPi any amounts for wrongfully denying promotion credits for**
4 **this reason?**

5 A. Yes. Our billing agent (Lost Key) has calculated that BellSouth has wrongfully
6 denied at least \$44,993.11 in promotional credits, almost entirely on the line connection
7 charge waiver alone. There are also credits owed for other promotions, such as the
8 Secondary Service Charge Waiver promotion and the Two Features For Free promotion
9 which were improperly denied.

10 **Q. Did BellSouth fail to credit dPi for any other reasons?**

11 A. As stated before, we have not yet received from BellSouth a response to our
12 request to tell us the reasons for all of the denials of credits. However, in other states we
13 saw that a credit was denied because it was not a “reacquisition” or a “winover” account
14 or because dPi also inadvertently submitted duplicate requests. Again, however, the vast
15 majority of times a request was rejected – on the order of 95% – was because the
16 Touchstar Blocking features were not counted as qualifying features for the LCCW, and
17 we have no reason to doubt that this does not apply in Kentucky as well.

18 **Q. Does this conclude your direct testimony?**

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

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

JAN 13 2010
PUBLIC SERVICE
COMMISSION

In the Matter of:

DPI TELECONNECT, LLC v.)
BELLSOUTH TELECOMMUNICATIONS,) Case No. 2005-00455
INC.

REBUTTAL TESTIMONY OF TOM O'ROARK

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

2 A: I have.

3 Q: Overall, what is your response?

4 A: First, as a housekeeping matter, I would like to address BellSouth's treatment of
5 non-Line Connection Charge Waiver ("LCCW") promotions, then respond to LCCW
6 related matters.

7 Q. Very well. What about the non-LCCW promotions?

8 A. For all practical purposes, they are irrelevant because discovery revealed the
9 dollar amounts related to these promotions to be so small. As a consequence, dPi
10 performed no analysis on the amounts applied for and denied under these promotions,
11 and has similarly has not bothered to review and analyze the points BellSouth presented
12 in its testimony.

13 In fact, when dPi filed its testimony in this case, dPi indicated that it would only
14 be pursuing and providing evidence on the LCCW promotion. By that time, discovery
15 in this case had revealed that of the total amount in dispute, almost all (near 97%) was

1 connected to a single promotion: the Line Connection Charge Waiver. Of those credits
2 applied for under the Line Connection Charge Waiver but denied, it was denied on the
3 grounds that dPi's orders for Basic Service plus the Touchstar Blocking Features HBG,
4 BCR, and BRD did not qualify for the promotion because BellSouth did not count these
5 features as "paid features." Accordingly, when dPi filed its testimony in this case it
6 indicated that it would be addressing only the LCCW promotion – because it does not
7 make economic sense to spend thousands of dollars in attorney time fighting over
8 \$1,349.79 in credits applied for under multiple other promotions and denied for multiple
9 reasons.

10 Nonetheless, BellSouth has gone to some length to talk about dPi's applying for
11 these credits. dPi has not spent the resources to disprove these claims. But two
12 observations come immediately to mind:

13 First, it is doubtful whether there really is a problem with the orders BellSouth
14 complains about. For example, with regards to the "double dipping" complaint that
15 BellSouth emphasizes at p. 24 of Ms. Moreland's testimony filed in Kentucky (and also
16 seen at p. 14 of Mr. Ferguson's Testimony filed in Georgia), in which credit requests
17 were submitted in the same month for accounts for both the LCCW (for new customers)
18 and the SSCW (for existing customers) promotions, note that ***there are no restrictions***
19 ***in either promotion prohibiting an end user in qualifying for both promotions in the***
20 ***same month.*** An educated consumer is able to qualify for the LCCW promotion by
21 signing up for new service on January 1, 2005, and the very next day, as an existing
22 customer, qualify for the SSCW promotion.

1 Second, if there is a problem, the true source of the problem here lies not with
2 dPi's billing agent's computer search engines, but with BellSouth itself: BellSouth has
3 created this situation by refusing to bill the correct amounts for service orders at the time
4 they are ordered, and instead dropping a haystack of billing information upon dPi and
5 requiring dPi to find the needles that are the qualifying orders and submit those for
6 refunds.

