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February 25, 2010

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**PUBLIC SERVICE
COMMISSION**

Jeff DeRouen
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40601

*Re: BellSouth Telecommunications, Inc. d/b/a Southeast d/b/a AT&T Kentucky
v. dPi Teleconnect, LLC
Case No. 2010-00029*

Dear Mr. DeRouen:

Enclosed please find an original and ten copies each of dPi Teleconnect, LLC's ("dPi") Answer and Counterclaims as well as its Motion to Dismiss and/or Stay and Response to Motion for Consolidation in the above referenced case.

Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies of each filing and return them to me our runner.

Sincerely yours,

Douglas F. Brent

DFB:jms
Enclosures

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Bellsouth Telecommunications, Inc. d/b/a)	
Southeast d/b/a AT&T Kentucky)	
)	
Complainant)	
)	
v.)	Case No. 2010-00029
)	
dPi Teleconnect, LLC)	
Defendant)	

ANSWER AND COUNTERCLAIM OF DPI TELECONNECT, LLC

dPi Telecommunications, L.L.C. (“dPi”) hereby answers the complaint filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky (“AT&T”) and brings a related counterclaim.

DPI’S ANSWER

1. In response to the specific allegations set forth in the Complaint, all allegations not specifically admitted are denied.
2. Generally, dPi has never applied for the “Word-of-Mouth” promotions, and in connection with the other promotions, has never withheld payment of the difference between the full amount of a cash back promotion (which dPi is actually entitled to) and the amount actually credited by AT&T/BellSouth (the promotional amount less the wholesale discount).
3. dPi responds in more detail to AT&T’s particular statements as shown below.

4. With regard to the section entitled "PARTIES": paragraphs 1 and 2 require no response from dPi.
5. The allegations set forth at Paragraph 3 of the Complaint are admitted.
6. With regard to the section entitled "DPI'S BREACH OF ITS INTERCONNECTION AGREEMENT(S)" and responding to the allegations set forth in Paragraph 4 of the Complaint, dPi admits that in 2003 and 2007 it entered into interconnection agreements with AT&T and purchased telecommunications services pursuant to that agreement. Except as expressly admitted herein, the remaining allegations of Paragraph 4 of the Complaint are denied.
7. dPi denies the allegations set forth in Paragraph 5 through Paragraph 8 of the Complaint and demands strict proof thereof.
8. With regard to the section entitled "DPI'S ERRONEOUS REASONS FOR NONPAYMENT" dPi denies the allegations set forth in Paragraph 9 of the Complaint to the extent that it assumes that an unpaid balance is owed by dPi to AT&T.
9. dPi denies the allegations set forth in Paragraphs 10 and 11 of the Complaint.
10. Paragraph 12 of the Complaint purports to quote (or summarize) federal statutes. dPi respectfully refers the Commission to such statutes for their contents, and denies any inconsistent characterizations or allegations.
11. dPi denies the allegations set forth in Paragraph 13 of the Complaint.
12. Paragraphs 14 and 15 of the Complaint purport to quote (or summarize) federal statutes. dPi respectfully refers the Commission to such statutes for their contents, and denies any inconsistent characterizations or allegations.

13. The allegations set forth in their Paragraph 17 of the Complaint, relating to “JURISDICTION”, are admitted.

14. In response to the “REQUEST FOR RELIEF” section, dPi denies that AT&T is entitled to any relief whatsoever.

AFFIRMATIVE DEFENSES

15. AT&T has failed to state a claim upon which relief can be granted.

16. AT&T’s claims are barred by the doctrines of laches, forbearance, estoppel, and waiver.

17. AT&T’s claims are barred by the statute of limitations.

18. AT&T has (or had) a contractual obligation to pursue, escalate, and preserve its claim to the promotional credits it seeks in its Complaint in accordance with the applicable provisions of the parties’ ICA(s). Upon information and belief, AT&T failed to C.F.R. 51.613(b).

19. The FCC has primary jurisdiction over all or part of AT&T’s claims.

20. AT&T’s claims are barred, in whole or in part, by its failure to mitigate any damages allegedly do so. Accordingly, AT&T should be barred from pursuing its claims that it failed to contractually preserve.

21. AT&T has violated 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 C.F.R. 51.613(b) by failing to provide Respondent with the appropriate resale promotion credit, and by failing to obtain Commission approval before placing restrictions on resale.

