

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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In the Matter of:

dPi TELECONNECT, L.L.C.)
v.) Case No. 2005-00455
BELLSOUTH TELECOMMUNICATIONS, INC.)

POST-HEARING BRIEF OF DPI TELECONNECT, LLC

Strict construction of the LCCW promotion's language shows an order qualifies for discount with just basic service plus TouchStar Blocking Features, and because the evidence further shows that is how BellSouth originally interpreted the promotion for both its retail customers and other CLECs, dPi is entitled to the promotional pricing.

INTRODUCTION

The dispute in this matter arises from a disagreement regarding BellSouth Telecommunications, Inc.'s ("BellSouth") resale obligations under 47 U.S.C. 251(c)(4)(A) and 252(d)(3). These statutes require incumbents like BellSouth to offer their retail services to competitors like dPi Teleconnect, L.L.C. ("dPi") at a wholesale discount, so that dPi can attempt to resell those services in furtherance of its own business.¹ More specifically, the question is whether

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."

Consequently, the Federal Communication Commission ("FCC") 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. Therefore, no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs.

Local Competition Order, 11 FCC Rcd at 15970, ¶948 (footnote omitted) (emphasis added).

The rules which the FCC adopted in the *Local Competition Order* plainly state that all promotional offerings must be made available for resale, other than those expressly provided for in Section 51.613 (cross-class and short term promotions). Thus, among other things, 47 C.F.R. § 51.605 "Additional obligations of incumbent local exchange carriers," states in part,

BellSouth must extend to dPi “promotional” pricing for services which would be eligible for the promotion pricing under the plain reading of the Line Connection Charge Waiver (“LCCW”) promotion BellSouth offered in Kentucky.

dPi ordered service for all of its end users with at least basic service plus two or more TouchStar Blocking Features. The blocking features are identified by Universal Service Ordering Codes which are listed in AT&T’s tariff amongst the rest of AT&T’s TouchStar Blocking Features.

dPi submitted requests for credit for each customer that (1) switched its local service to dPi from another provider and (2) purchased basic service with at least two features; and (3) did not have dPi service within ten days of the connection request. AT&T denied some of these requests. Because dPi’s orders (1) were precisely within the qualifying criteria *drafted by AT&T*, (2) mirror orders from other CLECs which were credited; and (3) mirror orders from AT&T’s own retail customers which likewise received the promotion, dPi is entitled to the credits.

ANALYSIS AND ARGUMENT: SPECIFIC ISSUES AND POSITIONS

ISSUE 1(a): Is dPi entitled to the Line Connection Charge Waiver promotion when dPi orders Basic Service plus two or more of the TouchStar Blocking Features?

dPi is entitled to promotional credits because dpi qualified under the promotion’s express terms by ordering basic service plus TouchStar Blocking Features; and because BellSouth

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

(emphasis added).

interpreted and applied the LCCW promotion to waive Line Connection Charges for both other CLECs and its own retail customers with orders configured like dPi's.

At the end of the day, the question before the Commission is whether dPi qualified for BellSouth's Line Connection Charge Waiver promotion by purchasing Basic Local Service plus two or more of the BCR, BRD, and HBG TouchStar Blocking Features. Under the express written terms of the promotion, dPi does qualify for this promotional pricing. The Commission should interpret the language of the promotion based on a plain reading of the text of the promotion and hold that when dPi purchases a package consisting of plain telephone plus two or more TouchStar Blocking Features, dPi qualifies for the promotional pricing. AT&T initially interpreted the promotion in this way; it simply chose to change its interpretation of the promotion after it realized that CLECs such as dPi would benefit more from such an interpretation than its own customers, given the nature of the parties' respective customer bases.

- A. dPi qualifies for the Line Connection Charge Waiver promotion pricing under the express language of the promotion.

The interpretation or construction of a contract that is clear and unambiguous is a matter of law.² Under the Line Connection Charge Waiver, or "LCCW" promotion, BellSouth waives the line connection charge for those customers who sign up with BellSouth and take at least basic service with two TouchStar Blocking Features. A review of the relevant language shows that all – ALL – dPi had to do to qualify for the line connection charge waiver is purchase Basic Service with one or

² See e.g., *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002). See also *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 703 (Ky. 2006) (quoting *Cantrell*, 94 S.W.3d 381, 385 (Ky. App. 2002)), *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005) (quoting *Cantrell*, 94 S.W.3d 381, 385 (Ky. App. 2002)), *Baker v. Coombs*, 219 S.W.3d 204, 207 (Ky. App. 2007) (quoting *Cantrell*, 94 S.W.3d 381, 385 (Ky. App. 2002)), and *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123, 125 (Ky. 2009) (quoting *Abney*, 215 S.W.3d 699, 703 (Ky. 2006)).

more TouchStar Blocking Features. According to its language, the LCCW provides that LCC will be waived when:

“The customer ... switch[es] their local service to BellSouth and purchase[s] any one of the following: BellSouth® Complete Choice® plan, BellSouth® PreferredPack plan, or BellSouth® basic service and two (2) custom calling (or TouchStar® service) local features.”