7 **Q: But it's really the LCCW promotion that's important to this case?**

8 A. Yes. By far, the main issue in this complaint is the Line Connection Charge
9 Waiver ("LCCW") Promotion. It accounts for about 97% of the total credits wrongfully
10 denied and thus it will be the focus of my rebuttal testimony.

11 **Q: Does focusing on the Line Connection Charge Waiver ("LCCW") Promotion**
12 **simplify issues for the Commission?**

13 A: Vastly. As noted above, the dispute over this promotion accounts for more than
14 97% of the dollars at issue between the parties. Frankly, the cost of litigation far
15 surpasses the minuscule amount at issue for the other two promotions. Had this been
16 known earlier, these claims likewise could have been dismissed earlier. From here out,
17 dPi will concentrate only on the LCCW promotions.

18 The vast majority of the time, dPi was denied credit under this promotion because
19 BellSouth refused to "count" as Touchstar features those features selected by dPi, such
20 as the Touchstar blocks. In fact, that is the basis for BellSouth's denial of promotion
21 credit 90+% of the time.

22 **Q: So in short, this case is reduced to whether dPi is entitled to promotional credits**
23 **when it orders Basic Service plus Touchstar block features because it has**

1 **“purchase[d] ... BellSouth Basic Service with at least one feature” and thus has**
2 **“qualif[ied] for a waiver of the local service connection fee.”**

3 A: Exactly. And there is no getting around the fact that dPi has in fact ordered Basic
4 Service with Touchstar features – because every line that dPi orders is a basic service line
5 with the Touchstar Blocking Features known by their USOCs of HBG, BCR, and BRD,
6 unless the customers order features that conflict with those features. If BellSouth did not
7 wish its promotion to apply to all Touchstar features, it should have (1) done like SBC
8 (prior to its merger with BellSouth), and alter its promotion so that the promotion
9 specifically lists those features that BellSouth requires to qualify for the promotion; and
10 (2) it should not have waived the Line Connection Charge for its own retail customers
11 who order basic service plus the TouchStar Blocking Features.

12 **Q: So what are your thoughts in response to BellSouth’s contentions about why dPi is**
13 **not entitled to the promotion when it orders basic service plus the TouchStar**
14 **Blocking Features?**

15 A. I understand why they are fighting this – there’s a lot of money at stake across
16 the entire BellSouth area of operations. But their contentions lack credibility, because
17 the sequence of events shows that the original interpretation of the promotion and
18 application was exactly as dPi has presented it, with BellSouth changing its interpretation
19 only after it realized that the original interpretation would result in it owing significant
20 amounts to CLECs. Once BellSouth realized that it faced a significant liability to
21 CLECs, it advanced a series of rationales, one after another, for why dPi’s orders do not
22 qualify. Each of these “justifications” were discredited in turn, and new ones were
23 generated.

1 **Q: Can you elaborate on this series of rationales BellSouth advanced as to why dPi's**
2 **orders did not qualify; and how, as each of these 'justifications' were discredited**
3 **in turn, new ones were generated?**

4 A. We know that BellSouth **did** originally interpret its promotion the as the plain
5 language reads, and as dPi contends it should be interpreted, for two reasons.

6 First, as described in earlier testimony, because Lost Key worked with BellSouth
7 in developing the automated system for processing these promotions. By December 2003
8 and January 2004, Steve Watson was working on the LCCW promotion, and had batches
9 containing credit requests for orders for basic service plus the TouchStar Blocking
10 Features approved. In fact, in January, February, March, and April 2004, regular batches
11 of such orders were approved for Teleconnex (on whose behalf Steve Watson was
12 working at the time), before Teleconnex was taken over by other owners and ceased
13 doing business. Then, in the summer of 2004, BellSouth was crediting other CLECs
14 (such as Budget Phone) with millions for promotional rates for orders essentially
15 identical to dPi's.

