

ORIGINAL

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COMMISSION  
CLERK

Mrs. Blanca S. Bayo  
Division of the Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Re: Docket No. 050863-TP; *dPi Teleconnect, L.L.C. v. BellSouth Telecommunications, Inc.*

Dear Mrs. Bayo:

This is regarding the above-referenced case which is being held in abeyance until the outcome is determined of a similar case before the North Carolina Utilities Commission (NCUC Docket No. P-55, Sub. 1577). Please be advised that an order denying dPi's Motion for Reconsideration was issued in the North Carolina complaint on October 12, 2006. However, dPi has appealed the results of this order; attached is dPi's Complaint and Request for Declaratory and Injunctive Relief filed on October 20, 2006 in the U.S. District Court, Western District of North Carolina, Charlotte Division. No action should be taken on this case until a final decision is rendered in this appeal.

Thank you for your courtesy in this matter. If you should have any questions, please do not

- CMP  ~~hesitate to call.~~
- COM
- CTR
- ECR
- GCL
- OPC  ~~Enclosure~~
- RCA
- SCR
- SGA
- SEC
- OTH

Very truly yours,

Christopher Malish

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*Mrs*  
FPS BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Mrs. Blanca S. Bayo

October 30, 2006

Page 2

cc: Manuel A. Gurdian, Attorney  
BellSouth Telecommunications, Inc.  
150 South Monroe Street, Room 400  
Tallahassee, Florida 32301

*Via Certified Mail, Return Receipt Requested*

Andrew Shore, Senior Regulatory Counsel  
BellSouth Telecommunications, Inc.  
675 West Peachtree Street, Suite 4300  
Atlanta, Georgia 30375

*Via Certified Mail, Return Receipt Requested*

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

**I. (a) PLAINTIFFS**

dPi Teleconnect, L.L.C.

(b) County of Residence of First Listed Plaintiff Dallas County, TX  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Ralph McDonald; Bailey & Dixon, LLP; P.O. Box 1351; Raleigh, NC 27602-1351; (919) 828-0731

**DEFENDANTS**

North Carolina Utilities Commission; JoAnne Sanford; Robert E. Kroger; Robert V. Owens, Jr.; Sam Ervin, IV; Lorinzo Joyner; James Y. Kerr, II; and Howard N. Lee (in their official capacities as Commissioners of the North Carolina Utilities Commission); and BellSouth Telecommunications, Inc.  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff  
 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)  
 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth-in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.L. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influence and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat. TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 341D <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of For Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Family <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inv. Security Act	<b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 BIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(n)) <input type="checkbox"/> 864 BSID Title XVI <input type="checkbox"/> 865 RSI (405(n))	<b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

**V. ORIGIN** (Place an "X" in One Box Only)

- 1 Original Proceeding  
 2 Removed from State Court  
 3 Remanded from Appellate Court  
 4 Reinstated or Reopened  
 5 Transferred from another district (specify)  
 6 Multidistrict Litigation  
 7 Appeal to District Judge from Magistrate Judgment

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. 2201

Brief description of cause:

Declaratory judgment for violation of Telecommunications Act of 1996

**VII. REQUESTED IN COMPLAINT:**

- CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23  
 DEMAND \$ \_\_\_\_\_  
 CHECK YES only if demanded in complaint:  
 JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions): JUDGE 1 DOCKET NUMBER \_\_\_\_\_

DATE: 10/20/2006 SIGNATURE OF ATTORNEY OF RECORD: 

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING OFF \_\_\_\_\_ FUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

Case No.:

dPi Teleconnect, L.L.C. )

Plaintiff, )

v. )

THE NORTH CAROLINA )  
UTILITIES COMMISSION, )  
Jo Anne Sanford, Robert E. Kroger, )  
Robert V. Owens, Jr., Sam Ervin, IV, )  
Lorinzo Joyner, James Y. Kerr, II, )  
and Howard N. Lee (in their official )  
capacities as Commissioners of the )  
North Carolina Utilities )  
Commission), and Bellsouth )  
Telecommunications, Inc. )

PLAINTIFF'S COMPLAINT  
AND REQUEST FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF

1. The dispute in this matter arises from a disagreement regarding BellSouth Telecommunications, Inc. ("BellSouth")'s resale obligations under 47 U.S.C. 251(c)(4)(A) and 252(d)(3), and more specifically whether BellSouth must extend to dPi Teleconnect, L.L.C. ("dPi") promotional credits for services which would be eligible for the promotion pricing under the plain reading of certain promotions BellSouth offered in the State of North Carolina.

