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January 20, 2010

VIA OVERNIGHT MAIL

2010 - 00029

RECEIVED
JAN 21 2010
PUBLIC SERVICE COMMISSION

Mr. Jeff Derouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: BellSouth Telecommunications, Inc., d/b/a AT&T Southeast d/b/a AT&T Kentucky, Complainant v. dPi Teleconnect, LLC, Defendant

Dear Mr. Derouen:

Enclosed for filing in the above-reference case are the original and five (5) copies of AT&T Kentucky's Formal Complaint along with a CD containing the applicable Interconnection Agreement.

Should you have any questions, please let me know.

Sincerely,

Mary K Keyer

Mary K. Keyer

Enclosures

cc: Registered Agent for dPi Teleconnect, LLC

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
JAN 21 2010
PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.
d/b/a AT&T SOUTHEAST
d/b/a AT&T KENTUCKY

Complainant

v.

DPI TELECONNECT, LLC

Defendant

Case No.: 2010-00029

FORMAL COMPLAINT

Pursuant to KRS 278.260(1) and 807 KAR 5:001, Section 12, and 47 U.S.C. § 252, BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky ("AT&T Kentucky") respectfully requests that the Public Service Commission of Kentucky ("the Commission") convene a docket for the purposes of: resolving billing disputes between dPi Teleconnect, LLC ("dPi") and AT&T Kentucky; determining the amount that dPi owes AT&T Kentucky[1] under the Parties' applicable Interconnection Agreements, and requiring dPi to pay that amount to AT&T Kentucky.[2]

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[1] In September 2009, AT&T Kentucky began applying a new methodology for calculating the resale promotional credits it will provide dPi and other CLECs with regard to the cashback component of certain retail promotional offerings. ***AT&T Kentucky is not seeking any amounts billed under this new methodology in this docket***. Additionally, some of the amounts at issue are also at issue in other proceedings before this Commission that dPi has brought against AT&T Kentucky. AT&T Kentucky will work in good faith with the Parties to adjust the amount it seeks in this proceeding to reflect the outcome of those other proceedings.

[2] AT&T Kentucky is filing similar Complaints with the Commission against three other CLECs. Because of the commonality of the issues set forth in Section IV of this Complaint and those set forth in Section IV of the other three Complaints, AT&T Kentucky plans to file a motion to

I. BACKGROUND AND SUMMARY OF COMPLAINT

dPi owes AT&T Kentucky a past-due and unpaid balance for telecommunications services that AT&T Kentucky provided to dPi for resale under the terms and conditions of the Parties' Interconnection Agreements entered into in 2003 and in 2007. As of November 9, 2009, this past-due and unpaid balance totals, in the aggregate, more than $250,000 in the Commonwealth of Kentucky.[3] To the extent that dPi has disputed AT&T Kentucky's bills, AT&T Kentucky has denied those disputes as required by its Interconnection Agreement with dPi. dPi, however, has declined to pay AT&T Kentucky the amounts associated with these denied disputes. A substantial amount of this past-due and unpaid balance is the result of dPi's withholding payments to AT&T Kentucky for one or both of the following reasons:[4] (1) dPi erroneously asserts that AT&T Kentucky cannot apply the resale discount approved by this Commission to the cashback component of various promotional offers that AT&T Kentucky makes available for resale;[5] and (2) dPi erroneously

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consolidate these four dockets for the purposes of resolving these common issues. AT&T Kentucky will file that motion in each of these dockets after the Commission assigns them docket numbers.

[3] As of November 9, 2009, dPi's unpaid and past-due balance is over $6.3 million across the nine AT&T Southeast states.

[4] A more detailed description of dPi's assertions, and a brief explanation of why they are erroneous, are set forth in Section IV of this Complaint.

[5] For one-time "cashback" promotions, AT&T Kentucky contends that resellers should receive less than the face amount of the promotion minus the wholesale discount because such valuation does not reflect the true economic value of the promotion on retail rates. Among other things, it does not consider the redemption rate, the in-service life of the subject customer, or the net present value of a one-time upfront payment associated with the promotion. Recently, AT&T implemented a new methodology aimed at providing the true economic value of the promotion to resellers. Several resellers are challenging the methodology in other proceedings, but that issue is not before the Commission in this docket because AT&T Kentucky is not seeking any amounts billed under this new methodology in this docket.

asserts that AT&T Kentucky's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale.