16 Second, we know from review of BellSouth's own retail ordering data that
17 ***BellSouth did credit its own retail users who otherwise qualify for the promotion and***
18 ***take only basic service plus the BCR, BRD, and HBG TouchStar Blocking Features.***

19 Through discovery in Florida, dPi sought records showing what non-recurring charges
20 BellSouth charged its own end users who (1) ordered new basic service and (2) any two
21 of the BCR, BRD, and HBG TouchStar Blocking Features (without any other TouchStar
22 features). The response showed that from 2003 to August 2007, in any given month, for
23 BellSouth end users ordering basic service plus the TouchStar Blocking Features,

1 BellSouth would waive the end users' Line Connection Charge between 8.8% and 40.1%
2 of the time. More particularly, for the time period from May 2003 to January 2005, new
3 BellSouth retail accounts created with basic service and 2 TouchStar Blocking Features
4 had their Line Connection Charge waived between 40% and 22% of the time. Those new
5 orders not receiving the waiver included orders that did not qualify because they were not
6 a "winover" or "reacquisition" (a requirement to qualify for LCCW); because they split
7 off of existing accounts; or the order were for accounts that were reestablished after being
8 disconnected – in other words, those orders not granted LCC waivers were for reasons
9 *other* than because BellSouth was not counting BCR and BRD as TouchStar features.
10 A detailed explanation of the data reviewed and the analysis of that data by Steven
11 Tepera is found in dPi's Exhibit 8. The frequency BellSouth awarded its end users
12 LCCW is shown on three graphs in dPi's Exhibit 6.

13 **Q Can you elaborate about this parade of excuses BellSouth gave for evading**
14 **extending the promotional pricing to dPi?**

15 The first theory they came up with after months of study was to say that dPi's
16 orders could not qualify because they were not win-overs or re-acquisitions, because they
17 were new orders. *See* Seagle depo at 48. This approach was developed in the fall 2004
18 and very early 2005 (*see* Seagle depo at 55), but was abandoned in February of 2005
19 when it became clear that this approach would not work (*see* Seagle depo at 44-45, 51).

20 Given the nature of its business – catering to credit challenged customers – essentially
21 all of dPi's clientele are those who were once customers of BellSouth or other carriers
22 but who were disconnected for failure to pay.

1 **Q** **What was the next excuse offered after the “customers not winnover/reacquisition”**
2 **excuse was abandoned?**

3 A. As noted in my direct testimony, another reason initially advanced for not issuing
4 the credits was for the supposed reason that the TouchStar Blocking Features dPi used
5 to qualify for the LCCW were really not “features.” This reason was withdrawn (though
6 it has now reappeared in sister states) after dPi pointed out that:

7 - by tariffed definition, “TouchStar service is” simply “a group of central
8 office call management features offered in addition to basic telephone
9 service” (Tariff at A13.19.1), and the items in question are undoubtably
10 call management features – there is no other category of service to which
11 they can be assigned;

12 - although BellSouth claims that the BCR, BRD, and HBG TouchStar
13 Features cannot be considered features because they are blocks, the fact
14 they are blocks does not mean the they are not features: blocks *are*
15 features. The most glaring example is the A13.19.2 E Call Block feature
16 from the tariff;

17 - the TouchStar Blocking Features appear in the Kentucky tariff (*e.g.*, at
18 A13.19.4 A. 1. (c),(f); A13.19.4 B. 1. (c),(f); (and various state tariffs)
19 where they are listed as features;

20 - they are specifically referred to as features in these tariffs;

21 - BellSouth employees repeatedly referred to these features as features
22 during communications between the parties; and

23 - BellSouth characteristically referred to and charged for these things as
24 features under the UNE regime.

25 **Q.** **What was the excuse offered after the “the TouchStar Blocking Features aren’t**
26 **really features excuse?**

27 The next approach was to claim that the promotion was not honored in situations
28 where the only things ordered were basic local service plus the TouchStar Blocking

1 features. Ms. Seagle conferred with Elizabeth Stockdale, a retail manager on the team,
2 on this issue:

3 After I got into validating dPi and realized that these blocks were on here,
4 I did call Elizabeth Stockdale and said can you run this one down, it's
5 BCR, BRD, HBG. Find out what happens when people order those
6 blocks on their -- with basic local service and that's it. She came back to
7 me and said we do not honor that. (Seagle depo 53).

8 While several months went into evaluating the winback/reacquisition "defense," almost
9 none went into evaluating the "TouchStar Blocking Features don't count" defense:

10 Q. Okay. How long did it take Elizabeth Stockdale's people or Elizabeth
11 Stockdale to get back to you with the information that you wanted from
12 her?