**JURISDICTION**

2. This action arises under Sections 252(e)(6) and 251(c)(4)(A) of the Federal

Telecommunications Act of 1996 (the "FTA" or "Act"), which is the source of the Court's jurisdiction in this matter. It is essentially an appeal of a State Commission's decision of a dispute arising under the FTA.

3. Venue in the United States District Court for the Western District of North Carolina is proper under 28 U.S.C. § 1391(b), because the Commission is based in said district.

### THE PARTIES

4. Complainant dPi Teleconnect, L.L.C. is a Delaware corporation headquartered at 2997 LBJ Freeway, Suite 225, Dallas, Texas 75234. dPi is a "competitive local exchange carrier" ("CLEC") as defined by the Act in 47 U.S.C. §251.

5. BellSouth is an "incumbent local exchange carrier" ("ILEC") as defined by the Act. 47 U.S.C. §251(h). It is a Georgia corporation with its principal place of business in Atlanta, and could be considered the real party in interest in this proceeding.

6. The North Carolina Utilities Commission is an agency of the State of North Carolina. Jo Anne Sanford; Robert E. Kroger; Robert V. Owens, Jr.; Sam Ervin, IV; Lorinzo Joyner; James Y. Kerr, II; and Howard N. Lee are all Commissioners of the North Carolina Utilities Commission and are served in their official capacities only.

### CONDITIONS PRECEDENT

7. All conditions precedent to jurisdiction have occurred or been complied with: Plaintiff originally filed this action with the North Carolina Utilities Commission and after issuance of the Commission's initial order in said proceeding, moved for rehearing, and now files this Complaint.

## FACTS

### **Regulatory Background**

8. The FTA opens up the local telephone service market by, among other things, requiring the incumbent local exchange carriers ("ILECs"), such as BellSouth, to offer their retail services at wholesale rates to competitive local exchange carriers ("CLECs"), such as dPi.

9. Among other things, ILECs are required to extend any promotional pricing offered to their end users for periods of 90 days or more to CLECs, like dPi.

### **Facts of the Case**

10. dPi Teleconnect resells BellSouth's retail residential telephone services. dPi's dispute centers on credits which are due from BellSouth to dPi Teleconnect as a result of dPi Teleconnect's reselling of services subject to BellSouth promotional discounts.

11. BellSouth has over the past months and years sold its retail services at a discount to its end users under various promotions that have lasted for more than 90 days. dPi is entitled to purchase and resell those same services at the promotional rate, less the wholesale discount.

12. As a practical matter, dPi Teleconnect has bought these services at the regular retail rate less the resale discount, then been credited the difference between that rate and the promotional rate pursuant to "promotion credit requests."

13. After completing an audit in 2004, dPi found that BellSouth had failed to issue dPi with hundreds of thousands of dollars worth of promotional credits to which dPi was entitled (system wide, not just in North Carolina). The bulk of the promotions for which

credits were due but not paid in North Carolina were related to BellSouth's Line Connection Charge Waiver ("LCCW") promotion.

14. Pursuant to this promotion, BellSouth waives the line connection charge for those customers who switch to BellSouth and take at least basic service with two Touchstar features.<sup>1</sup> Thus all - *ALL* - dPi had to do to qualify for the line connection charge waiver is purchase Basic Service with one or more Touchstar features.

15. In every situation in which dPi applied for the promotional credit, dPi had purchased through a single order a package consisting of at least Basic Service plus two or more Touchstar features. This is because 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, or "HBG" block.<sup>2</sup> There is no dispute that dPi ordered these Touchstar blocks.