If one were to diagram this paragraph, it would show Line Connection Charge will be waived when the customer:

... purchase[s] any one of the following [packages]:

- (1) BellSouth® Complete Choice® plan,
- (2) BellSouth® PreferredPack plan, or
- (3) BellSouth® basic service and two (2) custom calling (or TouchStar® service) local features.

Under the express written terms of the promotion, dPi qualified for this promotional pricing by purchasing basic service plus the BCR, BRD, and HBG TouchStar Blocking Features.

1. dPi is entitled to the promotion pricing because the BCR, BRD, and HBG blocks are all TouchStar Blocking Features.

dPi’s basic offering always includes at least two TouchStar blocks, including the call return block (known by its Universal Service Ordering Code [“USOC”] of “BCR”); the repeat dialing block (“BRD”); and the call tracing block (“HBG”). But despite having paid promotional credits to carriers and having credited its own retail customers with similar orders, BellSouth now seeks to avoid having to pay these credits to dPi by asserting these blocks are not “features,” and thus cannot qualify for the promotion. This argument is made purely out of expediency, and is without merit.

First, we begin with noting that under Kentucky law, as with most jurisdictions, a contract – or in this instance, the Tariff – drafted by a party without significant negotiations must be construed in favor of the non-drafting party.

Next, we note that in fact, BellSouth’s own employees – including dPi’s point of contact on this issue, Kristy Seagle as well as her boss, Gary Patterson, referred to these blocks as “features” when communicating with dPi.³

TouchStar Service is simply “a group of central office call management features offered in addition to basic local telephone service.” BellSouth’s Tariff, Sec. A 13.19.1. A (Ex. PLF 4). Blocks are by definition “central office call management features offered in addition to basic local telephone service” since they are installed at the central office and are used for call management. Various different blocks are specifically identified as “features” within the BellSouth tariff, including “free” blocks. For example:

Call Block; Tariff A13.19.2.E, Ex. PLF 4

Calling Number Delivery Blocking – Permanent; Tariff A13.19.2.I, Ex. PLF 4, (note that there is no charge for this feature: Tariff A13.19.4.A.1.(p), Ex. PF4);

Calling Number Delivery Blocking – Per Call; Tariff A13.19.2.J, Ex. PLF 4 – again, there is no charge for this feature, see Tariff A13.19.4.A.1.(q), Ex. PLF 4.

The call return block (“BCR”); the repeat dialing block (“BRD”); and the call tracing block (“HBG”), at issue in this case are all described in the TouchStar Service section of BellSouth’s tariff in most states, where they are described at the bottom of the same section defining the features they

³ O’Roark Direct at 16; dPi Exhibit 5.

block: A13.19.2(A) (call return); A13.19.2(B) (repeat dialing); A13.19.2(F) (call trace.) Note that in Kentucky, AT&T appears not to offer the Call Trace block, or HBG, in its tariff.

Furthermore, the BCR, BRD, and HBG TouchStar Blocking Features each have their own USOC and are listed in the rates and charges portion of the TouchStar tariff at section A13.19.4 (relating to “Residence – Individual Features”); for example, BCR is listed at A13.19.4(A)(1)(c); BRD is listed at A13.19.4(A)(1)(f); and HBG is listed (in non-Kentucky tariffs, such as North Carolina – dPi Ex. 1) at A13.19.4(A)(3)(c). Each of these features is specifically referred to as a feature in a footnote to this portion of the tariff in other states. For example, in Florida, BellSouth’s Tariff at p. 12, Sec. A13.19.4(A), Note 1, states that: “These [BCR, BRD, HBG] *features* should not be included....[in calculating discounts not related to this case].” [Emphasis added.]. Here in Kentucky, a similar footnote reads “Neither [BCR, BRD] or Calling Number Delivery Blocking - Permanent should be included in the determination of appropriate discounts when ordered in combination with *other* TouchStar service *features*.” A13.19.4 A, Note 1. [Again, emphasis added.]