13 ***

14 A. Okay. Reacquisition was a couple of months of meetings. There was
15 a lot of other issues being discussed, like secondary service or FR, but it
16 was at least a couple months before we could come to any conclusion,
17 then of course they changed it.

18 With the block -- with the blocks I want to say I don't have perfect recall
19 here, but I want to say the next day, within a day or two.

20 Q. So a very short turnaround compared to --

21 A. Yes. (Seagle depo at 55).
22

23 Note that the same information that would have been necessary to verify what BellSouth
24 was doing for its own customers -- taking basic service plus the TouchStar Blocking
25 Features -- is the same information that BellSouth resisted producing in Florida and
26 Louisiana for months on the grounds that it was too labor- and time- intensive to recover
27 and evaluate. The conclusion to be drawn here is obvious: no real evaluation was done

1 here: someone just made a snap decision to use this as the reason, as it sounded rational
2 and defensible.

3 **Q. Well, isn't there a requirement that the TouchStar features be purchased "at**
4 **additional cost" as BellSouth says?**

5 No, not at all. This argument fails because BellSouth *is reading additional*
6 *requirements into its promotion criteria that simply aren't in the text.* According to the
7 plain language of the promotion, all dPi must do to qualify is

8 ... purchase[s] *any one* of the following [packages]:
9 [1] BellSouth® Complete Choice® plan,
10 [2] BellSouth® PreferredPack plan, or
11 [3] BellSouth® basic service and two (2) custom calling (or Touchstar®
12 service) local features.¹

13 Accordingly, dPi meets the requirements of the text of the promotion when it purchases
14 the combination of basic local service plus the two or more Touchstar block Features.
15 For BellSouth to impose added restrictions to these written terms – such as that the
16 features must be “purchased at additional cost” – imposes qualifying criteria that simply
17 don't appear in the text.²

1
See dPi's Exhibit 2, 3.

2

In any event, the word “purchase” does not have the limited meaning – “to pay cash for” – which BellSouth seems to ascribe to it. Among other things, “purchase” includes:

1: to gain or acquire; to acquire (real property) by means other than descent or inheritance

2: to obtain by paying money or giving other valuable consideration [such as choosing to do business with one over another]. See Webster's; Merriam Webster law dictionary. “Purchase” also includes taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property. See U.C.C. § 1-201(32). Cf. Securities Exchange Act § 3: the term “purchase” includes any contract to purchase or otherwise acquire.

1 BellSouth's argument that the HBG, BCR, and BRD TouchStar blocking features
2 could not possibly have been meant to count, since including them would be tantamount
3 to giving something away for free, and that BellSouth would therefore lose money, is
4 either disingenuous or inane: BellSouth routinely discounts things or waives charges in
5 order to generate goodwill and win business, and the entire purpose behind the promotion
6 was to increase BellSouth's market share at the expense of its competitors – as evidenced
7 by the fact that the promotion was directed only to “winover” or “reacquisition”
8 customers. So BellSouth does “get something” when it waives the line connection
9 charge for these customers: it gains goodwill, it expects to increase its customer base and
10 market share – just as when it gives away promotional items at sporting events. Waiving
11 the sign up charge is a common method of getting new customers, used not just by
12 telephone companies but all sorts of other businesses – like Gold's Gym, for instance.
13 The drive is to get as many paying customers as they can.

14 Again, BellSouth's assertion that these items don't count because BellSouth
15 would never intend to give anything away for free when they do so all the time, and
16 where they are in fact attracting customers to rebuild their customer base, undermines
17 BellSouth's credibility not just on this issue, but on all other assertions it makes in this
18 case.

19 Furthermore, if the Touchstar Blocking Features were originally intended not to
20 be “counted” towards fulfilling the promotion, BellSouth could easily have drafted its
21 promotional language to so specify -- as it did before in other promotions/tariff sections,
22 which point out that the blocks could not be counted towards different discount pricing

1 plans. The lack of such limiting language indicates BellSouth did not consider these
2 features as not counting towards the promotion.

3 Alternatively, BellSouth could have specifically listed those limited features
4 which it would allow to qualify for the promotion (i.e., “choose any two from the
5 following list...”). But BellSouth did *not* so limit the list of features from which one
6 could choose. Again, this lack of limiting language indicates BellSouth did not consider
7 these features as not counting towards the promotion.