The Interconnection Agreements between AT&T Kentucky and dPi provide that disputes like these are to be resolved in the first instance by this Commission. AT&T Kentucky, therefore, respectfully requests that the Commission resolve the outstanding disputes, determine the amount that dPi owes AT&T Kentucky under the Parties' applicable Interconnection Agreements, and require dPi to pay that amount to AT&T Kentucky.

II. PARTIES

1. AT&T Kentucky, a Georgia corporation, is an incumbent local exchange carrier providing telecommunications services in 78 counties in the Commonwealth of Kentucky. AT&T Kentucky's address in Kentucky is 601 W. Chestnut Street, Louisville, Kentucky, 40203.

2. The full name and address of the authorized representative for AT&T Kentucky in this proceeding is:

Mary K. Keyer
601 Chestnut Street, Suite 407
Louisville, KY 40203
(502) 582-8219
mary.keyer@att.com

3. dPi is organized under the laws of the State of Delaware and is a competitive local exchange carrier ("CLEC") authorized to provide resold local exchange telecommunications services within the Commonwealth of Kentucky.

III. DPI'S BREACH OF ITS INTERCONNECTION AGREEMENT

4. In 2003 and in 2007, AT&T Kentucky and dPi entered into a negotiated interconnection agreement (collectively "Interconnection Agreements") in which AT&T Kentucky agreed, among other things, to offer various telecommunications services for resale to dPi at specified wholesale rates and subject to specified terms and conditions. Copies of the Interconnection Agreements are on a CD attached hereto as **Exhibit A**.[6]

5. As of November 9, 2009, dPi owes a past due and unpaid balance to AT&T Kentucky in the amount of $253,802.83 (the "Past Due Balance"). The Past Due Balance represents the amounts AT&T Kentucky billed dPi for telecommunications services provided to dPi in Kentucky pursuant to the Parties' Interconnection Agreements less: payments made by dPi, and credits provided by AT&T Kentucky to dPi in connection with valid disputes and approved promotional credit requests submitted by dPi as of November 9, 2009.

6. The Past Due Balance does not include any amounts related to disputes or promotional credit requests submitted by dPi, but not yet reviewed by AT&T Kentucky.

7. To the extent that the Past Due Balance includes any charges on AT&T Kentucky's invoices that dPi has disputed, AT&T Kentucky has denied those disputes as required by the Interconnection Agreements with dPi.

8. dPi has breached the Interconnection Agreements by refusing to pay amounts that are due and owing to AT&T Kentucky under those agreements.

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[6] AT&T Kentucky will make copies of this CD available to the Parties upon request.

IV. DPI'S ERRONEOUS REASONS FOR NONPAYMENT

9. As noted above, a substantial amount of dPi's unpaid balance is the result of dPi's withholding payments to AT&T Kentucky for one or both of the following reasons.

A. Application of the resale discount to the "cashback" component of promotional offerings.

10. dPi asserts that AT&T Kentucky cannot apply the resale discount approved by this Commission to the cashback component of various promotional offerings that AT&T Kentucky makes available for resale. Assume, for example, AT&T Kentucky's retail promotional offering provides a coupon that can be redeemed for a \$50 check to a retail residential customer who purchases Telecommunications Service A under certain conditions. When dPi resells that promotional offering to qualifying end users and submits to AT&T Kentucky an appropriate promotional credit request, AT&T Kentucky provides dPi a bill credit of \$41.60 (\$50 less the 16.79% resale discount established by this Commission). dPi, however, erroneously contends that it is entitled to a bill credit for the full \$50 "face value" of the cashback amount.

11. There is no basis in logic or law for dPi's assertions. If AT&T Kentucky were to reduce the retail price of a telecommunications service by \$50 in a given month (say from \$200 to \$150), dPi would not receive the full \$50 "face value" of the reduction when it purchased that service for resale. Instead, dPi would receive a \$41.60 reduction – the \$50 face value of the reduction less the

16.79% avoided cost discount established by the Commission.[7] dPi clearly should not receive a greater wholesale reduction merely because the retail reduction takes the form of a "cashback" offer rather than a price reduction.