Finally, we know that on the UNE side of operations, these blocks are listed and billed as features. AT&T employees referred to them as features and AT&T’s “USOC” decoder also decodes these USOCs as being TouchStar Blocking Features.

Given the foregoing, it becomes clear that BellSouth regards these blocks as features when it is profitable for them to do so (on the UNE side, where it charges for them) and chooses to regard them as something other than features when – as here – acknowledging them as features will result in costs to BellSouth. Under the entire set of circumstances, given the language of the tariff and the conduct of the parties prior to BellSouth’s identifying a way to avoid financial liability by

disclaiming these blocks as features, it's clear that the preponderance of the evidence establishes that these blocks are indeed TouchStar Blocking Features. Under the circumstances, BellSouth's insistence that they are not features because they are blocks undermines BellSouth's credibility not just on this issue, but on all other assertions it makes in this case.

2. dPi is entitled to the promotion pricing because it purchases in a single order a package consisting of Basic Local Service plus at least two features: the BCR, BRD, and HBG TouchStar Blocking Features.
 - a. There is no requirement that the TouchStar Blocking Features be purchased "at additional cost"

BellSouth' next line of defense was that even if the BCR, BRD, and HBG blocks are features, they don't qualify for the promotion credit because they weren't purchased separately for a separate sum of money. This argument fails because BellSouth *is reading additional requirements into its promotion criteria that simply aren't in the text*. Again, we begin by recalling that a contract drafted by a party without significant negotiations must be construed in favor of the non-drafting party. "No rule is better established than that, when a contract is susceptible of two meanings, it will be construed strongest against the party who drafted and prepared it." *Theatre Realty Co. v. P.H. Meyer Co.*, 48 S.W.2d 1, 2 (Ky. 1932) (quoting *Glenmary Land Co. v. Stewart*, 290 S.W. 503, 504 (Ky. App. 1927)).⁴

⁴ See *B. Perini & Sons v. Southern Ry. Co.*, 239 S.W.2d 964, 965-966 (Ky. 1951) (quoting *Theatre Realty Co. v. P.H. Meyer Co.*, 48 S.W.2d 1, 2 (Ky. 1932)) and *Pulliam v. Wiggins*, 580 S.W.2d 228, 231 (Ky. App. 1978) (quoting *Boyd v. Phillips Petroleum Company*, 418 S.W.2d 736, 738 (Ky. 1966)).

"[I]t must not be forgotten that in construing a written instrument, the courts will construe it more strongly against the party who prepared the instrument or writing and, in cases of doubtful construction, will resolve the doubt against the maker of the instrument in favor of the party thereto who did not take part in its preparation." *Fidelity & Deposit Co. of Maryland v. Lyon*, 124 S.W.2d 74, 77 (Ky. 1938).

See also *Moore v. Commonwealth Life Ins. Co.*, 759 S.W.2d 598 (Ky. App. 1988) (quoting *Woodson v. Manhattan Life Insurance Co.*, 743 S.W.2d 835 (Ky. 1987)): "However, restrictive interpretation in a standardized adhesion contract such as this is not favored."

According to the plain language of the promotion, all dPi must do to qualify is ... purchase[s]

any one of the following [packages]:

- (1) BellSouth® Complete Choice® plan,
- (2) BellSouth® PreferredPack plan, or
- (3) BellSouth® basic service and two (2) custom calling (or TouchStar® service) local features.

Accordingly, dPi meets the requirements of the text of the promotion when it purchases a package consisting of combination of basic local service plus any two or more TouchStar Blocking Features. For BellSouth to impose added restrictions to these written terms – such as that the features must be “purchased at additional cost” – imposes qualifying criteria that simply don’t appear in the text.⁵

- b. The assertion that this promotion could not have been meant to apply to “free” features is without merit since the goal was to win back market share from competitors and BellSouth routinely issues promotions that bring no immediate benefit to itself.

BellSouth’s argument that the HBG, BCR, and BRD TouchStar Blocking Features could not possibly have been meant to count, since including them would be tantamount to giving something away for free, and that BellSouth would therefore lose money, is disingenuous: BellSouth routinely discounts things or waives charges in order to generate goodwill and win business, and the entire purpose behind the promotion was to increase market share at the expense of its competitors – as evidenced by the fact that the promotion was directed only to “win-over” or “reacquisition”

⁵ 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.

customers. So BellSouth does “get something” when it waives the line connection charge for these customers: it gains goodwill, and it expects to increase its customer base and market share – just as when it sponsors giveaway promotional items at sporting events.