16. BellSouth initially admitted its obligation to pay the credits to dPi Teleconnect and repeatedly promised to issue the credits to dPi Teleconnect. BellSouth has paid similar

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<sup>1</sup>In relevant part, the promotion reads as follows:

**Promotion Specifics**

**Specific features of this promotion are as follows:**

Waived line connection charge to reacquisition or winover residential customers who currently are not using BellSouth for local service and who purchase BellSouth® Complete Choice® service, BellSouth® PreferredPack service, or basic service and two (2) features will be waived.

**Restrictions/Eligibility Requirements**

The customer must switch their local service to BellSouth and purchase 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.

<sup>2</sup>*Id.*

credits to other CLECs. However, despite its promises, and its treatment of other CLECs with essentially identical claims, BellSouth ultimately refused to issue the credits to dPi

17. Ultimately, in North Carolina, BellSouth wrongfully denied dPi \$185,719.49 for credits applied for in situations where dPi qualified for the LCCW promotion credit by purchasing Basic Local Service plus two or more of the BCR, BRD, and HBG Touchstar block Features. BellSouth argued that dPi does not qualify for the promotion for a number of reasons: because the features that dPi is ordering are not Touchstar features; because dPi did not pay additional sums to secure those features; and because BellSouth does not sell to its customers in this way. Each of these arguments is without merit: the blocks are identified as Touchstar Features under the tariff, the UNE regime, and the conduct of the parties prior to the dispute; the text of the promotion does not require that the features be purchased at additional cost; and (if true) the fact that BellSouth's typical end users do not attempt to qualify for the promotion does not mean dPi, which has much different needs from the BellSouth' end users, does not qualify for the promotion.

18. dPi initiated a case against BellSouth on this issue before the North Carolina Commission in August, 2005. The case was styled *In the Matter of the Complaint of dPi Teleconnect, L.L.C. Against BellSouth Telecommunications, Inc. Regarding Credit for Resale Services Subject to Promotional Discounts*, Docket No. P-55, SUB 1577, before the State of North Carolina Utilities Commission.

19. The Commission heard the case and entered an initial decision not favorable to dPi on June 7. On July 6, dPi filed a motion for reconsideration, pointing out that had the Commission applied the correct test – i.e., interpreting the “contract” documents as written, as opposed to BellSouth's “interpretation” of how the promotion was to be applied, or basing



the decision on the best evidence in the record, rather than the testimony of BellSouth's corporate spokesperson, who admittedly had no personal knowledge of the facts of the case, that dPi was entitled to prevail. The Commission rejected dPi's arguments and entered an order disposing of the motion for reconsideration on October 12, 2006.

#### APPEAL

20. Plaintiff hereby appeals the Commission's order in Docket No. P-55, SUB 1577. In particular, Plaintiff appeals the Commission's order with respect to dPi's eligibility to receive promotional pricing under BellSouth's Line Connection Charge Waiver promotion in situations where dPi is entitled as a matter of law to promotional pricing because dPi qualifies for the promotion under the express written terms of the promotion.

#### PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully request that Defendants be cited to appear and answer herein and that upon a final hearing of the cause, judgment be entered for Plaintiff granting the following relief:

a declaration that the PUC's order is contrary to the FTA of 1996 and/or arbitrary and capricious and that that dPi is entitled to the promotion credits it seeks to collect, with a reversal or remand of this case to the PUC with the instruction that the PUC issue a new order not inconsistent with the Court's ruling in this case; and

such other and further relief to which the Plaintiff may be entitled at law or in equity.

Respectfully submitted this 20<sup>th</sup> day of October, 2006.

David S. Wisz  
Ralph McDonald  
N.C. State Bar No. 5037  
P.O. Box 1351  
Raleigh, N.C. 27602-1351  
(919) 828-0731

OF COUNSEL:

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Foster Malish Blair & Cowan, L.L.P.  
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(512) 476-8591

By: /s/ David S. Wisz  
N.C. State Bar No. 22789  
/s/ Ralph McDonald  
N.C. State Bar No. 5037  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Defendants in this action by depositing a copy thereof in the United States mail, postage prepaid.

This 20<sup>th</sup> day of October, 2006.

/s/ David S. Wisz