22. AT&T’s claims are barred and/or preempted, in whole or in part, by federal laws and regulations, including (without limitation) 47 U.S.C. § 251(c)(4), 47 C.F.R. 51.605 and 47 sustained.

23. AT&T's right to recover, if any, is offset in whole or in part, for the reasons stated in dPi's counterclaim.

24. dPi asserts the right to attorneys' fees after successful defense of this matter to the extent allowed under the terms of its Interconnection Agreements with AT&T and/or applicable law.

25. dPi reserves the right to amend this answer to add other affirmative defenses which are determined to be applicable upon discovery in this case.

dPi's COUNTERCLAIM

26. AT&T seeks a determination that, if it is required to extend cash back promotions to CLECs at all, then it should not be required to extend to CLECs the entire amount of the promotion, but rather a lesser amount derived by reducing the promotional amount by the resale discount. Upon close examination, AT&T's contention is incorrect and incompatible with the requirements of the FTA, harms competition, and should be repudiated. To comply with the law, the Commission should properly require AT&T/BellSouth to provide the full amount of the cash back promotions to CLECs.

27. The overarching purpose behind the FTA's resale provisions is to permit CLECs to purchase, for subsequent resale, services from the ILEC at a *lower* rate than the ILEC sells those services at *retail*. In short, *wholesale* should always be *less* than *retail*.

28. The flaw in AT&T's position is dramatically illustrated by the promotions in question, where applying the formula advanced by AT&T results in a situation where the cash back promotion reduces the *retail* sale price of the offer in question to a point where it is lower than the *wholesale* price. An easy hypothetical example showing the effect of applying AT&T's method is shown in Figure 1, below:

Figure 1.
Comparison of Results of applying AT&T's proposed method for calculating promotion amount due resellers to (applying hypothetical 20% wholesale discount to both tariff price and to promotional price).

Standard/Tariffed monthly price	Special/promotional retail cash back offer	Net retail price (first month)	Net wholesale price (first month)
\$50	\$0	\$50	\$40
\$50	\$50	\$0	\$0 (retail now same as wholesale)
\$50	\$100	\$-50	\$-40 (retail now LESS than wholesale)

29. Obviously, adopting a model which results in the wholesale price that is no longer less than the retail price guts the purpose of the FTA and dooms competition. Accordingly, AT&T's model cannot be correct.

30. The appropriate method for determining the wholesale price is to first calculate the amount of the avoided cost discount, then subtract the avoided cost from the actual sales price. *See* 47 USC § 252(d)(3).¹ At the times when these resale agreements were first built in 1996 and 1997, the avoided cost (and thus the wholesale discount) was calculated upon the ILECs' standard tariffed pricing, at the time still regulated. The calculations were *not* based on promotion prices, which did not then exist, and which in any event by definition are not standard prices, but the equivalent of a special sale price.

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

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

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

Obviously, there will always be *costs* to providing service, regardless of what the *sales price* is, and although initially formulated as a percentage to avoid recalculating the costs as tariffed rates rose, the avoided cost is best considered a fixed amount of the *standard, or tariffed, rate*.

31. Since the actual sales price is not necessarily the tariffed price, but can be lowered by short term “promotional” offers, *i.e.*, special sales, the FCC has required ILECs to make the benefits of those promotions available to CLECs.² The FCC has discussed the promotion issue at length in various dockets, notably including *Local Competition Order*.³ Indeed, in the *Local Competition Order* the Commission expressly recognizes the risk that ILECs could use promotions like AT&T’s to manipulate their retail rates and effectively avoid their resale obligations. Consequently, the Commission found that the resale requirement of section 251(c)(4) of the Act

makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale

² 47 C.F.R. § 51.605 Additional obligations of incumbent local exchange carriers.

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

³ *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”).

obligation by *shifting their customers to nonstandard offerings*, thereby eviscerating the resale provisions of the 1996 Act. *Local Competition Order*, 11 FCC Rcd at 15970, ¶948 (footnote omitted)(emphasis added).

32. That FCC decision anticipated the possibility that ILECs whose retail rates became exempt from state tariffing requirements might attempt to avoid obligations under Section 251 by using rebates or similar incentives and claiming they were not part of the “price” of service. Of course, BellSouth now has such an exemption under Kentucky law, *see* KRS 278.544(1), making it even more important that the Commission pay close attention to the practice at issue here.