- c. Had BellSouth meant to exclude these features from qualifying for the promotion, the promotion could have been written to either particularly include those features that qualified, or exclude those features that would not qualify.

If the TouchStar Blocking Features were originally intended not to be “counted” towards fulfilling the promotion, BellSouth could easily have drafted its promotional language to so specify – as it did before in other promotions/tariff sections, which point out that the blocking features could not be counted towards different discount pricing plans. The lack of such limiting language indicates BellSouth did not consider these features as not counting towards the promotion.

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

- d. Public Policy prohibits reconstructing the text of the promotion in favor BellSouth to include limitations that don’t appear on its face.

The fact that BellSouth honored the promotion for CLECs with the same kinds of orders as dPi,⁶ and for its own retail customers with the same kinds of orders as dPi, and then took *eight months* – from September 2004 to April 2005⁷ – to think of a colorable reason to justify not paying the credits suggests BellSouth had to “come up” with a reason not to pay these credits *after* the fact. Under the circumstances, there is no reason to favor BellSouth by reconstructing the text of the

⁶ E.g., Budget Phone; Teleconnex. See O’Roark direct at 11.

promotion to include limitations that don't appear on its face. The credits should be paid to dPi just as they were to other CLECs. As a matter of public policy, AT&T, which has created a "promotion credit" system that universally overcharges its CLEC customers and requires the CLECs to hunt down the overcharges and apply for credits, should not be allowed to unjustly enrich itself at the expense of its competitors by changing its "interpretation" of the promotion in question to avoid paying credits that are due under a plain reading of the promotion.

- B. dPi qualifies for the Line Connection Charge Waiver promotion pricing under AT&T's interpretation of, and practice of awarding, the promotion prior to the dispute.

Evidence of behavior prior to dispute is the best evidence of what BellSouth originally intended, as it shows how BellSouth handled the promotion before its policy was modified to suit BellSouth's goals for this litigation. In this case, the evidence shows that prior to the dispute between dPi and BellSouth, BellSouth waived the Line Connection Charge for both other CLECs and its own retail customers with orders configured like dPi's.

Furthermore, since dPi is entitled to the same treatment as BellSouth's retail customers get in practice, regardless of BellSouth's "policy," the fact that BellSouth waived the Line Connection Charge for its retail end users means that dPi is entitled to have the Line Connection Charge waived for its orders too.

- 1. The evidence shows the LCCW was extended to CLECs taking basic service plus the TouchStar Blocking Features.

The undisputed evidence in this case shows that BellSouth provided the Line Connection Charge to CLECs with orders mirroring dPi's in January and February 2005. BellSouth's claims that

⁷ See O'Roark direct at 14-15.

BellSouth made these credits by mistake, or that CLECs were “stealing” from BellSouth, is belied by the fact that *BellSouth never attempted to backbill or initiate collections activity for these amounts.*⁸

2. The evidence shows the LCCW was extended to BellSouth’s own retail customers taking basic service plus the TouchStar Blocking Features.

Documentary evidence AT&T was forced to produce shows that BellSouth retail customers taking orders configured the same as dPi’s – just basic service plus the BCR, BRD, and HBG TouchStar Blocking Features – repeatedly and systematically received waivers of the Line Connection Charge. This documentary evidence is AT&T’s own billing and ordering data, which is reproduced at dPi Exhibit 4 and summarized at dPi Exhibit 6.

The data can be used to identify those new service orders placed for:

- (1) 1FR (that is, basic service);
- (2) at least 2 of the TouchStar Blocking Features;
- (3) and no other features; and
- (4) that were or were not charged a line connection fee.

These were the retail orders that AT&T processed that fit the criteria of being basic service plus two TouchStar Blocking Features and being granted the Line Connection Charge waiver. However, since there was no way to filter the data for those orders submitted by win-over or winback customers, there is no way to identify exactly what customers who met all the criteria were charged.⁹

All told, AT&T’s data shows that 5,052 1FR + 2 TouchStar Blocks orders received Line Connection Charge waivers, and 20,074 did not from May 2003 to August 2007. Of course, the 20,074 orders not receiving the waiver are presumed to include all such orders placed by customers not entitled to promotion pricing because they were not win-overs or win-backs (and of course, the

⁸ AT&T’s Pam Tipton, FLA Record 326.