12. The federal Act expressly contemplates that when an incumbent LEC resells services under § 251(c)(4), "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." 47 U.S.C. § 252(c)(3). Using this "costs avoided" standard, this Commission determined a state-wide percentage discount from the retail rate that is used to determine the wholesale rate at which the incumbent LEC, AT&T Kentucky, is to sell its services to CLECs for resale. Far from being inappropriate, subtracting the wholesale discount from the face value of the promotion is exactly what is contemplated by the federal Act.

B. Customer Referral Marketing Promotions.

13. dPi asserts that AT&T Kentucky's customer referral marketing promotions (such as the "word-of-mouth" promotion) are subject to resale. Assume, for example, that AT&T Kentucky gives retail customers who qualify a $50 bill credit when they refer others who purchase AT&T services. dPi contends that it is entitled to resell this customer referral marketing promotion

[7] When the retail price of the service was $200, dPi paid AT&T Kentucky $166.42 ($200 less the 16.79% resale discount) when it purchased the service for resale. When the retail price of the service is reduced to $150, dPi pays AT&T Kentucky $124.82 ($150 less the 16.79% resale discount) when it purchases the service for resale. In other words, a $50 reduction in the retail price of the service results in a $41.60 reduction in the price dPi pays for the service (from $166.42 to $124.82), which is the $50 "face value" of the reduction less the 16.79% resale discount.

and that it, therefore, is entitled to a $50 bill credit when one of dPi's end users refers others who purchase services from dPi.

14. Subject to certain conditions and limitations, AT&T Kentucky is required "to offer for resale at wholesale rates any *telecommunications service* that [it] provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c)(4)(A) (emphasis added). Customer referral marketing promotions, however, are not telecommunications services that are subject to resale obligations. An end user does not receive any benefit under these promotions for purchasing telecommunications services from AT&T Kentucky. Instead, an end user receives benefits under these promotions only if he or she successfully markets AT&T Kentucky's services to others who then purchase services from AT&T Kentucky. dPi obviously is free to give similar benefits to its end users who successfully market its services to others, but it is not entitled to have AT&T Kentucky finance any such marketing programs that dPi may employ.

15. The federal Act makes it clear that CLECs must finance their own marketing programs when it directs state commissions to "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 . . . costs that will be avoided by the local exchange carrier.*" 47 U.S.C. § 252(d)(3). Accordingly, the resale discount rate that this Commission established (and that is incorporated in the Interconnection Agreements) already excludes the costs of customer referral marketing promotions like the "word of mouth" promotion. To go further and also require AT&T Kentucky to give dPi

additional promotional credits for these customer referral marketing promotions would impermissibly force AT&T Kentucky to double-count its marketing expenses -- first in the wholesale rate, and again in the promotional credit.

V. JURISDICTION

17. The Commission has jurisdiction to interpret and enforce the terms of the Interconnection Agreement at issue in this docket. The 1996 Act expressly authorizes state commissions to mediate interconnection agreement negotiations,[8] arbitrate interconnection agreements,[9] and approve or reject interconnection agreements.[10] In addition, the courts have held that § 252 implicitly authorizes state commissions to interpret and enforce the interconnection agreements they approve.[11]

VI. REQUEST FOR RELIEF

WHEREFORE, AT&T Kentucky respectfully requests that the Commission:

(1) Serve a copy of this Complaint upon dPi and require dPi to answer the Complaint;

(2) Find that dPi has breached the Interconnection Agreements by wrongfully withholding amounts due and payable to AT&T Kentucky for services provided in accordance with the Parties' Interconnection Agreements;

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[8] 47 U.S.C. § 252(a)(2)
[9] *Id.* § 252(b)
[10] *Id.* § 252(e)
[11] *See, e.g.*, *Bell Atl. Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 304 (4th Cir. 2001) ("The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements – we believe they do"), *vacated on other grounds in Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 65 (2002). *See also Core Commc'ns v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 342 n.7 (3rd Cir. 2007) ("[E]very federal appellate court to consider the issue has determined or assumed that state commissions have authority to hear interpretation and enforcement actions regarding approved interconnection agreements").

(3) Find that AT&T Kentucky has been financially harmed as a direct result of dPi's breach;

(4) Find that dPi is liable to AT&T Kentucky for all amounts wrongfully withheld by it, including without limitation late payment charges and interest;

(5) Require dPi to pay AT&T Kentucky all amounts wrongfully withheld by it, including without limitation late payment charges and interest; and

(6) Grant AT&T Kentucky such additional relief as the Commission may deem just and proper.

Respectfully submitted,

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