33. In light of the FCC’s determination, the *price* to which the avoided cost discount is applied is simply the lower of the standard price, or, if any, the promotional price in effect for the services in question. Stated another way, the three steps to finding the wholesale price are:

- STEP 1. Find the retail price.
- STEP 2. Multiply the standard/tariffed retail price by the wholesale discount factor. This gives you the value of the avoided costs.
- STEP 3. Subtract the avoided cost from the retail sales price, which is standard/ tariffed price, or, if a promotion applies, the price after applying the promotion.

The results of using this method are shown below in Figure 2. Note that by using this method, the wholesale price is always the same amount less than the retail price, which is a better reflection of the fact that the cost to provide the services is constant regardless of what the sales price turns out to be.

Figure 2.
Comparison of results of applying just avoided cost discount based on standard/tariffed retail price

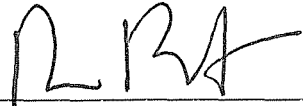
Standard/Tariffed monthly price	Special/promotional retail discount	Net retail price (first month)	Net wholesale price (first month)
\$50	\$0	\$50	\$40 (avoided cost is \$10)
\$50	\$50	\$0	\$-10 (wholesale still \$10 less than retail)
\$50	\$100	\$-50	\$-60 (wholesale still \$10 less than retail)

34. Because dPi has consistently been credited not the full amount of the promotions to which it is entitled, but instead by that amount less the wholesale discount, dPi is entitled recover the difference, and hereby pleads for the same.

WHEREFORE, having responded to the Complaint, dPi respectfully requests that the Commission issue an Order dismissing the Complaint and granting such further relief as dPi is entitled to.

February 25, 2010

Respectfully submitted,

By:  _____

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Attorneys for dPi Teleconnect, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served by First Class Mail on those persons whose names appear below this 25th day of February, 2010.

Mary K. Keyer
AT&T Kentucky
601 West Chestnut Street
Suite 407
Louisville, Kentucky 40203

A handwritten signature in black ink, appearing to read 'DLBA', written over a horizontal line.

Douglas F. Brent

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Bellsouth Telecommunications, Inc. d/b/a)	
Southeast d/b/a AT&T Kentucky)	
)	
Complainant)	
)	
v.)	Case No. 2010-00029
)	
dPi Teleconnect, LLC)	
)	
)	
Defendant)	

**DPI TELECONNECT, LLC'S MOTION TO DISMISS AND/OR STAY
AND RESPONSE TO MOTION FOR CONSOLIDATION**

dPi Teleconnect, LLC ("dPi") respectfully requests that the Kentucky Public Service Commission ("the Commission") enter an order dismissing the Formal Complaint (the "Complaint") filed by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky ("AT&T") in the above-referenced matter, or, in the alternative, staying or holding in abeyance these proceedings pending a final order in Federal Communications Commission ("FCC") WC Docket No. 06-129, *In the matter of Petition of Image Access, Inc. d/b/a NewPhone for Declaratory Ruling Regarding Incumbent Local Exchange Carrier Promotions Available for Resale Under the Communications Act of 1934, as Amended, and Sections 51.601 et seq. of the Commission's Rules* (the "FCC Resale Docket").

Further, because the FCC Resale Docket will determine the policy issue that AT&T urges the Commission to consolidate -- whether AT&T can apply the resale discount to retail "cash-back" promotions offered by AT&T to resellers -- the

Commission should deny AT&T's Motion for Consolidation, without prejudice, as premature or moot. The FCC Resale Docket already effectively consolidates the issue, and the FCC's decision will provide guidance to AT&T and resellers on a national basis, rather than subjecting the parties to potential inconsistent state commission and appellate court decisions.

BACKGROUND

Image Access, Inc. d/b/a NewPhone ("NewPhone") filed a Petition for Declaratory Ruling the FCC to remove uncertainty surrounding the resale of incumbent local exchange carrier ("ILEC") services subject to cash-back promotions, gift cards, coupons, checks, or other similar giveaways.

In response to the FCC's Public Notice requesting comments and reply comments from interested parties, BellSouth Corporation and AT&T Inc.¹ both filed timely comments opposing the relief requested by NewPhone. This matter is currently pending before the FCC in WC Docket No. 06-129.

Thereafter, AT&T filed separate complaints against dPi and three other competitive carriers operating in Kentucky. AT&T also filed substantively identical complaints against dPi in Louisiana, Tennessee, Mississippi, Georgia, North Carolina, South Carolina and Alabama; in those other jurisdictions, AT&T filed separate complaints against at least three other carriers.