⁹ A detailed analysis of this data is found in dPi Exhibit 6 (filed May 1, 2008).

majority of BellSouth's new customers are not win-overs or win-backs.) This information is shown as a pie chart in Exhibit 6.

More detailed analysis of this data shows that orders for 1FR + 2 TouchStar Blocks were awarded Line Connection Charge waivers approximately 28% of the time from May 2003 to December 2004, with a sharp decline in late 2004. The average for January 2005 through August 07 was approximately 14%. The month by month percentages are shown in dPi Exhibit 6, p. 3; raw counts by month are shown in dPi Exhibit 6, p. 2.

Ultimately, the data shows that Line Connection Charge waivers were granted in each and every month during this time frame. The data show that the award of waivers was not rare, was not intermittent, and was not accidental. The graphs concisely show that not only did AT&T provide a Line Connection Charge waiver to its end users with identical orders to dPi's orders, but they did it regularly and systematically.

AT&T attempts to excuse or dismiss these results by claiming that their own systems are not trustworthy. However, their data is the best data to be had.

AT&T further attempts to excuse or dismiss these results by claiming they can be attributed to other causes – for example, reconnects following disconnects done in error, or reconnects after hurricanes. *However, BellSouth was unable to produce any ordering documents backing up these assertions, and no BellSouth witness has offered more than vague generalities about these “other explanations” for the number of orders receiving the waiver.*

With regards to hurricanes, an examination of the data showed no correlation between the dates of hurricane activity in Florida and the amount of orders receiving the Line Connection Charge

waiver. The dates and strengths of hurricanes and tropical storms in Florida are plotted on the line chart in dPi Exhibit 6, p. 3, and show there is no apparent correlation in Florida between the presence of a storm and the frequency of line connection charge waivers given to end users. This refutes AT&T's contention that these end users had their line connection charge waived because they are simply reconnections of service disrupted by hurricanes.

BellSouth's next best excuse was BellSouth's claim that 15% of the orders receiving the waiver could be explained by having been reconnected after a disconnection in error.¹⁰ But again, no documentary evidence – e.g., the orders themselves– were produced to back this claim up, and in any event, BellSouth's witness could find no information on *the majority* of the orders allowing her to attribute their existence to something other than the Line Connection Charge Waiver.

Ultimately, the information that can be drawn from the data is the AT&T provided its end users who ordered 1FR plus two TouchStar Blocking Features a waiver of the line connection charge regularly since at least 2003, and that for most of these, there is indication that would allow one to attribute the waiver to something such as a hurricane or some other cause. In fact, only one conclusion can reasonably be taken from this data – that the Line Connection Charge was waived pursuant to the Line Connection Charge Waiver Promotion.

- C. dPi is entitled to the same OFFERS from AT&T that AT&T OFFERS its retail customers – regardless of how it repackages and markets those services to third parties.

AT&T appears to claim that if *dPi's customers* don't specifically request the blocks *from dPi* (like BellSouth end users would supposedly do when ordering from BellSouth), then BellSouth is not

¹⁰ Tipton, FLA Record 335.

required to extend the promotion to dPi. This argument is simply a trap to confuse the unwary and the poorly informed.

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

In any event, BellSouth cannot legally impose these restrictions on a CLEC's ability to resell these services at the wholesale discount. Conditioning dPi's eligibility for the promotions upon a verification of *dPi's relations with third parties* (e.g., whether dPi's customers specifically request the TouchStar Blocking Features by name, and whether dPi passes on all or some of the promotional savings to its customers) both violates the law and contradicts the overarching general provisions of the contract. Under the law, whatever retail offers BellSouth makes to its customers, it must make available to CLECs. If a retail customer can obtain service a certain way from BellSouth for a

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

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

ISSUE 1(b): What amount is dPi owed in connection with the Line Connection Charge Waiver Promotions?

The evidence shows that amount in question that dPi was wrongfully denied was \$44,993.11 for Line Connection Charge Waiver.¹¹

¹¹ O'Roark direct testimony p. 17.

CONCLUSION AND PRAYER

The competent and credible evidence in this case shows overwhelmingly that dPi qualified for the Line Connection Charge Waiver under the promotion's express terms by placing orders for basic service plus the TouchStar Blocking Features BRC, BRD, and HBG; and that BellSouth initially interpreted and applied the LCCW promotion to waive the Line Connection Charge for both other CLECs and its own retail customers with orders configured like dPi's; that BellSouth continued to waive the Line Connection Charge for its retail customers with orders configured like dPi's even after this dispute arose. Under these facts and the law, BellSouth is required to make this promotional pricing available to dPi and dPi is entitled to \$44,993.11 in credits relating to this promotion in Kentucky.