8 Note also that BellSouth relies heavily on the fact that the North Carolina Utilities
9 Commission initially decided that dPi was not entitled to the LCCW credit because the
10 North Carolina Utilities Commission found that BellSouth did not actually provide the
11 credit to its end users with identical orders as dPi’s customers. The North Carolina
12 Commission’s decision was, however, founded upon BellSouth’s Pam Titpon’s testimony
13 that the BellSouth did not waive the Line Connection Charge for its end users taking
14 basic service plus the TouchStar Blocking Features, which the North Carolina
15 Commission found to be “dispositive.”

16 **Q. What’s the latest excuse now that the “yeah, but these TouchStar blocking features**
17 **weren’t purchased at additional cost” has been debunked?**

18 A. The latest excuse, which has come up only after the litigation started, appears to
19 be that if *dPi’s customers* don’t specifically request the blocks *from dPi* (like BellSouth
20 end users would supposedly do when ordering from BellSouth), then BellSouth is not
21 required to extend the promotion to dPi. This position is simply a trap to confuse the
22 unwary and the poorly informed.

1 **Q. Why do you say BellSouth's contention that it need only extend the promotion to**
2 **end users of dPi's who have specifically requested these features is a trap to confuse**
3 **the unwary and the poorly informed ?**

4 One must remember that the service plans dPi provides its customers is not a
5 clone of BellSouth's tariff; dPi picks the services that it wishes to resell and repackages
6 them for resale. dPi's service offerings do not directly mirror AT&T's. dPi's basic
7 package is designed to provide a guaranteed fixed price for basic service without the
8 possibility additional charges being added to the bill by the customer (or another user of
9 the customer's phone) accessing fee-per-use services. In order to provide customers
10 requesting this fixed price product, dPi places the necessary universal service order codes
11 that limit a customer from experiencing usage charges such as call return, repeat dialing
12 and/or call tracing on such orders – unless the end users chooses a level of service that
13 would entitle him or her to one or another of those features that would otherwise be
14 blocked. The customer is not informed of the technical details of how the order must
15 be provisioned to deliver the level of service requested; however, in requesting dPi's
16 product, the customer is requesting the blocks (and whatever technical provisioning
17 mechanisms are necessary) to ensure that the product is fixed priced.

18 In any event, BellSouth cannot legally impose these restrictions on a CLEC's
19 ability to resell these services at the wholesale discount. Conditioning dPi's eligibility for
20 the promotions upon a verification of *dPi's relations with third parties* (e.g., whether
21 dPi's customers specifically request the TouchStar Blocking Features by name, and
22 whether dPi passes on all or some of the promotional savings to its customers) both
23 violates the law and contradicts the overarching general provisions of the contract.

1 Under the law, whatever retail offers BellSouth makes to its customers, it must make
2 available to CLECs. If a retail customer can obtain service a certain way from BellSouth
3 for a certain price, the CLEC obtaining the same service the same way to resell is entitled
4 to the same price, less the avoided cost discount. For BellSouth, CLECs are the end user;
5 CLEC customers are unrelated third parties. BellSouth's contention that it can require
6 additional requirements is extrapolated from a single footnote to a chart in the ICA,
7 which provides that "Where available for resale, promotions will be made available only
8 to End Users who would have qualified for the promotion had it been provided by
9 BellSouth directly." The best interpretation of this footnote is that the only resale orders
10 that will qualify for promotional pricing are those that would qualify for promotional
11 pricing had they been made by a BellSouth end user directly. Interpreting this footnote
12 in the way now suggested by BellSouth – as conditioning dPi's eligibility for the
13 promotions upon a verification of *dPi's relations with third parties* (e.g., whether dPi's
14 customers specifically request the TouchStar Blocking Features by name, and whether
15 dPi passes on all or some of the promotional savings to its customers) – both violates
16 the law, and contradicts the overarching general provisions of the contract, such as the
17 Resale Attachment's General Provision section 3.1:

18 ...Subject to effective and applicable FCC and Commission rules and
19 orders, *BellSouth shall make available to DPI for resale those*
20 *telecommunications services BellSouth makes available...to customers*
21 *who are not telecommunications carriers.*

22 **Q: Does this conclude your testimony?**

23 **A:** Yes – for now. But I reserve the right to supplement or amend it at hearing.