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October 20, 2006

VIA HAND DELIVERY

filed electronically in docket office on 10/20/06

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *dPi Teleconnect v. BellSouth*
Docket No. 05-00310

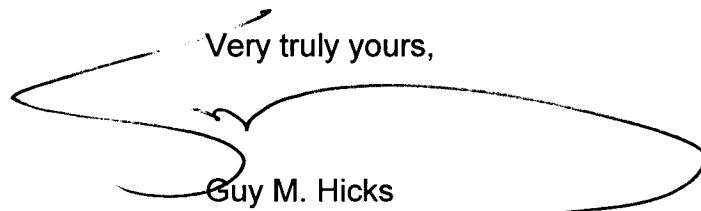
Dear Chairman Kyle:

On February 6, 2006, the Authority granted the *Joint Motion for Abatement* filed by BellSouth and dPi. In that *Motion* the parties informed the Authority that a similar case presenting the same issues was being litigated by the parties before the North Carolina Utilities Commission. The parties further stated that they had agreed to abate the Tennessee proceeding until 30 days after a dispositive order was issued in the North Carolina docket. On October 12, 2006, the North Carolina Utilities Commission entered a dispositive order denying dPi's *Motion for Reconsideration*. Copies of that order are enclosed.

BellSouth voluntarily agreed not to enforce its contractual remedies in Tennessee until a dispositive order was entered by the North Carolina Utilities Commission. Now that the dispositive order has been entered, BellSouth may exercise such contractual remedies and pursue collection action to recover amounts owed by dPi to BellSouth.

A copy of this letter is being provided to counsel of record.

Very truly yours,

A handwritten signature in black ink, appearing to be "Guy M. Hicks", written over a horizontal line. The signature is stylized with a large loop at the end.

Guy M. Hicks

GMH:ch

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-55, SUB 1577

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	
Complaint of dPi Teleconnect, L.L.C. Against	)
BellSouth Telecommunications, Inc. Regarding	)
Credit for Resale of Services Subject to	)
Promotional Discounts	)
	ORDER DENYING dPi's MOTION TO RECONSIDER

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, and Chair Jo Anne Sanford

APPEARANCES:

For dPi Teleconnect, L.L.C.:

Ralph McDonald, Bailey & Dixon, L.L.P., Post Office Box 1351, Raleigh,
North Carolina 27602-1351

Christopher Malish, Foster, Malish, Blair & Cowan, L.L.P., 1403 West
Sixth Street, Austin, Texas 78703

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III, BellSouth Telecommunications, Inc., Post Office
Box 30188, Charlotte, North Carolina 28230

Andrew D. Shore, BellSouth Telecommunications, Inc., 675 W. Peachtree
Street NE, Suite 4300, Atlanta, Georgia 30375

For the Using and Consuming Public:

Robert S. Gillam and Ralph J. Daigneault, Staff Attorneys, Public Staff -
North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh,
North Carolina 27699-4326

BY THE COMMISSION: On August 25, 2005, dPi Teleconnect, L.L.C. (dPi) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking credit for resale of services subject allegedly to promotional discounts in accordance with their interconnection agreement. Among other things, dPi resells BellSouth's retail residential telephone services, some of which are subject to BellSouth promotional discounts. The

discount dPi seeks credit for in this proceeding is the Line Connection Charge Waiver (LCCW), which BellSouth gave to customers that purchased certain packages or features.

It was dPi's belief that some of its customers met the requirements of the LCCW by obtaining at least two of the following features: blocking per-use call return, blocking repeat dialing, and blocking call tracing. BellSouth refers to these features by the codes BCR, BRD, and HBG, respectively. BellSouth charges customers for most custom calling features, but it furnishes BCR, BRD, and HBG to customers upon request, without charge. BellSouth believes that customers obtaining BCR, BRD, or HBG did not qualify for the discount because the promotion only provided the discount for purchased features.

On March 1, 2006, the Commission held an evidentiary hearing in Raleigh with witnesses from dPi and BellSouth presenting testimony and exhibits. On April 27, 2006, the Public Staff filed its Proposed Order and dPi and BellSouth filed briefs. On June 7, 2006, the Commission issued an Order Dismissing the Complaint.

On July 6, 2006, dPi filed a Motion for Reconsideration which can be summarized as follows:

- a. dPi is entitled to recover \$2,537.70 for credits wrongfully denied on the grounds that a transfer, rather than a winover or reacquisition, was involved.
- b. Applying the correct test, or basing the decision on the best evidence in the record, inexorably leads to the determination that dPi is entitled to LCCW promotion pricing when it purchases Basic Local Service plus two of the BCR, BRD, and HBG Touchstar features.

The Commission subsequently issued an Order Requesting Comments from BellSouth and the Public Staff and requiring reply comments to be filed by dPi. Briefly summarized, the parties commented as follows:

BellSouth Comments

BellSouth contended that dPi failed to present anything new for the Commission to consider. It simply reiterated statements contained in its earlier brief. dPi's arguments were not persuasive the first time, nor are they now. dPi's claim is founded upon selective use of three months out of two years billing data. dPi has presented absolutely no substantive evidence that refutes the results of the statistically valid sampling analysis presented by BellSouth. As such, the Commission should deny dPi's request for payment of \$2,537.70.

