

February 25, 2010

VIA HAND DELIVERY

Hon. Sara Kyle, Chairman
c/o Sharla Dillon, Docket Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37238

filed electronically in docket office on 02/25/10

Re: BellSouth Telecommunications, Inc, d/b/a AT&T Southeast d/b/a AT&T
Tennessee vs. dPi Teleconnect, LLC
Docket No. 10-00007

Dear Chairman Kyle:

Please find enclosed the original and four (4) copies of dPi Teleconnect, LLC 's Motion to Dismiss and/or Stay and Response to AT&T's Motion for Consolidation.

Very truly yours,

BRADLEY ARANT BOULT CUMMINGS LLP

By: 

Henry Walker,
Counsel for dPi Teleconnect, LLC

HW/dnr

**BEFORE THE
TENNESSEE REGULATORY AUTHORITY**

IN THE MATTER OF:

DOCKET NO.: 10-00007

**BELLSOUTH TELECOMMUNICATIONS, INC.
D/B/A AT&T SOUTHEAST D/B/A AT&T
TENNESSEE**

VERSUS

dPi TELECONNECT, LLC

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

dPi Teleconnect, LLC ("dPi") respectfully requests that the Tennessee Regulatory Authority ("the TRA") 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 Tennessee ("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 TRA to consolidate -- whether AT&T can apply the resale discount to retail "cash-back" promotions offered by AT&T to resellers -- the TRA 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 with the FCC, at FCC WC Docket No. 06-129, asking 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.

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

In its Complaint filed against dPi with the TRA, 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) 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 Tennessee be consolidated across the four proceedings for “expeditious resolution” — apparently in the form of a declaration from the TRA, 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

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.

discount established by the TRA 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

I. The TRA 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 TRA has jurisdiction over the issues and that the sought-for prospective declaration is allowable in a complaint proceeding (particularly one

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 appropriately time in this proceeding.

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 Tennessee 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).

clearly asserting retrospective claims, *see* Complaint p.1 fn.1 & p.2 fn.5), the TRA 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 TRA, 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 interpreting the regulations at issue, to provide guidance on the issues presently before the TRA, 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 TRA 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 TRA 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, and not assert frivolous claims that have no factual or evidentiary support. At a minimum, AT&T should immediately amend its Complaint against dPi to remove any claims relating to the word-of-mouth promotion.

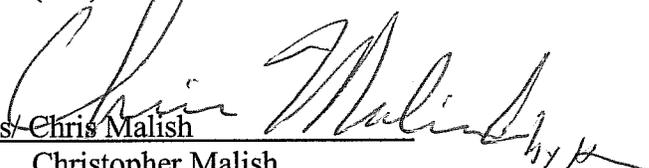
In any event, as the claim relates to AT&T's Motion to Consolidate, for the reasons stated above, dPi vehemently opposes the consolidation of the Complaint against it based on a word-of-mouth claim that does not exist. Thus, the only claim presenting a case and controversy between AT&T and dPi is that 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 TRA dismiss the Complaint filed by AT&T, or, in the alternative, stay or hold in abeyance the proceeding in this Docket

pending the FCC's Resale Docket and/or the referenced court cases. dPi further requests that the TRA deny AT&T's Motion for Consolidation, without prejudice, as premature or moot.

Respectfully submitted this 25th day of February, 2010.

Malish & Cowan, P.L.L.C.
1403 West Sixth Street
Austin, Texas 78703
Phone: (512) 476-8591
Fax: (512) 477-8657

By:  /s/ Chris Malish

Christopher Malish
State Bar No. 00791164
cmalish@malishcowah.com

and

BRADLEY, ARANT BOULT CUMMINGS LLP

By: 

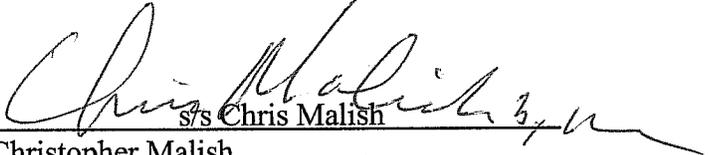
Henry Walker
State Bar No. 000272
1600 Division Street, Suite 700
Nashville, Tennessee 37203
Phone: (615) 252-2363
Fax: (615) 252-6363
hwalker@babbc.com

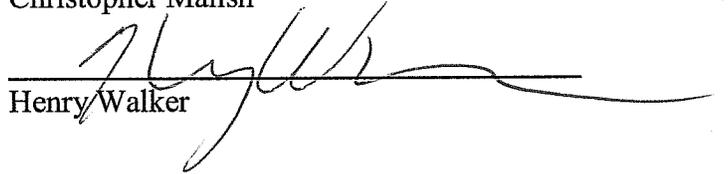
Attorneys for dPi Teleconnect, L.L.C.

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:

Guy Hicks
AT&T Tennessee
330 Commerce Street
Nashville, TN 37219


s/s Chris Malish
Christopher Malish


Henry Walker