Respectfully Submitted,



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APPENDIX 1:

ANALYZING DPI EXHIBIT 4: AT&T'S BILLING AND ORDERING DATA FOR RETAIL ORDERS FOR BASIC SERVICE PLUS TOUCHSTAR BLOCKING FEATURES

dPi formed and served discovery requests designed to test AT&T's assertion that it did not provide the Line Connection Charge Waiver to its own retail customers taking just basic service plus the TouchStar Blocking Features which make up the bulk of dPi's orders.

AT&T responded in two parts. The first set, dated September 26, 2007, contained responsive data from January 2005 to August 2007. The second set, dated November 7, 2007, and contained data from May 2003 through December 2005.

The data was extremely voluminous and dense. Together there were 1089 pages, each page containing thirty-three to thirty-eight lines of entries, and each line containing nine to ten columns of data.

All this material is included in the Record as dPi Exhibit 4.

The data can be used to identify those new service orders placed for:

- (1) 1FR (that is, basic service);
- (2) at least 2 of the TouchStar Blocking Features;
- (3) and no other features; and
- (4) that were not charged a line connection fee.

These were the retail orders that AT&T processed that fit the criteria of being basic service plus two TouchStar Blocking Features and being granted the Line Connection Charge waiver.

One can count these orders on a page-by-page basis. Begin with the first page of Exhibit 13 in the record, Bates stamped 000001. Per the letter of AT&T's Phil Carver, orders that had their line connection charge waived were indicated by a WNR, WLC, or WSO (collectively, "W codes") in column 6, titled "Account Waiver Code." For instance, on 000001, seven lines are highlighted

which have W codes. However, in some cases, BellSouth reproduced the same order twice (presumably because two different W codes were applied to the same account); see e.g., the fourth and fifth highlighted lines, and the sixth and seventh highlighted lines. These entries should only counted once. Also, some orders should not be counted at all if either a subsequent order showed the customer taking additional features later (*see e.g.*, p. 000002, lines 24 and 25 (line 25 shows account in line 24 taking “ESX” or call waiting)), or if the order showed that it was not an order for basic service (*see e.g.*, p. 0002, line 15 (“1FRCL” means Caller I.D. was on the line); and line 16 (“NXMCR” is an order for Basic Service plus Caller ID Deluxe with Anonymous Call Rejection)).

Performing the count allows one to tabulate the results by month, as shown in Exhibit 6, which summarizes the underlying orders, and how many had the line connection charge waived

All told, Exhibit 4 shows that 5,052 1FR + 2 TouchStar Blocks orders received Line Connection Charge waivers, and 20,074 did not from May 2003 to August 2007. Of course, the 20,074 orders not receiving the waiver are presumed to include all such orders placed by customers not entitled to promotion pricing because they were not win-overs or win-backs (and of course, the majority of BellSouth’s new customers are not win-overs or win-backs.) This information is shown as a pie chart in Exhibit 6.

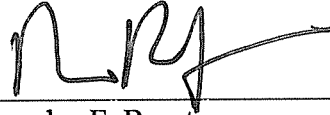
More detailed analysis of this data shows that orders for 1FR + 2 TouchStar Blocks were awarded Line Connection Charge waivers approximately 28% of the time from May 2003 to December 2004, with a sharp decline in late 2004. The average for January 2005 through August 07 was approximately 14%. The month by month percentages are shown in Exhibit 6, p. 3; raw counts by month are shown in Exhibit 6, p. 2.

The dates and strengths of hurricanes and tropical storms in Florida are plotted on the line chart in Exhibit 6, p. 3, and show there is no apparent correlation in Florida between the presence of a storm and the frequency of line connection charge waivers given to end users. This refutes AT&T's contention that these end users had their line connection charge waived because they are simply reconnections of service disrupted by hurricanes.

Ultimately, the data shows that Line Connection Charge waivers were granted in each and every month during this time frame. The data show that the award of waivers was not rare, was not intermittent, and was not accidental. The graphs concisely show that not only did AT&T provide a Line Connection Charge waiver to its end users with identical orders to dPi's orders, but they did it regularly and systematically.

CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing document has been filed with the Kentucky Public Service Commission and served upon Defendant BellSouth through its below-listed attorneys on this 29th day of March, 2010.



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