BellSouth recommended that the Commission reaffirm its ruling that dPi is not entitled under the terms of the parties' interconnection agreement to credits for BellSouth's Line Connection Charge Waiver Promotion because BellSouth does not and

would not give the promotion to its own End Users with only basic service and free blocks.

Public Staff Comments

The Public Staff stated that it cannot confirm whether dPi's claims for \$2,537.70 in credits for wrongfully denied transfers/winovers are legitimate without a review of each credit request submitted by dPi. The Public Staff recommended that BellSouth should examine each credit request individually, without the use of a sampling procedure, to determine the correct amount of credits due. If the total credits due as a result of the recalculation are greater than the credits already granted to dPi, BellSouth should award the necessary additional credits; if they are lower, dPi should reimburse BellSouth for the excess credits it has received.

It was also the Public Staff's view that BellSouth should not be forced to allow promotional pricing for customers that subscribe to blocking services for which no charge is made, including BCR, BRD, and HBG. The Public Staff believes these services did not serve to qualify a customer for BellSouth's promotion and agrees with the Commission's ruling.

dPi Reply Comments

In its Reply Comments, dPi reiterated its comments from its Motion to Reconsider that:

1. dPi is entitled to recover \$2,537.70 for credits wrongfully denied on the grounds that a transfer, rather than a winover or reacquisition, was involved.
2. Applying the correct test, or basing the decision on the best evidence in the record, inexorably leads to the determination that dPi is entitled to LCCW promotional pricing when it purchases Basic Local Service plus two of the BCR, BRD, and HBG Touchstar features.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission's analysis on Reconsideration addresses the two core issues raised by the reconsideration motion—improper credits for transfers and interpretation of the interconnection agreement:

Improper Credits for Transfers. During the hearing, dPi witnesses Brian Bolinger and Steve Watson responded affirmatively to the following question by dPi's counsel in prefiled rebuttal testimony:

So in short, this case is reduced to whether dPi is entitled to promotional credits when it orders Basic Service plus Touchstar block features because it has "purchase[d]... BellSouth Basic Service with at least [two] feature[s]" and thus has "qualif[ied] for a waiver of the local service fee." Tpp. 40, 111.

G. S. 62-73 provides that complaints may be made by any person having an interest in any act or thing done or omitted to be done by a public utility that is unjust and unreasonable. The burden of proof with respect to any such complaint shall be upon the Complainant to show that the public utility's rates, service, classification, rule, regulation or practice is unjust and unreasonable. G.S. 62-75. In this case, dPi has the burden to demonstrate to this Commission by the greater weight of the evidence that BellSouth's determination of the credits due to dPi was unjust and unreasonable.

In this case, BellSouth Witness Pat Tipton testified that BellSouth employed two procedures to determine transfer – related credits due to dPi. First, BellSouth sampled end user accounts submitted for promotional billing credit to determine if they would qualify for the promotion in question. If, during the course of review, BellSouth determined that a portion of the accounts did not qualify, BellSouth applied the resulting percentage of qualified accounts to the total credit amount requested to determine dPi's credit amount. Tp. 201. BellSouth issued credits to dPi based on the results of this sampling process for each month of the 22 month promotional period. Tp. 204, dPi Exh 4.

In the second procedure, BellSouth enlisted the services of Dr. Joseph B. Thomas, PhD in statistics, to develop a sampling procedure for the North Carolina accounts for which dPi was claiming promotional credits. Dr. Thomas determined the sample sizes for dPi promotional requests that would determine a statistical accuracy of 95% and a precision of +/- 5%. When applied to the LCCW credits requested by dPi, Dr. Thomas found that 64% of the North Carolina credits applied for by dPi did not qualify for the promotion. This result, when the margin of error is considered, compared favorably with the 66% denial rate that BellSouth actually utilized when denying dPi promotional requests based on the previously described sampling process. Tp. 206.

During the hearing, BellSouth contended that it was not required to examine each account submitted to determine if the accounts qualified for promotional credits. According to BellSouth, such verification is neither necessary nor required. Rather, in BellSouth's view, examination of a representative sample of the accounts submitted is a suitable substitute for determining the amount of credits due. Under those circumstances, one cannot expect that the numbers provided by BellSouth will correspond precisely with the actual numbers derived after an actual examination of the credit requests for each month. At best, the numbers can merely approximate, within a range, the numbers predicted by the sampling process employed by BellSouth and verified by Dr. Thomas. BellSouth contends and the Commission concludes that the sampling process employed by BellSouth was statistically valid.