In its Complaint filed against dPi with this Commission, AT&T seeks a decision declaring that (a) dPi has breached its interconnection agreement by wrongfully withholding amounts due and payable, (b) AT&T has been financially harmed, and (c)

¹ AT&T Inc. was the result of a merger of SBC Communications, Inc. and AT&T Corp. The opposition of AT&T Inc. in FCC Docket No. 06-129 included the company's ILEC subsidiaries.

dPi is liable to AT&T, and (d) dPi is required to pay AT&T all amounts withheld, including late payment charges and interest. *See* Complaint pp. 3, 5 (¶8), 9 (part VI).

In the Motion to Consolidate, however, AT&T asks that two issues it asserts are “in common” with the other complaints it filed in Kentucky be consolidated across the four proceedings for “expeditious resolution” — apparently in the form of a declaration from the Commission, rather than through the asserted interconnection claims contained in the complaints. Specifically, AT&T suggests the common issues are: (1) whether AT&T can apply the resale discount established by the Commission to “cash-back” promotions offered by AT&T to its customers that AT&T makes available for resale, and (2) whether AT&T is required to offer for resale certain customer referral marketing promotions (such as the “word-of-mouth” promotion).

ARGUMENT

As discussed below, the first issue raised by AT&T is already pending for resolution before the FCC. Therefore, AT&T’s related claim against dPi should be dismissed without prejudice, or stayed pending the FCC’s decision.

The second issue raised by AT&T is not applicable to dPi as it has not sought any credits associated with AT&T’s word-of-mouth promotion. Therefore, AT&T’s Complaint fails to even state a claim against dPi, and provides no basis for consolidation.²

² dPi has asserted the defense of no cause of action as to AT&T’s word-of-mouth claim in its answer, and will file a dispositive motion relating to that claim at the appropriate time in this proceeding.

I. The Commission should dismiss or stay AT&T's Complaint as it relates to the resale issues being decided in the FCC's Resale Docket.

Having chosen to file separate cases against dPi and others before at least five state commissions purportedly to interpret and enforce the separate interconnection agreements it has with each defendant and determine the individual amount that may be owed by each such defendant, AT&T turns around and wants to have a state-by-state "consolidated" determination only about the application of the resale discount to cash back promotions required to be offered to CLEC resellers.³ Assuming *arguendo* that the Commission has jurisdiction over the issues and that the sought-for prospective declaration is allowable in a complaint proceeding (particularly one clearly asserting retrospective claims, *see* Complaint p.1 fn.1 & p.2 fn.5), the Commission should dismiss AT&T's Complaint or, alternatively, hold the Complaint in abeyance pending the FCC's decision in its Resale Docket.

Each complaint, including AT&T's Complaint before the Commission, requires interpretation of FCC regulations regarding AT&T resale obligations to make retail promotions available to CLEC resellers; nowhere does AT&T allege violation of a state commission regulation or state statute. Not only would judicial economy and efficiency be best served by allowing the FCC, the governing body charged with promulgating and

³ At the same time, AT&T's proposed consolidation is not sufficiently respectful of the differences in interconnection agreements, disputes, facts, and positions as between dPi and the other Kentucky defendants. In its Motion (pp.2-3), AT&T asserts that "[t]he facts associated with these common issues do not vary significantly (if at all) from one docket to the next, and few (if any) of those facts are in dispute," but cannot say whether or what portion of a defendant's disputed billings/payments "are subject to one or both of the ... common issues." It does not address whether any "common" interpretation of an issue can be anything more than an abstract, advisory opinion in sorting out the actual billing and payment disputes that have arisen, and it recognizes that individual questions will remain after the requested consolidated proceedings (Motion p.4 & fn.3).

interpreting the regulations at issue, to provide guidance on the issues presently before the Commission, the FCC is the most appropriate agency to interpret *its own* regulations.

Further, consolidation of a regional issue involving interpretation of federal statutes and regulations, can realize efficiencies only at a federal or national level — not on a state-by-state basis. Furthermore, state-by-state determinations raise the risk of inter-state conflicts and are duplicative of existing proceedings considering the same issues.

In fact, as to the one issue in which dPi has any interest (restrictions on the resale discount), there are already three proceedings in which the issue is pending:

a. Interpretation of the Telecommunications Act of 1996 and FCC regulations relating to AT&T's resale obligations and the prohibition against imposing unreasonable or discriminatory conditions or limitations on resale are issues currently pending in the FCC Resale Docket.

b. Issues of AT&T's resale obligations under the federal statute and regulations are also pending in *CGM, LLC v. BellSouth Telecommunications, Inc.*, Case No. 3:09-cv-00377 (W.D. N.C.). The appellate court for that circuit has already ruled, in *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439 (4th Cir. 2007), that the Telecom Act and FCC regulations thereunder require AT&T to make the promotional offered to retail customers available to CLEC resellers.

c. A U.S. District Court in Texas enjoined AT&T from engaging in restrictions on resale designed to reduce the amount of promotional discounts offered to CLEC resellers when compared to retail consumers. *Budget PrePay, Inc. v. AT&T Inc. f/k/a SBC Communications, Inc.*, Case No. 3:09-cv-1494-P (N.D. TX). AT&T is

currently appealing that decision to the United States Fifth Circuit Court of Appeals, Case Nos. 09-11188 and 09-11099.

The efficiencies that AT&T asserts will follow from its proposed, “limited consolidation,” can be obtained by abating this proceeding in deference to one or more of the proceedings listed above. Rulings made in those earlier-filed proceedings will clarify or determine AT&T’s resale obligations under federal statutes and regulations, and advance the resolution of the particular billing and payment issues in AT&T’s complaint against dPi. If, at that point, there are legal arguments or other issues that might efficiently be addressed by consolidating the proceedings in one or more of AT&T’s separately-filed complaint cases, a party may request and the Commission may consider consolidation at that time.

AT&T itself has recognized the benefits of abating a related proceeding pending before the Louisiana Public Service Commission, Docket No. U-31202, *In re: BellSouth Telecommunications, Inc. d/b/a AT&T Louisiana, Petition for Review Concerning Resale Promotion Methodology Adjustment*, in light of the case pending before the Fifth Circuit. In a Motion for Abeyance, AT&T urged that the outcome of the appeal to the Fifth Circuit referenced above could provide guidance to the parties or be dispositive of some or all of the issues in the Louisiana docket and that administrative and judicial economy would be well served and resources appropriately conserved by holding that docket in abeyance.

dPi agrees with AT&T and, for the same reasons, urges the Commission to, at a minimum, hold this proceeding in abeyance as well, as described above.

II. AT&T has no claim against dPi for amounts allegedly owed for the Word-of-Mouth Promotion.

In an apparent effort to craft the Complaint against dPi in a manner similar to the complaints being filed by AT&T against other CLEC resellers, AT&T went so far as to assert a claim against dPi that it knows, or should know through basic investigation, has no basis whatsoever. Specifically, AT&T has asserted a claim to hold dPi liable for credits allegedly due associated with its word-of-mouth promotion. dPi has not applied for credits, let alone withheld payments associated with, the word-of-mouth promotion.

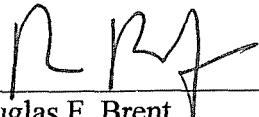
AT&T has a basic obligation, prior to filing a complaint against another party, to investigate the claims to be asserted. At a minimum, AT&T should immediately amend its Complaint against dPi to remove any claims relating to the word-of-mouth promotion.

In any event, as the claim relates to AT&T's Motion to Consolidate, for the reasons stated above, dPi opposes the consolidation of the Complaint against it based on a word-of-mouth claim that does not exist. Thus, the only claim presenting a case and controversy between AT&T and dPi is that relating to AT&T's calculation of the cash back promotional credits due – the issue already pending before the FCC.

WHEREFORE, as discussed above, dPi requests that the Commission dismiss the Complaint filed by AT&T, or, in the alternative, stay or hold in abeyance the proceeding in this case pending the FCC's Resale Docket and/or the referenced court cases. dPi further requests that the Commission deny AT&T's Motion for Consolidation, without prejudice, as premature or moot.

Respectfully submitted this 25th day of February, 2010.

Respectfully submitted,

By: 

Christopher Malish
(admission under SCR 3.030 to be obtained)
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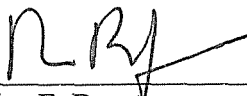
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Attorneys for dPi Teleconnect LLC.

CERTIFICATE OF SERVICE

This is to certify that, this 25th day of February, 2010, a copy of the above and foregoing Motion and Response has been served upon all parties of record or their counsel, by facsimile and First Class mail, as follows:

Mary K. Keyer
General Attorney - Kentucky
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Louisville, Kentucky 40203
Fax: (502) 582-1573



Douglas F. Brent