According to dPi, the process employed by BellSouth resulted in dPi being shortchanged in the amount of \$2,537.70. dPi now asks this Commission to award it additional credits in that amount. In support of this request, dPi noted that its review of the BellSouth sampling data revealed denials for the months of June, August and November, 2005 which were significantly higher than industry and company expected denials for transfers. These results led dPi to question the validity of the data derived from these samples and caused dPi to perform an audit of those months. The audit revealed the denial percentages derived from the audits' actual numbers were substantially less than the denial percentages derived from sampling.

dPi now contends that it did not receive credits that it was due because the sampling process utilized by BellSouth was flawed. We are not persuaded from the evidence provided by dPi that BellSouth's approach to calculating credits due yielded incorrect results and is therefore unjust or unreasonable.

In this case, BellSouth determined credits for dPi based on the sampling process described by Witness Tipton and validated by Dr. Thomas for each of the 22 months of the promotional period. dPi chose not to examine the results derived from this sampling process for 19 of the 22 months for which the promotion operated. That is, dPi did not audit each credit request submitted for the entire 22 months for which the promotion was featured, and the credits were calculated to reach this conclusion. Nor did dPi perform an audit for each of the 12 months in which the sample indicated that a transfer request was denied. Either audit would have been invaluable in determining whether the sampling process provided a realistic assessment of transfer based denials.

Instead of auditing the submittals in the manner previously suggested, dPi picked those months for audit which had extremely high denial rates for transfers and offered the most opportunity for errors favorable to dPi, and did not audit those months which had low or zero denial rates because of transfers which, presumably, would yield results more favorable to BellSouth. dPi's method of calculating the credits it was due was inherently flawed and does not account for those months in which the denial rate, as determined by the sample, was low or nonexistent; nor does it indicate if the denial rates derived from the sample for other reasons were inaccurate. As a result, we have no way of knowing if the sampling process employed by BellSouth is in error or if the abnormally high deviations are no more than an anomaly in the statistically accurate sampling process.

Stated more simply, we are unable to tell from this data whether the \$2,537.70 deviation identified by dPi is offset by a similar deviation in the remaining 19 months of the promotion period in favor of BellSouth. Thus, even if we accept that those three months produced a discrepancy of \$2,537.70, we cannot determine by the greater weight of the evidence that the "error" requires an adjustment to dPi's account because dPi has not proven that the discrepancy has not been offset at some other point in BellSouth's statistically valid sample. Thus, dPi has not met its burden of proving by the greater weight of the evidence that the result reached by BellSouth's sampling process is unjust or unreasonable. Therefore, dPi's request for additional credits must be denied.

Interconnection Agreement Interpretation. On June 7, 2006, the Commission issued an Order Denying dPi's Complaint against BellSouth to recover credits which it alleged had been wrongfully denied. In the Order, we stated:

Under the clear language of this provision, promotions are only available if end users would have qualified for the promotion if the promotion had been provided by BellSouth directly. In Witness Tipton's testimony, she stated emphatically that BellSouth does not authorize promotional discounts to its End Users who only order basic services and the blocks provided by dPi. This fact was uncontested by dPi at the hearing and unrebutted in its post hearing brief. Thus, under the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are not eligible for the credits because similarly situated BellSouth End Users are not entitled to such credit. dPi's complaint should therefore be denied.

In its Motion for Reconsideration, dPi argues that the Commission's decision in this case rests upon the Commission's failure to accurately apply a provision of the parties' interconnection agreement which states:

"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."

dPi argues that the Commission was required to interpret the promotion to determine whether the end-user would have qualified for the promotion. The argument that dPi is now making is identical to the argument that it made in the hearing and in the post hearing brief. In our Order of June 7th, we expressly rejected this approach. We stated that "the Commission concludes that we are not required to analyze and decide this case based on the language of the promotion. The fact is that BellSouth and dPi jointly agreed to methodology for determining the limits of any promotion in their voluntarily negotiated interconnection agreement." (emphasis in original) Further, we stated "Under the clear terms of the interconnection agreement and the facts of this case, dPi end users who only order blocking features are not eligible for the credits because similarly situated BellSouth End Users are not entitled to such credits." (emphasis in original) Although dPi challenges the credibility of the testimony offered by BellSouth concerning the manner in which BellSouth applies the promotion in question to its own customers, nothing in the record suggests that BellSouth applies the promotional language in any manner other than that described by BellSouth's witness. As a result, dPi has not offered any persuasive rationale that would lead this Commission to overturn its original determination in this regard. For that reason, dPi's motion to reconsider this issue is denied.

IT IS, THEREFORE, SO ORDERED that:

1. dPi's motion for the Commission to award it additional credits in the amount of \$2,537.70 be denied.

2. dPi's motion to reconsider the Order of June 7, 2006 be denied.

ISSUED BY ORDER OF THE COMMISSION.

This the 12th day of October, 2006.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

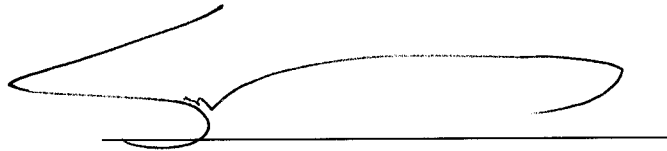
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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2006, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

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